UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. P.J. Spillane Company, Inc., Respondent.	OSHRC DOCKET NO. 11-0380

Appearances:

Kevin Sullivan, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts
For Complainant

Barrett A. Metzler, Representative, Dallas, Texas
For Respondent

Before: Administrative Law Judge John H. Schumacher

DECISION AND ORDER

PROCEDURAL HISTORY

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a P.J. Spillane Company, Inc. ("Respondent" or "Spillane") worksite at 126 High Street in Boston, Massachusetts on August 12, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty to Respondent alleging eleven (11) serious violations of the Act and proposed a total penalty of $12,500.00. Respondent filed a timely notice of contest, bringing this matter before the Commission.

The Secretary filed a Complaint on February 23, 2011. By a letter dated March 31, 2011,

Respondent timely filed a Motion to Dismiss,[1] which was based upon an alleged error in the Secretary's description of the worksite location. On April 8, 2011, the Secretary filed its Opposition to Respondent's Motion to Dismiss, indicating that the error in the Secretary's description of the worksite location was a typographical error.[2] The Motion to Dismiss was denied by the Court on April 25, 2011. On May 26, 2011, the Secretary filed a Motion to Amend Citation and Complaint, which was granted by the Court on June 6, 2011.

This case was originally designated for Simplified Proceedings on February 25, 2011. On June 17, 2011, the parties participated in a telephone conference call, during which Respondent requested discontinuance of Simplified Proceedings. The Secretary did not object, and the Court granted Respondent's oral motion to discontinue Simplified Proceedings on June 21, 2011. A hearing was held on October 18, 2011, in Boston, Massachusetts. Both parties timely submitted post-trial briefs.

JURISDICTION

Based upon the record, I find that Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act.[3] Therefore, I conclude that the Occupational Safety and Health Review Commission has jurisdiction over the parties and subject matter in this case pursuant to Section 10(c) of the Act.[4]

APPLICABLE LAW

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the

1. In light of the fact that Respondent opted to be represented by a non-attorney representative, the Court treated Respondent's Motion to Dismiss as its Answer to the Secretary's Complaint.
2. The original Citation and Complaint identified the worksite as Bunker Hill Monument. The Secretary indicated her intent to file a Motion to Amend the Citation and Complaint that identified the worksite as the corner of High and Pearl Streets in Boston, MA.
3. The Commission has held that construction activity, even a small project, affects interstate commerce. *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983).
4. In its "Answer", Respondent did not dispute that it is an employer under the Act, nor did it dispute that the Commission has jurisdiction in this matter.

employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, (No. 504, 1976). To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc*., 6 BNA OSHC 1341, 1978 CCH OSHD ¶ 22,524 (No. 3324, 1978). Further, the Secretary need not show that "an employer understood or acknowledged that the physical conditions were actually hazardous." *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

A violation is "serious" if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm could result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

DISCUSSION

In July of 2010, Compliance Safety and Health Officer ("CO") Mark Heffron was traveling between inspections when he observed an employee of Respondent working on a stepladder on top of a scaffold at 126 High Street. (Tr. 14). Based upon that observation, CO Heffron called the area office in Braintree and informed his supervisor what he had observed.

(*Id.*). Heffron's supervisor informed him that he could conduct an inspection of the worksite. (*Id.*). Heffron attempted to conduct an inspection; however, he was informed by Respondent that it was company policy to require a warrant to conduct an inspection. (*Id.*). Heffron obtained a warrant and returned to the 126 High Street worksite to conduct an inspection on August 12, 2010. As a result of that inspection, Respondent was cited for eleven serious violations of the Act.

Six witnesses testified at the hearing: (1) the investigating OSHA CO, Mark Heffron; (2) OSHA's Braintree, Massachusetts area director, Brenda Gordon; (2) Respondent's outside foreman, superintendent, and safety person, Kenneth Canale; (3) Respondent's General Manager and CFO, Sarah Spillane; (4) Respondent's site foreman, Richard Repici, Jr.; (5) Respondent employee, Robert Bekerian; and (6) Respondent employee, Michael Lanier.

Citation 1, Item 1

In Citation 1, Item 1, the Secretary alleges a serious violation of 29 C.F.R. § 1910.134(c)(2)(ii), which provides:

> Where respirator use is not required . . . the employer must establish and implement those elements of a written respiratory protection program necessary to ensure that any employee using a respirator voluntarily is medically able to use that respirator, and that the respirator is cleaned, stored, and maintained so that its use does not present a health hazard to the user. Exception: Employers are not required to include in a written respiratory protection program those employees whose only use of respirators involves the voluntary use of filtering facepieces (dust masks).

The citation specifically alleges that "the employees' respirator [sic] were not clean and maintained in a sanitary condition while worn during masonry tuck-pointing operations." (Citation and Notification of Penalty at 4). On the day of the inspection, Respondent was performing tuck-pointing operations at the 126 High Street worksite. (Tr. 17, 207). Tuck-pointing consists of removing mortar from in between joints that are damaged or deteriorated and installing new product to repair or update the joints. (Tr. 152). During his interviews with

Respondent's employees, CO Heffron discovered that the employees were wearing respirators to protect themselves from airborne contaminants. (Tr. 17).

CO Heffron asked Respondent's foreman, Richard Repici, Jr., to retrieve one of the respirators that the employees were using that day. (Tr. 17, 112). While inspecting the respirator, CO Heffron discovered dust that had collected inside the face piece and that the nose piece had significantly deteriorated. (Tr. 18, C-4, C-5). CO Heffron also noticed that two of the employees, Repici and Lanier, had facial hair, which can interfere with the proper operation of a respirator. (Tr. 30, 117, C-6, C-7, C-36). CO Heffron also asked when the employees last cleaned and inspected their respirators. (Tr. 23). At the time of the interview, the employees could not recall when their respirators were last cleaned or inspected. (Tr. 23–24). Based on the foregoing, CO Heffron concluded that Respondent failed to properly implement its respiratory protection program.

In order to establish a *prima facie* violation of the Act, the Secretary has the burden to prove that the standard applies to the cited condition. *See, e.g.*, *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097 (No. 98-1748, 2000), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). The cited standard is prefaced by the phrase "[w]hen respirator use is *not* required . . . ." 29 C.F.R. § 1910.134(c)(2)(ii) (emphasis added). Subsection (c)(1) states, "In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer the employer shall establish and implement a written respiratory program." *Id.* § 1910.134(c)(1); *see also* Respiratory Protection, 63 Fed. Reg. 1152, 1189–90 (January 8, 1998) (indicating different protections for standard- or employer-required respirators and voluntary respirator use under (c)(2)). In order to determine whether subsection (c)(2)(ii) is applicable, the Court must determine whether either the standard or Respondent required the use of respirators or whether the employees' use of the respirators was voluntary.

The Court finds that the standard applies. CO Heffron testified that the standard requires the use of respirators when it is determined that an employee is exposed to harmful contaminants in excess of specified limits. (Tr. 77–78); *see also* 29 C.F.R. § 1910.1000. That determination would be made by either OSHA or the employer through the use of air monitoring. (Tr. 78). There was no testimony from either side regarding the level of airborne contaminants resulting from tuck-pointing operations at 126 High Street and, therefore, no evidence to suggest that respirators were required by the standard or by the employer. The only testimony regarding the required use of respirators came from Respondent's foreman, Richard Repici, who responded in the affirmative to the following question: "Now, are you required, at any time, to wear a respirator?" (Tr. 204). It was not specified, however, as to what those times were.[5] (Tr. 204). Respondent's own respiratory protection program specifies that "[r]espirators shall only be used when effective engineering controls are not possible or practical . . . ." (C-36). The program provides examples of engineering controls, which include "reducing dust particles with water mist, spray or vacuum systems." (*Id.*). Respondent's employees testified that vacuum systems were in place during tuck-pointing operations to reduce airborne contaminants. (Tr. 207, 241). Finally, although not specifically testified to, CO Heffron's notes indicate that Respondent had not done site-specific monitoring, which lends further support to the Court's conclusion that the use of respirators was not required and that the standard applies. (C-2).

The Court also finds that the standard was violated. The respirator observed by CO Heffron clearly had accumulations of dust and showed signs of excessive wear, which should have been discovered if Respondent's respiratory protection program had been properly implemented. As noted above, CO Heffron, with the assistance of his contemporaneously recorded notes, recalled the conversations he had with employees regarding their respirator

5. Although Respondent's brief argues that the use of respirators was required, no evidence was introduced to support that proposition.

maintenance, cleaning, and inspection routines, during which they admitted that they did not recall the last time they had cleaned or inspected their respirator. On the other hand, Lanier and Bekerian testified that they did not recall such a conversation; however, they were able to testify that they regularly cleaned and inspected their respirators prior to each use, including each time they returned from returned from a lunch or coffee break. (Tr. 226, 240–42). The Court finds the testimony of CO Heffron more credible in that he was able to testify as to the specific conversations he had with the employees, whereas Lanier and Bekerian were only able to testify regarding typical procedures for respirator cleaning and maintenance. If these procedures were so diligently followed, then surely Respondent's employees could have recalled the last inspection or cleaning, which would have taken place that morning. Furthermore, the deteriorated condition of the respirator's nosepiece, although not directly related to the filtering efficiency of the respirator, lends support to the Court's conclusion that Respondent failed to properly implement its respiratory protection program.[6]

All three employees were also exposed to the condition. Although there was some dispute as to whom the respirator identified in exhibits C-4 and C-5 belonged, it was clearly brought to CO Heffron in response to his request that he be able to look at one of the respirators that had been used that day. (Tr. 112). Additionally, the failure to properly implement Respondent's respiratory protection program affects all individuals at a worksite equally. The fact that a respirator was found in poor condition and two out of three employees were found to have facial hair in violation of Respondent's own policy strongly supports a finding of employee exposure. Respondent also knew, or with the exercise of reasonable diligence, could have

6. With respect to the facial hair issue, the Court finds that this is merely additional evidence of the violation already established. Respondent's respiratory protection program specifically provides: "The employee cannot have any facial hair or other condition that interferes with the face-to-respirator seal." (C-36). Both Lanier and foreman Repici, who, according to the program is the "person [who] shall be responsible for implementing the . . . program," had facial hair in violation of Respondent's policy. (Tr. 209, C-6, C-7). Thus, not only did Repici fail to properly implement the program as to the employees, he also failed to lead by example.

known of the condition. Respondent charged Repici with the responsibility to implement the respiratory protection policy. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004 (No. 85-369, 1991) (actual or constructive knowledge of a foreman is imputable to the employer). A cursory examination of the respirators would have uncovered the deterioration of the nose piece, not to mention the presence of facial hair, which Repici admits to having on the day of the inspection.

The preamble to the cited standard, which governs the voluntary use of respirators, states that "[p]aragraph (c)(2) is necessary because the use of respirators may itself present a health hazard to employees who are not medically able to wear them, who do not have adequate information to use and care for respirators properly, and who do not understand the limitations of respirators." 63 Fed. Reg. 1152, 1190. CO Heffron testified as to the expected injuries that could result from a violation of this standard, including respiratory problems from breathing in silica dust, which is a typical byproduct of tuck-pointing operations.[7] (Tr. 76–77). Respondent offered no evidence to the contrary. Accordingly, the Court finds this violation was serious. Citation 1, Item 1 shall be AFFIRMED.

Citation 1, Item 2

In Citation 1, Item 2, the Secretary alleges a violation of 29 C.F.R. § 1910.1200(g)(1), which provides:

> Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

The citation specifically alleges that "the (employer) did not have the MSDS available at the worksite for employees using Sure Klean 600 detergent that contains HCl, a corrosive ingredient that poses special health and safety hazards to the user." (Citation and Notification of

7. The preamble to the standard also identifies other potential health hazards and injuries that may result from improper maintenance and care of respirators, such as dermatitis and ingestion of harmful substances. 63 Fed. Reg. at 1190.

Penalty at 4). An MSDS (material safety data sheet) describes the hazards associated with the use of a particular product, the potential for exposure, signs and symptoms of exposure, recommended personal protective equipment, and the type of first-aid to be rendered in the event of exposure. (Tr. 25, C-12). During his inspection, CO Heffron saw that Respondent had a container of Sure Klean 600 detergent at the worksite. (Tr. 25). Sure Klean is a corrosive cleaning agent that contains hydrochloric acid (HCl), which, depending on its use, can cause damage to the eyes, skin, and respiratory tract. (Tr. 25, C-10, C-12). At the time of the inspection, CO Heffron requested a copy of the MSDS for Sure Klean; however, Respondent was unable to provide him with one until weeks later. (Tr. 32). Foreman Repici stated that they had an MSDS booklet; however, he also indicated that it was not inclusive of all chemicals located on the worksite and that some MSDSs were located in his briefcase, which he did not have with him at the worksite. (Tr. 210, 214). Accordingly, the cited standard applies and was violated.

All three of Respondent's employees were exposed to the condition. CO Heffron testified that Respondent's employees told him that they used Sure Klean on a daily basis. (Tr. 25). At trial, however, foreman Repici stated that they had not used the Sure Klean for at least a month and would probably not use it again for at least a couple of months. (Tr. 212–13). Accordingly, Respondent contends that, because the product was not specifically "in use" at the time of the inspection, there was no violation of the standard. This argument is contrary to the plain language of the standard and to Commission case law. The standard merely requires that the employer shall have an MSDS in the worksite for each hazardous chemical which they use. *See* 29 C.F.R. § 1910.1200(g)(1). Although the Sure Klean may not have been in use on the day of the inpsection, the Court finds that the chemical was available for use, had been used at the worksite, and would be used again in the future. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002

(The Secretary may show employee access through either actual employee exposure, or by showing that "while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger.").

The Court also finds that Respondent had knowledge of the condition. To establish employer knowledge, an employer does not have to possess knowledge that a condition violated the Act, just knowledge that the condition existed. *Shaw Construction, Inc*., 6 BNA OSHC 1341. The Sure Klean was not in storage and was located in plain view. Furthermore, Respondent's foreman, Richard Repici, was responsible for maintaining the MSDSs for the worksite, and he failed to have the proper MSDS for Sure Klean. (Tr. 210). *See A.P. O'Horo Co.*, 14 BNA OSHC 2004 (No. 85-369, 1991) (actual or constructive knowledge of a foreman is imputable to the employer).

The Court finds, however, that this violation was not serious. As will be explained further in the following sections, Respondent's employees were well-versed in the proper handling and use of Sure Klean, as well as the required Personal Protective Equipment ("PPE") associated with its use. Further, to the extent that Sure Klean had not and would not be used for a considerable period of time, there was a very low probability of death or serious physical harm resulting from its presence on the worksite. Accordingly, Citation 1, Item 2 will be MODIFIED to an other-than-serious violation, and the penalty will be reduced in kind.

Citation 1, Item 3(a)

In Citation 1, Item 3(a), the Secretary alleges a violation of 29 C.F.R. § 1926.21(b)(3), which provides:

> Employees required to handle or use poisons, caustics, and other harmful substances shall be instructed regarding the safe handling and use, and be made aware of the potential hazards, personal hygiene, and personal protective measures required.

The citation specifically alleges that "[e]mployees handling and using the Sure Klean 600

detergent were not trained in its potential hazards and the appropriate handling procedures needed for protection. This product contains HCl, an ingredient that is corrosive that poses special health and safety hazards to the user." (Citation and Notification of Penalty at 5). During his inspection, CO Heffron inquired about the employees' use of Sure Klean and whether they were familiar with the hazards associated with its use. (Tr. 27, C-13). CO Heffron testified that one of the employees told him that they did not think that the material was hazardous, while the other employees stated that they were unsure whether the material was hazardous or not. (Tr. 28, 125).

Respondent's employees all testified that they had experience using the Sure Klean product prior to working for Respondent. (Tr. 212, 224, 243). They also testified as to what personal protective equipment (PPE) their previous employers and Respondent had them wear in order to protect them from the hazard of exposure, i.e., full face protection, respirators with chemical cartridges, rain gear, and rubber boots. (Tr. 212, 224, 243). Additionally, Repici, Lanier, and Bekerian have all taken the OSHA-10 class, and Repici and Lanier have taken the OSHA-30 class. These classes address issues such as hazardous chemicals and proper PPE. (Tr. 217–18, 228, 245). Finally, Canale testified that each new employee is provided information with respect to MSDS sheets and proper PPE and signs a form indicating that they have received information regarding Respondent's hazardous communications program. (Tr. 195, R-2, R-3, R-4, R-5). This information session is typically conducted at the office on the employees' first day; however, it can sometimes be provided at the worksite. (Tr. 195).

With respect to training standards, the Commission has held that employers are required to give instructions that are reasonable under the circumstances. *Pratt & Whitney Aircraft Grp.*, 12 BNA OSHC 1770 (No. 80-5830, 1986); *see also Compass Environmental, Inc. v. OSHRC*, 663 F.3d 1164 (10th Cir. 2011). In determining the reasonableness of the instructions, a court

"must consider such factors as the obviousness of the hazard, the experience of the employees, the likelihood that an accident would occur, and the degree of harm that would result from an accident." *Pratt & Whitney*, 12 BNA OSHC 1770.

In addition to the testimony of CO Heffron, the Secretary points to the following as evidence that Respondent failed to provide adequate training with respect to the use of harmful substances: (1) Lanier testified that he could not remember "off the top of his head" whether he had received hazardous communication training from Respondent; (2) Bekerian gave a rather abbreviated response as to the nature of his hazardous communication training ("You know, just what kind of protective equipment to wear.") (Tr. 233, 239, 245–46). On the other hand, Respondent asserts that, based upon their previous experience and training and the information provided by Respondent, the employees were properly instructed according to the cited standard.

The Court finds that the cited standard applies; however, the Court does not find that it was violated. The weight of the evidence suggests that the information provided to the employees was sufficient to constitute proper instruction under the standard. The hazard was clearly obvious: the sealed, plastic bucket containing the Sure Klean had a clear warning label indicating the nature of the hazard. (C-10). *See Pratt & Whitney*, 12 BNA OSHC 1770 (citing *Butler Lime & Cement Co. v. OSHRC*, 658 F.2d 544, 551 (7th Cir. 1981)) (caution signs on acid tanks sufficient to warn employees of hazard). Secondly, the employees were clearly experienced in the use of the chemical as indicated by their testimony regarding their experience using Sure Klean on previous jobs. In light of the previous two factors, although the degree of harm resulting from an accident involving Sure Klean would be serious, the Court finds that such an accident would be unlikely. Accordingly, Citation 1, Item 3(a) shall be VACATED.

Citation 1, Item 3(b)

In Citation 1, Item 3(b), the Secretary alleges a violation of 29 C.F.R. §

1926.1200(h)(2)(ii), which provides:

> Employees shall be informed of any operations in their work area where hazardous chemicals are present.

The citation specifically alleges that "[f]or employees exposed to Sure Klean 600 detergent, the employer did not train these employees in the physical and health hazards of HCl, an ingredient that is corrosive that poses special health and safety hazards to the user." (Citation and Notification of Penalty at 5).

Based on the discussion regarding the use of Sure Klean in Items 2 and 3(a), the Court finds that the cited standard applies. The standard, however, was not violated. As noted above, the use of a sign can be sufficient to communicate hazards to employees. *See Butler Lime & Cement Co.*, 658 F.2d at 551 (employer may communicate 10-foot clearance rule by sign). The container of Sure Klean was clearly marked as a hazardous material, which, coupled with the facts mentioned in Item 3(a), is more than adequate to inform employees that a hazardous chemical was present. Accordingly, Citation 1, Item 3(b) shall be VACATED.

Citation 1, Item 4

In Citation 1, Item 4, the Secretary alleges a violation of 29 C.F.R. § 1926.50(g),[8] which provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The Citation specifically alleges that "[e]mployees had no eyewash station available for those who are spraying and handling Sure Klean 600 Detergent, which contains HCl, a corrosive." (Citation and Notification of Penalty at 6). After discovering that Respondent's employees used Sure Klean at the worksite, CO Heffron asked if Respondent had an eyewash

8. The Citation and Notification Penalty contains a typo, indicating that the cited standard is 1925.50(g), which is a non-existent standard. After a colloquy at trial, the Court finds that this was a typographical error and that the proper standard was tried by consent. Furthermore, Respondent was placed on notice of the proper standard to the extent that the language of 1926.50(g) was listed in the Citation and Notification of Penalty.

station available. (Tr. 41). Repici, Bekerian, and Lanier stated that the worksite did not have an eyewash station. (Tr. 42). However, Respondent did have a hose and eyewash bottle available at the location of the worksite where Sure Klean would be applied. (Tr. 43, 213–14, C-2). Because Respondent had corrosive chemicals on the worksite available for use, the Court finds that the standard applies.

The Secretary argues that Respondent's failure to have an eyewash station constitutes a violation of the standard. Specifically, the Secretary contends that a hose and eyewash bottle would be insufficient because it did not allow for hands-free washing and that the variable pressure and temperature of the hose could cause additional damage to the eyes. (Tr. 43–44). Respondent contends, as it has with respect to other violations, that Sure Klean was not in use at the time and, thus, an eyewash station was not required. Respondent also contends that the hose and eyewash bottle were "suitable" facilities for the purposes of the standard.

According to the Commission:

> [W]hether an employee has complied with its obligations to provide 'suitable facilities' . . . depends on the 'totality' of the relevant 'circumstances', including the nature, strength, and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities.

Atlantic Battery Co., Inc., 16 BNA OSHC 2131 (No. 90-1747, 1994) (internal citations omitted).[9] "The Secretary bears the burden of proving that the facilities provided by the employer are not 'suitable' within the meaning of the standard." *Id.* This burden cannot be met merely by showing that the flushing apparatus is not an eyewash fountain. *Id.* (citing *E.I. duPont de Nemours & Co.*, 10 OSHC BNA 1320, 1324–25) (No. 76-2400, 1982). In *Atlantic Battery*, the Commission found that the Secretary failed to establish that an aerated hose located in close proximity to the worksite unsuitable. *Id.* (also finding that the record did not establish that the

9. It should be noted that the standard at issue in *Atlantic Battery* and the other cases cited by the Court refer to 29 C.F.R. § 1910.151(c). The language of the standard at issue in this case (29 C.F.R. § 1926.50(g)) is identical.

strength and amount of the chemical used by the employer was such that only an eyewash fountain could be considered suitable); *see also E.I duPont*, 10 OSHC BNA at 1325 (holding that Secretary failed to meet her burden that a shower was unsuitable).

As in the cases cited above, the Secretary has failed to carry her burden. CO Heffron expressed his concern that a hose would not allow an exposed individual to hold his eyelids open during the washing process and that the variable temperature and pressure of the water coming from the hose may cause additional eye damage. (Tr. 43–44). These concerns were merely speculative; there was no evidence to establish that the temperature or pressure of the hose was such that it could be considered and unsuitable facility according to the standard. *See E.I. duPont*, 10 OSHC BNA at 1325 (CO made no effort to determine the pressure at which the shower flowed and Secretary failed to establish that the flow could not be moderated). Furthermore, no evidence was proffered as to the strength and the amount of the chemicals that were being used. What is known is that a hose, capable of providing a continuous stream of water, was provided in close proximity to the location where Sure Klean would be applied. Because the Secretary has failed to carry her burden, Citation 1, Item 4 shall be VACATED.

Citation 1, Item 5

In Citation 1, Item 5, the Secretary alleges a violation of 29 C.F.R. § 1926.102(a)(1), which provides:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Citation specifically alleges, "Where employees sprayed and handled Sure Klean 600 Detergent, a masonry cleaning agent containing corrosive HCl, the employer did not require employees to wear the appropriate eye (chemical goggles) and face protection." After being told that Sure Klean was being used on a daily basis at the worksite, CO Heffron asked whether the

employees wore proper eye protection during its application. (Tr. 49). CO Heffron testified that Respondent's employees told him that they were using Sure Klean and other chemicals without chemical-splash goggles. (Tr. 49). During his initial visit to the worksite, CO Heffron observed Michael Lanier applying Conpro Lastic to the building without wearing any eye protection, which is recommended by the MSDS for that material.[10] (Tr. 49–50, C-20, C-21).

None of Respondent's employees specifically recall whether they discussed the use of chemical-splash goggles with CO Heffron; however, each of them credibly testified regarding what is required when applying Sure Klean detergent. (Tr. 212, 224, 243). Repici, Lanier, and Bekerian all testified that they had prior experience and training regarding the proper application of Sure Klean, which required acid-resistant rain gear and boots, goggles, full face masks, and chemical respirators. (*Id.*). Lanier, who was photographed by CO Heffron while applying Conpro Lastic without chemical-splash goggles, testified that the material was thick "like pancake batter" and did not present a splashing hazard such that he believed goggles were necessary to prevent eye injuries. (Tr. 232).

Based on the foregoing, the cited standard clearly applies; however, the Court finds that the standard was not violated. The hazard in this case is the possibility that Sure Klean or Conpro Lastic would get in the eyes of the employees. It is clear that either of these materials, which are corrosive and alkaline, respectively, could cause serious injuries if they came into contact with an employee's eyes. The question remains, however, as to whether there was a potential for eye injury with respect to their use.

There appears to be a measure of confusion regarding both the "when" and "what" of this citation. With respect to the "when", CO Heffron testified that Respondent's employees told him "that they were using [Sure Klean] previous days on a daily basis." (Tr. 123). In response to

10. The initial visit took place in July 2010, which was prior to the official inspection that took place on August 12, 2010.

cross-examination, CO Heffron clarified that statement by saying, "Previous days, up until my initial time that I had arrived on site where I was refused entry, they were using products, Sure Klean, on a daily basis." This characterization of the "when" was confirmed when Foreman Repici testified that the Sure Klean had not been used for at least a month and would not likely be used again for at least another month because it is not used during tuck-pointing operations.[11] (Tr. 212–13). The only product that CO Heffron observed being used and that Respondent's employees testified to using during the period from the initial visit up to and including the subsequent inspection was the Conpro Lastic coating. (Tr. 49). With respect to the Conpro Lastic, the Court finds that, although it has alkaline properties that could cause eye injuries, the testimony of Lanier clearly illustrated that there was little, if any, potential for those injuries to occur. Furthermore, with respect to the Sure Klean, the Court finds that the testimony of CO Heffron regarding the employee statements about their use of chemical-splash goggles to be inconclusive. The only evidence introduced regarding the use of Sure Klean without chemical goggles came during the first question of CO Heffron's direct examination about this Item. (Tr. 49). The remainder of CO Heffron's testimony on this topic involved the employee's application of the Conpro Lastic coating. (Tr. 49–52). On the other hand, Respondent's witnesses testified quite clearly as to what was required during the application of Sure Klean. (Tr. 212, 224, 243). Based on the evidence presented, the Court finds that the Secretary did not sustain her burden to prove a violation. Accordingly, Citation 1, Item 5 shall be VACATED.

Citation 1, Item 6

In Citation 1, Item 6, the Secretary alleges a violation of 29 C.F.R. § 1926.451(e)(1), which provides:

> When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers

11. CO Heffron agreed that Sure Klean is not likely to be used during tuck-pointing. (Tr. 121).

> (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The Citation specifically alleges that "employees were exposed to falls while ascending and descending an elevated scaffold platform using a milk crate." (Citation and Notification of Penalty at 7). While traveling along the scaffolding, CO Heffron observed an unsecured milk crate being used as a step to gain access to a higher level on the platform. (Tr. 52–53, C-24). Using a tape measure, CO Heffron determined that there was a 27-inch difference in elevation between the two platforms. (Tr. 52, C-25). In addition to the employees telling him that they used the milk crate to access the upper platform, CO Heffron observed the employees using the milk crate as they were climbing off of the mast climbing platform (upper level) to the lower frame scaffold platform. (Tr. 56). One of the individuals that used the milk crate was foreman, Richard Repici. (Tr. 216).

Respondent contends that the list of acceptable means of access is not exhaustive and, therefore, a milk crate is not eliminated as one of those means. Respondent is correct to the extent that the standard does entertain the possibility of alternative means of access; however, the operative phrase at the end of the list of possible alternative is "or similar surface." 29 C.F.R. § 1926.451(e)(1). A milk crate, as its names implies, is designed to hold milk. As compared to the other means of access listed in the standard, a milk crate is not rated to withstand repeated loading from a human body, nor is it designed to remain in a static, stable condition while in use. (Tr. 139). In that respect, the Court simply cannot conclude that a milk crate constitutes a "similar surface" as understood in the cited standard. Based on the foregoing, the standard applies and was violated.

As noted above, all three of Respondent's employees were exposed to the condition. Respondent also knew of the condition in that Respondent's foreman, Richard Repici, used the

milk crate in order to ascend and descend from the mast-climbing platform. *See A.P. O'Horo*, 14 BNA OSHC 2004. Finally, this violation was properly classified as serious because employees using an unstable and insufficiently rated, plastic milk crate as a means of access could be seriously injured. (Tr. 54, 139–40). Accordingly, Citation 1, Item 6 will be AFFIRMED.

Citation 1, Item 7

In Citation 1, Item 7, the Secretary alleges a violation of 29 C.F.R. § 1926.451(f)(3), which provides:

> Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

The Citation specifically alleges that "[t]he employer's scaffold competent person did not conduct inspections of the tubular welded frame scaffold prior to each shift's use." CO Heffron interviewed Repici and asked whether he had performed an inspection of the scaffolds that day. (Tr. 56). CO Heffron testified that Repici had told him that he had inspected the mast-climber scaffold but that they did not perform daily inspections of the tubular welded frame scaffold. (Tr. 57). Performing an inspection of the scaffolding is important to determine whether any defects exist from regular wear and tear or, as in this case, from damage due to the proximity of vehicular traffic. (Tr. 58). Repici claims that he misunderstood CO Heffron and thought that he was inquiring only as to whether he had performed a formal, written inspection. (Tr. 214–15). Repici, who is the worksite's "competent person," had forgotten his inspection checklist that day, so he claims that he performed a visible, yet unwritten, inspection. (Tr. 214).

The Court finds that Repici failed to perform the inspection as required by the standard. Although Repici claims that he misunderstood the question, the testimony of CO Heffron and his contemporaneously recorded notes undermine that claim. CO Heffron specifically testified and documented that Repici told him that he had performed an inspection of the mast-climber

scaffold but that he did not perform daily inspections of the tubular welded frame scaffold, including the day of the inspection. (Tr. 57, 143, C-2 at 2). Accordingly, the Court finds that the standard applies and was violated.

The Court also finds that Respondent's employees had access to the condition. All three employees at the 126 High Street worksite access and work on the scaffolding on a daily basis. Further, Respondent had knowledge of the condition in that the individual charged with the responsibility of performing the inspection was the worksite foreman, Richard Repici. *See A.P. O'Horo*, 14 BNA OSHC 2004. Finally, the violation was properly classified as serious. Although no defects were found by CO Heffron during his inspection,[12] the scaffolding's proximity to vehicular traffic requires heightened vigilance on behalf of Respondent. Should a defect go unnoticed due to Respondent's failure to properly inspect the scaffolding and its components on a daily basis, serious injury or death could result. Accordingly, Citation 1, Item 7 will be AFFIRMED.

Citation 1, Item 8(a)

In Citation 1, Item 8(a), the Secretary alleges a violation of 29 C.F.R. § 1926.451(f)(15), which provides:

> Ladders shall not be used on scaffolds to increase the working level height of employees, except on large area scaffolds where employers have satisfied the following criteria.

The Citation specifically alleges that Respondent's "employee was exposed to falls from a wooden step ladder placed against the building in a folded closed position." During his initial visit to the 126 High Street worksite, CO Heffron observed Lanier standing on a folding stepladder that was placed on top of the scaffolding in order to apply coating to the exterior of the building. (Tr. 58, 233, C-20, C-21, C-29). The scaffolding in this location was not high

12. It should be noted that CO Heffron identified an area of the scaffolding that was missing a guardrail. (Tr. 57). That issue, however, will be dealt with more specifically in the Court's discussion of Citation 1-9.

enough for Lanier to be able to apply the coating to the exterior of the building, so the stepladder was used to increase his working height. (Tr. 58–59). By using the stepladder on top of the scaffolding, Lanier was positioned above the highest level of the guardrail, which exposed him to a potential fall over the guardrail. (Tr. 59, 65).

Respondent appears to contend that there was no evidence to suggest that the platform at issue was not a "large area scaffold" as indicated in the exception to the standard. First of all, "[T]he party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim." *Kaspar Elecroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993). It is not incumbent upon the Secretary to prove that the exception did not apply; rather, it is the responsibility of Respondent to prove that it did. Secondly, even if the Court were to give Respondent the benefit of the doubt, the regulations clearly provide a definition for a "large area scaffold," which the structure at 126 High Street does not meet. *See* 29 C.F.R. 1926.450(b) ("Large area scaffold means a pole scaffold, tube and coupler scaffold, systems scaffold or fabricated frame scaffold *erected over substantially the entire work area*. For example: a scaffold erected over the entire floor area of a room.") (emphasis added). Notwithstanding Respondent's arguments, the standard applies and was violated.

Michael Lanier was clearly exposed to the condition; he was photographed applying a coating to the building while standing on a stepladder that was placed on top of the scaffolding. Given Lanier's prominent position at the top of the scaffolding, the Court finds that Respondent also knew or with the exercise of reasonable diligence, should have known, about the condition. Finally, the Court finds that this violation was serious. By standing near the top of a 10-foot ladder, which was located on top of scaffolding, Lanier was not protected by the guardrails that run along the scaffolding. If an accident were to occur, it could reasonably be expected to cause death or serious bodily injury. Accordingly, Citation 1, Item 8(a) shall be AFFIRMED.

Citation 1, Item 8(b)

In Citation 1, Item 8(b), the Secretary alleges a violation of 29 C.F.R. § 1926.1053(b)(4), which provides:

Ladders shall be used only for the purpose for which they were designed.

The Citation specifically alleges that Respondent's "employee was exposed to falls from a wooden step ladder placed against the building in a folded closed position." At one point, CO Heffron observed Lanier using a folding stepladder in the open position with the spreaders locked in place; in other words, the ladder was self-supporting. With respect to this citation, however, Lanier had folded the stepladder and placed it against the building. (Tr. 61). Thus, the building, rather than the second set of ladder feet, was being used to support the ladder. (Tr. 62).

CO Heffron testified that a folding stepladder is not intended to be used in the manner illustrated in exhibits C-20 and C-21. (Tr. 62–64). Specifically, he stated that the feet of a folding stepladder are cut at an angle such that they will be completely flush with a level surface when the ladder is unfolded and locked in place. When the ladder is not unfolded and locked into position, the feet are not in complete contact with the supporting surface, which reduces the efficacy of the ladder feet and increases the possibility that the ladder will slip and cause an employee to fall off of it. (Tr. 62–63). Lanier stated that he believed that using the ladder in the manner described above was safer than using the ladder in the open and locked position because he did not have to lean out over a two-foot gap in order to reach the building while applying the Conpro Lastic coating. (Tr. 233).

The Commission has held that proposed violations are duplicative if the same abatement action would correct the violative conditions described in both citation items. *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, (No. 94-1979, 2009); *Capform, Inc.*, 13 BNA OSHC 2219, 1989 CCH OSHD ¶ 28,503 (No. 84-556, 1989). The standard cited in item 8(a), 29 C.F.R. §

1926.451(f)(15) prohibits Respondent from using a ladder to increase the working level height of employees working on scaffolds. In both 8(a) and 8(b), Respondent was cited for using a "wooden step ladder placed against the building in a folded closed position." Ostensibly, there are two separate violations involved here, which, in other circumstances, may require separate abatement actions, i.e., not using a ladder on top of a scaffold and not using a folding stepladder as a non-self-supporting ladder. The basic thrust of the Secretary's argument, though, is that any ladder, regardless of the manner in which it is used, shall not be used to increase the working level height of an employee working on a scaffold. To the extent that the ladder referenced in item 8(b) was being used as an adjunct piece of scaffolding to increase the working level height of Lanier, such use would be contrary to the purpose for which it was designed.[13] Thus, in this case the same abatement action—not using a ladder on top of a scaffold—would cure both violative conditions. Therefore, the items are duplicative. Accordingly, Citation 1, Item 8(b) shall be VACATED.

Citation 1, Item 9

In Citation 1, Item 9, the Secretary alleges a violation of 29 C.F.R. § 1926.451(g)(1), which provides:

> 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. Paragraphs (g)(1) (i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

The Citation specifically alleges that "the employees were exposed to fall hazards of 11.5 feet to the ground below while traveling on a tubular welded frame scaffold to access a mast

13. The argument at trial and in the parties' respective briefs addresses the issue of whether the manufacturer of the folding stepladder intended that it be used in the manner described in the narrative of this citation. Regardless, no evidence was proffered regarding the manufacturer of the ladder and its intended purpose. The Secretary introduced an exhibit regarding Werner ladders; however, no attempt was made to link that exhibit to the specific ladder being used. (C-31). The Court will not engage in speculation as to whether a folding stepladder cannot be used as a non-self-supporting stepladder merely based upon the fact that it folds. That said, the ladder was surely not designed to replace the proper use of scaffolding to increase the working level height of employees on a scaffold.

climbing work platform without fall protection." When CO Heffron arrived at the 126 High Street worksite, he observed Respondent's employees working on the mast climbing work platform.[14] In order to exit the scaffolding from that position, the employees had to travel along an elevated walking/working surface located on the tubular welded frame scaffold. (Tr. 66, 68, C-33). This elevated surface, which was covered in electrical cables, was 11.5 feet above the ground below. (Tr. 71–72, C-35). At one point along this elevated surface, the scaffolding was missing a section of guardrail and no alternative means of fall protection were provided. (Tr. 66, 68, C-34). This section of the surface was not completely open, however, because the gap was covered by debris netting that was attached along the entire length of the walkway. (Tr. 70, 168–69).

The Secretary contends that Respondent's failure to provide a guardrail or other means of fall protection at this point along the walkway constitutes a serious violation of the cited standard. Respondent argues that the debris netting was sufficient to protect employees from falling to the ground below. Ken Canale, Respondent's safety director, testified that the debris netting is rated to hold 2500 pounds. (Tr. 168). Conversely, he pointed out that the flex rating for a top rail is 200 pounds. (Tr. 170); *see also* 29 C.F.R. § 1926.451(g)(1)(v). Ultimately, Respondent contends that the debris netting substantially complied with the requirement of 29 C.F.R. § 1926.451(g)(1).

On the face of it, it would appear that the debris netting, rated to hold 2500 pounds of debris, should be sufficient to protect an employee from falling to the ground below. The resolution of this issue, however, is not quite so simple. First of all, none of the subsections indicated in (g)(1) state that a debris net is sufficient; in fact, all of the subsections of (g)(1)

14. CO Heffron first observed this condition on July 15, 2010, when he was initially denied entry to inspect the 126 High Street location. The photographs in exhibits C-34 and C-35 were taken during the official inspection of August 12, 2010.

provide either that a guardrail or *personal* fall arrest system, or a combination of the two, *shall* be provided. *Id.* § 1926.451(g)(i)–(vii). A debris net is neither a guardrail nor a personal fall arrest system as those terms are defined in 29 C.F.R. § 1926.450(b). Secondly, even if the Court were to consider the debris net as a system of fall protection, the Court cannot conclude that the debris net provided by Respondent was sufficient as a guardrail substitute.[15]

Presumably, Respondent is contending that the debris net is the equivalent of a safety net. Section 1926.105 provides the minimum requirements for safety nets. Although Respondent testified as to the capacity of the debris nets, this still falls short of what is required by the standard. Specifically, safety nets "shall meet accepted performance standards of 17,500 foot-pounds minimum impact resistance as determined by the manufacturers, and shall bear a label of proof test." *Id.* § 1926.105(d). Clearly the testimony provided by Canale is not sufficient to establish this requirement. Accordingly, the standard applies and was violated.

As depicted in exhibit C-33, and as testified to by CO Heffron, all three employees were exposed to the condition. Furthermore, Respondent knew about the condition: Canale stated that he had performed a very thorough inspection of the scaffolding and stated his belief that the debris netting was sufficient as a method of fall protection. (Tr. 167–169). Finally, the violation was properly characterized as serious. The debris netting was not tested or approved as a means of preventing employees from falling from the scaffolding. If an employee were to trip on the cables that were strewn about the walkway and fall through the area that was missing a handrail, a serious injury or death could occur. Accordingly, Citation 1, Item 9 shall be AFFIRMED.

PENALTIES

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the

15. Respondent's Safety Director, Ken Canale, stated that debris netting is typically used in conjunction with a guardrail system. (Tr. 169).

employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶ 29,964 (No. 87-2059, 1993). The Secretary reduced the proposed penalties by forty percent for each violation based on Respondent's small size. No penalty adjustments were made for history or good faith. (Tr. 92–93) Considering these reductions, as well as the totality of the factual circumstances discussed above in each instance, the Court assesses the following penalties for the affirmed violations as set out below.

ORDER

Based upon the foregoing, it is ORDERED that:

1. Citation 1, Item 1 is hereby AFFIRMED with an assessed penalty of $1200.00;
2. Citation 1, Item 2 is hereby MODIFIED to an other-than-serious violation AFFIRMED as modified, and a penalty of $450.00 is assessed;
3. Citation 1, Item 3(a) is hereby VACATED;
4. Citation 1, Item 3(b) is hereby VACATED;
5. Citation 1, Item 4 is hereby VACATED;
6. Citation 1, Item 5 is hereby VACATED:
7. Citation 1, Item 6 is hereby AFFIRMED with an assessed penalty of $900.00;
8. Citation 1, Item 7 is hereby AFFIRMED with an assessed penalty of $1500.00;
9. Citation 1, Item 8(a) is hereby AFFIRMED with an assessed penalty of $1500.00;
10. Citation 1, Item 8(b) is hereby VACATED;

11. Citation 1, Item 9 is hereby AFFIRMED with an assessed penalty of $1500.00;

/s/ John H. Schumacher
John H. Schumacher
Judge, OSHRC

Date: May 8, 2012
Denver, Colorado