United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. RAGNAR BENSON, INC., Respondent.	OSHRC Docket No. 97-1676

DECISION

Before: ROGERS, Chairman; and VISSCHER, Commissioner.

BY THE COMMISSION:

This case arises out of a citation issued to Ragnar Benson, Inc. ("Ragnar") by the Secretary of Labor as a result of an inspection performed by a compliance officer of the Occupational Safety and Health Administration ("OSHA"). A hearing was held before an administrative law judge of this Commission, and the judge's decision has been directed for review pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

As the OSHA compliance officer was driving past a construction site in Skokie, Illinois, he observed what he believed to be a violation of OSHA's safety standards, individuals working on a scaffold that was missing guardrails. He stopped and entered the worksite looking for whoever was in charge. Having determined that Ragnar was the general contractor for the project, he sought out two Ragnar employees (its project manager

and its job superintendent) presented his credentials, and explained the reason for his presence.[1]

While he was on the worksite, the compliance officer observed a wire cable that was serving as a guardrail on the second floor of the building. Because it appeared from the ground that the cable was sagging excessively, the compliance officer asked to be taken to the second floor so that he could see the cable more closely. When he and Ragnar's employees reached the top of the stairway to the second floor, the compliance officer noticed two openings in the concrete floor that had been covered with plywood. Upon inspecting the openings, the compliance officer determined that the plywood was not fastened in place, and the openings were not marked as holes as required by OSHA construction safety standards. The compliance officer photographed the two covered holes as well as another hole next to a wall that had been covered by scaffold planking which was not fastened in place or marked. As a result of the compliance officer's observations, Ragnar was cited for violating the OSHA construction safety standards at 29 C.F.R. §§ 1926.502(I)(3) and 1926.502(I)(4).[2] When the compliance officer pointed out to Ragnar's employees that these

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[1]Both Ragnar and the masonry subcontractor, who had erected the scaffold and whose employees were on it, were issued citations that alleged violations of OSHA's requirement for guardrails on scaffolds. However, those citations are not before us here. While this case was on review, the Secretary withdrew the citation issued to Ragnar alleging a scaffolding violation.

[2]Those sections provide:

> **§ 1926.502 Fall protection systems criteria and practices**
>
> . . . .
>
> *(I) Covers*. Covers for holes in floors, roofs, and other walking/working surfaces shall meet the following requirements:
>
> . . . .
>
> (3) All covers shall be secured when installed so as to prevent accidental displacement by wind, equipment, or employees.
>
> (4) All covers shall be color coded or they shall be marked with the word

(continued...)

conditions did not comply with OSHA's requirements, the project manager instructed the job superintendent to remedy the situation; it was promptly done.

Initially, the Secretary took the position that Ragnar was liable for the violations because, as the general contractor at the multi-employer construction site, it had supervisory authority over the site. The parties tried the case on that theory, and that was the basis on which the judge decided the case. On review, however, the Secretary has expressly abandoned that theory of liability and asks us not to consider it. The Commission need not review an issue abandoned by a party. *E.g.*, *Bratton Corp.*, 14 BNA OSHC 1893, 1895-96, 1987-90 CCH OSHD ¶ 29,152, p. 38,991 (No. 83-132, 1990). The Secretary now asserts that Ragnar should be held responsible for the violations solely on the ground that, even though Ragnar did not create the violations, its employees were exposed to them.[3] Having reviewed the record in light of the Secretary's arguments on this question, we find that the Secretary has not met her burden of proof.

Discussion

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees were exposed or had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with

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[2](...continued)
"HOLE" or "COVER" to provide warning of the hazard.

[3]In its reply brief, Ragnar requests that the Commission dismiss these items for want of prosecution because the Secretary has not addressed the issues directed for review. Although Ragnar has not made a formal motion, we have considered and rejected its request because, the Secretary did not, as Ragnar asserts, fail to prosecute this case, but, rather, urged the affirmance of the administrative law judge's disposition on an alternative legal theory. Rule 92(c) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.92(c), codifies the Commission's precedent holding that it will not normally consider an issue not presented to the judge. Here, however, the question of actual exposure was presented by the Secretary, albeit as a secondary theory of liability.

the exercise of reasonable diligence. *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). There is no dispute that the standards apply and that their requirements were not met. The questions presented by this case are whether the Secretary has proved the exposure and the knowledge elements. In light of our determination on the knowledge element, we need not reach the question of exposure.

Knowledge

We find that the Secretary has failed to prove that Ragnar had knowledge of the two violations. Knowledge of the violative condition, either actual or constructive, is an element of the Secretary's burden of proving a violation: the Secretary must prove either that the employer knew of the violative condition or that it could have known with the exercise of reasonable diligence. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1386, 1995-97 CCH OSHD ¶ 30,909, p. 43,028 (No. 92-262, 1995); *C F & T Available Concrete Pumping Inc.*, 15 BNA OSHC 2195, 2196-97, 199 CCH OSHD ¶ 29,945, pp. 40,936-37 (No. 90-329, 1993); *Prestressed Sys., Inc.*, 9 BNA OSHC 1864, 1868-69, 1981 CCH OSHD ¶ 25,358, p. 31,499-500 (No. 16147, 1981); *Harvey Workover, Inc.* 7 BNA OSHC 1687, 1690, 1979 CCH OSHD ¶ 23,830, p. 28,909 (No. 76-1408, 1979); *D.R. Johnson Lumber Co.*, 3 BNA OSHC 1124, 1125, 1974-75 CCH OSHD ¶ 19,695, p. 23,494 (No. 3179, 1975). *See also Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975) (same, serious violation). *Cf. United States v. Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998) (criminal prosecution).[4]

Only three Ragnar employees were ever on the worksite, where an addition was being constructed on the Oakton Park Community Center. The job superintendent was at the site

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[4]The Secretary takes the position that she does not have the burden of proving knowledge as an element of her *prima facie* showing of a violation. As the examples cited indicate, that position is contrary to longstanding Commission precedent and to the holdings of a number of courts of appeals.

every day. His duties included coordinating the work of the various contractors, working out scheduling and detail problems, and reviewing the work for quality and compliance with the plans and specifications. If he saw a safety violation, he would bring it to the attention of the appropriate contractor. Ragnar's project manager visited the site once or twice a week for approximately 30-45 minutes per visit. While there, he would walk around the site to review the progress of the work in order to report to the owner of the building. In addition, Ragnar's general superintendent, who also acts as its safety manager, would visit the site approximately once a week for anywhere from 20 to 45 minutes. None of these three employees performed physical labor; the job of each of them was to inspect the worksite, and they would walk around the construction site making the necessary observations.

Both Ragnar's safety director and its project manager testified at the hearing that they had not been aware of the situation before the compliance officer pointed it out. The compliance officer concluded that Ragnar knew that the hole covers were not fastened in place because, when he pointed them out to Ragnar's two employees, the job superintendent, who did not testify at the hearing, stated that the reason the covers were not fastened down was that contractors had been performing work in the holes earlier that day.[5] We do not, however, interpret that statement as an admission of prior knowledge. It appears to us just as likely that that the speaker was attempting to explain how the condition occurred, not saying that he had previously known that the condition existed. Under these circumstances, we do not find that a preponderance of the evidence establishes that Ragnar had actual knowledge that the covers were not fastened in place.

We must therefore determine whether the Secretary has established that the company had constructive knowledge of the condition.

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[5]Although the compliance officer attributed that statement to Ragnar's project manager, that individual testified at the hearing that it had been made in his presence by the job superintendent. We find that his recollection was more likely to be accurate and find that the superintendent made the statement.

> [An] employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard.

(emphasis in original). *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,652, p. 42,527 (No. 91-3467, 1995); *see also New York State Elec. & Gas v. Secretary*, 88 F.3d 98, 106-10 (2d Cir. 1996) (Secretary has burden of proving constructive knowledge; employer's duty is a reasonable one and employer not required to provide constant supervisory surveillance). If the employer maintains an adequate inspection program, the burden is on the Secretary to demonstrate that the employer's failure to discover the violative condition was due to a lack of reasonable diligence. *Texas A.C.A., Inc.*, 17 BNA OSHC at 1050, 1993-95 CCH OSHD at p. 42,526.

The first item before us involves the failure to secure the covers. With regard to that item, the compliance officer testified that one of Ragnar's employees told him that the reason the floor covers were not secured in place was "the frequency with which contractors had to access those holes to do their work," and Ragnar's project manager confirmed that this statement had been made.[6] Although the compliance officer opined that the holes had been there for a week or more, he did not offer any estimate as to how long the cited condition had existed. Ragnar's job superintendent told the compliance officer that other contractors had been performing work in the holes that morning. Although there is no indication exactly what time the last work was performed in the holes, the inspection began "just before noon." It is therefore possible that someone was working there when the inspection began and had stopped work for lunch while the inspection was taking place. In that case, it would not be reasonable to expect Ragnar to have detected the violation, since its only two employees on the site were accompanying the compliance officer.

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[6]As noted above, we do not consider this statement to be an admission of prior knowledge of the cited conditions.

The compliance officer testified that he saw the holes from the head of the stairs and that "as you get off the stairway, it's . . . forward and a little bit to your right." From this description, we cannot determine how far the holes were from the top of the stairs, where they were located in relation to the normal traffic patterns, or whether any construction work was being performed near them that Ragnar's employees might have to inspect. The photographic exhibits are not helpful in this regard, either. We therefore cannot determine how easily detected the cited condition was without active investigation by Ragnar.

Because we cannot determine on this record how long the violative condition involving the unsecured covers had existed or how aggressively Ragnar would have had to investigate to determine that they were not fastened down, we cannot determine whether Ragnar exercised reasonable diligence in discovering it.

A similar situation exists with regard to the second item, the failure to mark the hole covers. The record indicates that, after the compliance officer pointed out the violation, Ragnar's job superintendent determined that there were some covers that had previously been marked as holes but that, when the cover was removed and replaced, the marked side was face down. It therefore appears that the covers had initially been properly marked and that the marked covers had been removed and replaced improperly or replaced with unmarked boards. As with the other item, we cannot determine how long this situation had existed before the inspection. We therefore cannot determine whether Ragnar could have known of it with the exercise of reasonable diligence. Because the Secretary has the burden of proving lack of reasonable diligence, we cannot find that a violation has been proved with regard to the failure to mark the covers.

Accordingly, we conclude that the Secretary has failed to establish that Ragnar's failure to become aware of the fact that the hole covers were not fastened in place or marked was the result of any lack of diligence.

Conclusion

Because we hold that the Secretary has failed to prove that Ragnar Benson had either actual or constructive knowledge of the cited conditions, we reverse the administrative law judge and vacate these two items.

/s/
Thomasina V. Rogers
Chairman

Date: September 27, 1999

/s/
Gary L. Visscher
Commissioner

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 97-1676
	:	
RAGNAR BENSON, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Linda J. Panko, Esquire
Kevin Koplin, Esquire
Chicago, Illinois
For the Complainant.

Robert E. Mann, Esquire
Chicago, Illinois
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 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 a work site in Skokie, Illinois, where Respondent, Ragnar Benson, Inc., was the general contractor of a project involving the construction of an addition to an existing building; as a result of the inspection, Respondent was issued a citation alleging serious violations of the Act. Respondent contested the citation, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and a hearing was held on February 24, 1998. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Gary Weil, the OSHA compliance officer ("CO") who conducted the inspection, was driving by the site on August 19, 1997, when he observed employees working on unguarded scaffolding at heights of over 10 feet; he pulled over, videoed the scene, and then proceeded to the site, where he met with Stan Zygowicz and Thord Lindquist, Respondent's project manager and job superintendent.

The CO stated why he was there, and learned that A. Horn was the masonry contractor working on the scaffolding; the foreman for A. Horn joined the group, and, after the CO advised that guardrails were required, the foreman removed his employees from the scaffolding. CO Weil then entered the building with Zygowicz and Lindquist and observed, on the 14-foot-high second level, three floor holes with plywood covers that were neither secured nor marked to indicate the holes. The CO learned that A. Horn had made the holes and that the covers were not secured because A. Horn and other trades at the site had been removing them frequently in order to access the holes; Lindquist abated the hazard by securing the covers and spray painting the word "hole" on them. Respondent was cited for both the unguarded scaffolding and for the unsecured and unmarked floor hole covers.

The Alleged Violations[7]

Item 1 of the citation alleges a violation of 29 C.F.R. 1926.451(g)(1), which provides, in pertinent part, as follows:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

Items 3a and 3b of the citation allege violations of 29 C.F.R. 1926.502(i)(3) and 29 C.F.R. 1926.502(i)(4), which state, respectively, as follows:

> All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.
>
> All covers shall be color coded or they shall be marked with the word "HOLE" or "COVER" to provide warning of the hazard.

The testimony of the CO, as summarized above, together with the video and photos he took, establishes that the employees on the scaffolding were not protected from falls and that the floor hole covers were not secured and marked as required.[8] The CO's testimony also establishes that the cited conditions were serious hazards; the masonry employees were working at heights of 10.5 and 14.5 feet and could have fallen from the unguarded scaffolding, employees of the trades at the site who were working in the vicinity of the floor holes could have stepped into them and fallen 14 feet, given that the covers were unsecured and unmarked, and both conditions could have resulted in serious

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[7]The citation as issued had three items; however, item 2, which alleged a violation of 29 C.F.R. 1926.502(b)(3), was withdrawn at the hearing, leaving for resolution items 1 and 3.

[8]C-1, the video, shows the employees on the unguarded scaffolding, as do C-2-3, while C-5-7 show the floor hole covers; C-8 shows one of the holes after its cover was secured and marked.

injuries. (Tr. 18-22; 28-44; 79-80; 85-88). Respondent does not really dispute the cited conditions, and the testimony of Stan Zygowicz and Tom Tibbetts, Respondent's project manager and safety director, respectively, essentially concedes them.[9] (Tr. 101-05; 114-15; 128-30). Respondent contends, however, that the citation items should be vacated because it did not create or control the conditions and was not responsible for them. The Secretary, on the other hand, contends the items should be affirmed because of Respondent's supervisory authority and control over the site.

Pursuant to the construction contract, Respondent, as the general contractor, was responsible for supervising, coordinating and directing the work at the site, for initiating, maintaining and supervising safety precautions and programs on the job, and for designating an individual whose duties included accident prevention; further, pursuant to its contract with A. Horn, Respondent had the authority to stop its subcontractor's work for safety violations. (Tr. 111-13; C-10, p. 4 ¶ 4, and sheet 3A; C-12, p. 8 § 3.3, and p. 19 § 10.2). Besides these provisions, the record shows that Thord Lindquist, the job superintendent, walked the site on a daily basis, that Stan Zygowicz, the project manager, usually walked the site twice a week, and that Tom Tibbetts, Respondent's safety director, visited the project at least weekly; one of the purposes of Lindquist's walks of the site was to identify safety hazards, which he would bring to the attention of the responsible subcontractor by means of a safety violation notice, and Lindquist also noted safety hazards on safety inspection checklists that Tibbetts would review during his visits.[10] The record also shows that Zygowicz told the A. Horn foreman to remove his employees and put up guardrails after the CO pointed out the problem, that Lindquist gave a safety violation notice to A. Horn in this regard after the OSHA inspection, and that Zygowicz instructed Lindquist to take care of the floor hole cover condition; moreover, CO Weil stated that Lindquist and Zygowicz told him that it was a continuous effort to get the subcontractors to comply with safety requirements and that they constantly looked for safety hazards as they did not want anyone hurt on the job. (Tr. 27; 38; 41-42; 45-51; 54-56; 76; 95; 100-18; 122-28; C-9).

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[9]Respondent's suggestion that the covers were already marked, but had been turned over, is rejected; the CO testified to the contrary, and photo C-6 shows the unmarked underside of one of the covers. (Tr. 35-40; 85-88; 102; 114-15).

[10]Safety notice items were to be corrected immediately. (Tr. 49-51; 54; 109-10; 128; C-9).

In addition to the above, the *Anning-Johnson* and *Grossman Steel* cases, the seminal Commission decisions addressing the multi-employer work site doctrine, set forth the following rules, respectively, in regard to the general contractor's responsibility on a multi-employer site:

> [T]ypically a general contractor on a multiple employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standards or to take the necessary steps to assure compliance.
>
> [T]he general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.

Anning-Johnson Co., 4 BNA OSHC 1193, 1199 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976).

Based on the foregoing, I conclude that it is appropriate to hold Respondent, as the general contractor, responsible for the cited conditions. Although Respondent asserts it could not reasonably have known of the conditions, its employees walked the site to detect safety hazards and the conditions were easily observable; in addition, CO Weil testified that he was told that employees had been working on the scaffolding for a week and a half to two weeks, and that he estimated, based on the stage of the construction and what he learned about employees accessing the holes, that the floor hole cover condition had existed for over a week. (Tr. 26; 38; 43-47; 80-86). Respondent also asserts that it cannot be held liable for the conditions because it had no employees who were exposed to them. The CO agreed that the only employees on the scaffolding were those of A. Horn, and that while he was told that Respondent had a laborer at the site he did not see him during his inspection; however, the CO noted that the employees who walked the site, that is, Lindquist, Zygowicz and Tibbetts, would have been exposed to the floor holes. (Tr. 41; 45-47; 65-66; 75). Regardless, even if none of Respondent's employees was exposed to either of the conditions, the Commission in a

similar case held the general contractor responsible pursuant to the principles set out *supra*. *Red Lobster Inns of America, Inc.*, 8 BNA OSHC 1762 (No. 76-4754, 1980).[11]

Respondent's final assertion is that the citation was improper in that A. Horn, the responsible employer, was cited for the same conditions and settled its citation with OSHA. (Tr. 70-73; R-1). The thrust of Respondent's assertion is that the citation in this case is duplicative, that A. Horn's settlement with OSHA rendered the subject citation moot, and that OSHA as a general rule cites either the general contractor or the subcontractor but not both. However, as the Secretary points out, Respondent's assertion is not supported by the multi-employer work site doctrine, which clearly provides for the citation of more than one employer for the same violative condition in appropriate circumstances. *See Anning-Johnson* Co., 4 BNA OSHC 1193 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976). Moreover, the Commission in a recent decision rejected the employer's argument that OSHA may cite only the creating employer, and, in so doing, stated that "health and safety responsibility may be shared by more than one employer at a worksite--indeed, this is a central tenet of [Commission] precedent addressing the apportionment of responsibility for violative conditions at a multi-employer construction worksite." *CH2M Hill Central, Inc.*, 17 BNA OSHC 1961, 1972 (No. 89-1712, 1997). Respondent's assertion is accordingly rejected, and items 1 and 3 of citation 1 are affirmed as serious violations.

The Secretary has proposed a penalty of $1,225.00 for item 1 and a penalty of $700.00 for the two grouped subitems of item 3. CO Weil testified that the initial penalty amounts proposed for items 1 and 3 were based on the gravity of the respective violations and that a total deduction of 65 percent was then applied to these amounts because of the company's small size, good faith and lack of history of previous violations. (Tr. 32-34; 44). In light of the CO's testimony, I find that the proposed penalties are appropriate; the penalties as proposed are therefore assessed.

Conclusions of Law

[11]Respondent's reliance on *Anthony Crane Rental, Inc.*, 70 F.3d 1298 (D.C. Cir. 1995), is misplaced, as that court has not yet decided whether there is a duty under the construction standards to protect employees other than one's own. *Id*. at 1306-07. Further, as the Secretary notes, other circuit courts have found that there is such a duty. In any case, the undersigned is constrained to follow the Commission precedent set out above.

1. Respondent, Ragnar Benson, 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. §§ 1926.451(g)(1), 1926.502(i)(3) and 1926.502(i)(4).

3. Respondent was not in violation of 29 C.F.R. § 1926.502(b)(3).

Order

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

1. Items 1 and 3 of serious citation 1 are affirmed, and penalties of $1,225.00 and $700.00, respectively, are assessed.

2. Item 2 of serious citation 1 is vacated.

/s/

Irving Sommer
Chief Judge

Date: May 15 1998