UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CARETTI, INC., Respondent.	OSHRC DOCKET NO. 04-0864

APPEARANCES:

Theresa C. Timlin, Esq.
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Thomas S. Beckley, Esq.
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Harrisburg, Pennsylvania
For the Respondent.

BEFORE: Administrative Law Judge William C. Cregar

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Caretti, Inc. ("Caretti") is a masonry contractor. On April 16, 2004, a compliance officer ("CO") of the U.S. Occupational Safety and Health Administration ("OSHA") inspected Caretti's work site, the auditorium of a school under construction, in Harrisburg, Pennsylvania. As a result of the inspection, OSHA issued a citation alleging a serious violation of a construction safety standard, 29 C.F.R. § 1926.501(b)(1), and proposing a penalty of $1,500.00. Caretti timely contested the citation, and a hearing was held in Harrisburg, Pennsylvania on December 1, 2004. The parties submitted post-hearing briefs. No affected employees sought party status. For the reasons below, I dismiss the citation. (C-3, R-7).

Jurisdiction

At all times relevant to this action, Caretti maintained a principal place of business at 4590 Industrial Park Road, Camp Hill, Pennsylvania, where it was engaged in the business of masonry construction. Caretti was engaged in interstate commerce. (CE-1, Para. IV. A, B, and F).[1] I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter.

Statement of Facts

In April 2004, Caretti was the masonry contractor at the Central Dauphin School District project in Harrisburg, Pennsylvania. The project involved the construction of a school with an auditorium. Caretti contracted directly with the school district to perform the masonry work at the site. Employees of other contractors were working on other aspects of the auditorium construction. (Tr. 18, 82-84).

On April 12, 2004, another contractor had poured a flat concrete deck ("deck") that was to become the floor of a control room. The deck, located at the rear of the auditorium, extended approximately 10 feet out from a "walkway"[2] running parallel to the rear wall of the auditorium. The edge of the deck farthest from the walkway ("the front") was 15 feet, 4 inches above the auditorium floor. On April 16, 2004, the date of the OSHA inspection, there were no guardrails along the front edge of the deck.[3] Alongside and beneath both sides of the deck were stairs providing access to what would become tiered bleacher seating. From the

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[1]Complainant's, Respondent's, and court exhibits are designated by, respectively, "C," "R," and "CE," followed by the number of the exhibit. References to the transcript are designated "Tr."

[2]The parties dispute that this area was in fact *used* as a walkway by Caretti's employees, but both have used this term to describe the area immediately behind the deck at the rear of the auditorium.

[3]R-1, photos of the walkway and deck, show guardrails around the deck except for the side adjoining the walkway. These photos were taken on April 21, 2004, and do not depict the deck as it was at the time of the inspection. (Tr. 95-99).

auditorium floor the steps rose to the level of the control room floor. The walkway would have made it possible for employees at the level of the deck to walk from one side of the auditorium to the other without going down the steps and back up. Prior to April 16, 2004, Scott Weber, Caretti's foreman, had tied yellow caution tape across the rear edge of the deck. The tape was intended to warn Caretti employees that the deck was not to be accessed; it did not prevent or warn against access to the walkway. Because the tape stretched across the edge of the deck, anyone standing on the walkway side would be no closer than 10 feet from the 15 foot, 4 inch drop off. (Tr. 20, 25-27, 30, 35, 41, 45-46, 62, 74, 96-100, 131; C-2, R-8).

On the morning of April 16, 2004, CO Mary Siegfried conducted an OSHA inspection. On that day a Caretti employee, Mr. Gaiski, was working from the steps in order to brick in the spaces between the steps and the control room floor and along the upper edge of the deck parallel to the steps. The area below each side of the deck adjacent to the steps had been assigned to a bricklayer with a laborer to assist. CO Siegfried entered the auditorium at the ground level and climbed the steps to the walkway area. As she walked along the walkway, she videotaped portions of the auditorium, including the control room deck. She also videotaped various materials and equipment owned by Caretti, including the parts of a disassembled scaffold that were located on the deck beyond the area marked off by the yellow caution tape.[4] At this time she observed approximately five individuals at the rear of the auditorium, including Mr. Weber, and she videoed him as he walked across the

[4]Complainant asserts that the leftover materials demonstrate that Caretti employees had actually been out on the deck. In support of this assertion, Complainant points to CO Siegfried's testimony that she overheard someone behind her sarcastically opine that the individual placing the materials either had long arms or that the materials had been kicked from the walkway and landed out there. In response, Mr. Weber credibly testified that the materials were left over from previous bricklaying along the surface of the front edge of the deck and that Caretti employees used a scaffold that had been partly disassembled at the time of the inspection. I credit his explanation. The material on the deck surface included parts of a disassembled scaffold. This fact is consistent with his testimony that the scaffold had been erected, used to begin bricking the front edge of the deck, and disassembled to allow "Georgia Buggies" (motorized dump wheelbarrows) to be brought into the auditorium. (Tr. 26, 65, 110-13, 129, 138-40; C-1).

walkway. The videotape shows Mr. Weber walking towards the camera and Mr. Gaiski working along the side of the deck.[5] Mr. Weber and Mr. Gaiski were the only Caretti employees in the video. Caretti employees were not observed on the deck itself. (Tr. 16-20, 26-27, 33, 55, 60, 100-02, 109, 115, 148, 156; C-1).

Mr. Weber had instructed the Caretti bricklayers and laborers not to cross the walkway. Indeed, it was not necessary they do so because each laborer could bring materials to his assigned bricklayer without having to traverse the walkway. (Tr. 122, 134, 148).

Discussion

The cited standard, 29 C.F.R. § 1926.501 (b)(1), provides as follows:

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

The citation alleges a violation of the above standard, as follows:

> Central Dauphin High School, Harrisburg, Pennsylvania, Auditorium- Employees worked/walked in close proximity to the unprotected side or edge of the control room deck, thereby being exposed to a fall hazard of approximately fifteen (15) feet, four (4) inches to the floor below, on or about April 16, 2004.

To establish a violation of a standard, the Secretary must show by a preponderance of evidence that: 1) the cited standard applies; 2) the standard was not met; 3) employees had access to the violative condition; and 4) the employer had actual knowledge of the violative condition or, with the exercise of due diligence, could have known of the violative condition.

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[5]Mr. Weber did not deny that he was on the walkway during the inspection. Respondent asserts that the reason he was at that location was to accompany the CO during her inspection and that the CO lured him into the "zone of danger"and then cited him for it. CO Siegfried denies having requested Mr. Weber to talk to her while on the walkway. Having observed both the CO's and Mr. Weber's demeanor, I found them both credible. While they disagree about whether CO Siegfried instructed Mr. Weber to cross the walkway, I attribute the differences in their testimony to their differing recollections. In view of my determination that the walkway was not in the "zone of danger," I need not resolve this conflict. (Tr. 116, 158).

Astra Pharmaceutical Prod., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982).

The Secretary has demonstrated three of the four criteria. The standard applies to the control room deck, a walking/working surface with an unprotected side or edge 15 feet, 4 inches feet above the next level. The standard was not met because a fall hazard would have permitted a fall of 15 feet, 4 inches. Respondent's actual knowledge of the violative condition is established by Mr. Weber's placement of yellow caution tape for the specific purpose of preventing employees from walking on the deck and his instruction to Caretti employees to stay away from the deck area. The Secretary has, however, failed to demonstrate the third element - employee access to the hazard.

The Commission's test for determining access to a violative condition includes a requirement that such access be "reasonably predictable."[6] This requirement entails a demonstration that:

> [E]mployees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

The "zone of danger" is "the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA

[6]Complainant relies on a decision of the Third Circuit Court of Appeals for the proposition that a showing of mere access is sufficient to satisfy the requirement. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804 (3rd Cir. 1985). That case involved employees not wearing hard hats who were exposed to falling objects from floors above their work area. In determining that employees were in danger while working under the floors, the Court applied an "access" test and rejected an "actual exposure" test. The Court did not mention the requirement of the Commission that access must be shown to be reasonably predicable. However, the Court cited with approval a number of cases, including the Commission's decision in *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). *Donovan, supra*, at 811, n.6. *Gilles* adds the "reasonably predictable" requirement to the "access" test. Thus, I read *Donovan's* adoption of the "access test" as incorporating the Commission's requirement of reasonable predictability.

OSHC 1229, 1234 (No. 91-2107,1995). The "zone of danger" determination is "one of fact to be determined on a case by case basis." *Gilles* at 2004.

Access to the Deck

Once across the yellow caution tape and on the deck, an employee would be in such close proximity to the front edge of the deck that a fall would be reasonably predictable. However, there is no evidence that Caretti employees had been or were on the deck at any period when the scaffolds had not been in place. Indeed, Mr. Weber instructed the employees to stay away from the area of the deck. The yellow caution tape warned them against walking on the deck, and there was no reason for them to be on it. Accordingly, Complainant has failed to demonstrate reasonably predictable access to the deck by Caretti's employees.

Access to the Walkway

As the Secretary points out, the Commission has upheld findings that employees within 6 to 12 feet of an improperly guarded perimeter were within the zone of danger. *Charles A. Gaetano Constr. Corp.*, 6 BNA OSHC 1463, 1468 (No. 14886,1978). In another case, a Commission judge held that employees who were approximately 6 feet away from an unprotected floor opening were within the zone of danger. *Brandenburg Indus. Serv. Co.*, 18 BNA OSHC 1386, 1388-89 (No. 96-1405, 1998) (ALJ decision). However, the distance between workers and the hazard does not end the inquiry. Thus, in *RGM*, *supra*, the Commission considered the likelihood that an employee would be exposed to the danger of an unguarded edge to a bridge where the employer had placed a cable with red plastic ribbons to warn of the danger. The Commission stated:

> RGM's employees had ample room to walk along the bridge surface without being in danger of falling off the edge. In the absence of evidence that the employees walked close to the edge, ran along the surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them, we find that the Secretary has not established that it is reasonably predictable that an employee would be in the zone of danger posed by the unguarded edge of the bridge. *RGM Const.*, *supra*, at 1234. *See also Armour Food Co.*, 14 BNA

OSHC 1817, 1824 (No. 86-247, 1990) (employees had sufficient space to walk by nip points of unguarded machinery without having to get near them).

I find that, even if they had been on the walkway, Caretti's employees had ample room to walk along it and were in no danger of falling off the edge of the deck.[7] There is no evidence that Respondent's employees ran along the surface, engaged in horseplay, or otherwise exposed themselves to the danger of falling off the front edge of the deck.

The record shows that Mr. Weber had instructed the employees to stay away from the area of the deck. The record also shows that it was not necessary for Caretti employees to use the walkway for any purpose, and yellow caution tape had been placed to warn the employees to stay at least 10 feet from the unprotected edge of the deck. Finally, the record shows that, even if employees did use the walkway, it was sufficiently distant from the front edge of the deck to assure safe passage without exposure to the alleged fall hazard. For all of these reasons, I conclude that the Secretary has failed to establish that access to the hazard by employees on the walkway was "reasonably predictable." Item 1 of Serious Citation 1 is accordingly vacated.

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is VACATED.

/s/
WILLIAM C. CREGAR
Judge, OSHRC

Dated: April 4, 2005
Washington, D.C.

[7]Mr. Weber's crossing of the walkway provides the only demonstrated instance that Caretti employees had used it.