UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

NEW ENGLAND MASONRY CO.,
Respondent

Docket Nr. 97-0832

Appearances

For Complainant

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For Respondent

Barrett A. Metzler
Northeast Safety Management,
Inc.
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Before:

JOHN H FRYE, III, Judge

DECISION AND ORDER

I. BACKGROUND.

This is a proceeding pursuant to ' 10 of the Occupational Safety and Health Act of 1972, as amended. It concerns a five-item serious citation issued by the Secretary to Respondent, New England Masonry Co., Inc. The citation addresses conditions and practices at a worksite where Respondent was replacing the flat roof on a brick building occupied by a convalescent home in Glastonbury, Connecticut. Tr. 8, 28. Compliance Officer Larry Ross inspected this worksite on May 15, 1997. Respondent had nine workers on site, Tr. 19, and a total workforce of fifty to seventy-five men, Tr. 157.

Respondent filed a timely notice of contest to the citation, and the Secretary filed her complaint with the Commission. In its answer to the complaint, Respondent admitted the jurisdiction of the Commission, denied the existence of the violations alleged, and asserted four affirmative defenses.

II. APPLICABLE LAW.

Under §17(k) of the Act, a serious violation exists where it poses a substantial probability that death or serious harm could result. The serious character of a violation is not a function of the probability of its occurrence; rather, the Secretary must show that an accident is possible and that there is a substantial probability that death or serious harm could result from the accident. *Flintco, Inc*., 1991 CCH OSHD ¶30,227 (RC 1993). However, the U.S. Court of Appeals for the Second Circuit, which has jurisdiction on this case, has held that the risk of an accident cannot be merely possible. The court held that there must be a significant risk that an accident will occur in order for a serious violation to exist, and indicated that a serious violation will exist where a realistic possibility

of the occurrence of an accident posing the threat of death or serious harm exists. *Pratt & Whitney Aircraft, Etc., v Secretary of Labor,* 649 F.2d 96, 103-105 (2d Cir. 1981).

III. THE ALLEGED VIOLATIONS.

A. Item 1.

Item 1 alleges that an employee working on the ground in the hoist area, while material was being hoisted to the roof, was not wearing a hard hat. A violation of 29 C.F.R. 1926.100(a) was alleged. The standard states:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Mr. Ross testified that he observed employee Ramos tying loads to a line and that the loads were being hoisted to the roof. Tr. 14, 15. Mr. Ross also testified that he saw two 25 gallon buckets being hoisted while Ramos worked below them without a hard hat, at one time directly under a load. Tr. 16, 17, 74. Mr. Ross offered two photographs to support his testimony, C-2 and C-3.

Respondent admits that the standard applies, but urges that the evidence does not show an employee exposed to the hazard of falling objects. Respondent points out that C-2 shows Ramos under the hoisting cable, but also shows that no load is being brought up by the hoist and that there is no operator at the hoist. Exhibit C-3 purports to show the employee through the windows of a red truck. However, the image is not clear enough to support that claim, or to place the employee in the zone of danger. Respondent argues that no evidence places an employee underneath a load.

While the photographs do not support the claim that Ramos was directly under objects being hoisted, Mr. Ross' testimony indicates that he was, and that he was not wearing a hard hat. While Mr.

Smith testified that he had not seen Ramos under a load without a hard hat, it is clear that, at a minimum, Ramos was in the vicinity of the hoist without a hard hat while the hoist was in operation. That is enough to trigger the application of the standard. To interpret the standard to require an employee's presence directly under an object that might fall would defeat its purpose. Ramos was close enough to be exposed to the hazard.

The Secretary proposed a $1,575 penalty, and Respondent has not contested this amount. It is assessed.

B. Item 2.

Item 2 concerns the employer's failure to maintain fire fighting equipment in operating condition and to replace defective firefighting equipment. The cited standard, 29 C.F.R. 1926 .150(a)(4) states:

> All firefighting equipment shall be periodically inspected and maintained in operating condition. Defective equipment shall be immediately replaced.

1. Subitem 2a.

Mr. Ross observed the kettle to be operating at the time of the inspection. Tr. 19, 21. Propane tanks were located near the kettle. Tr. 21. The kettle and the tanks were six feet from the building itself. Tr. 22. Mr. Ross found that the fire extinguisher located at the kettle area was discharged, and consequently was not operable. Tr. 19, 20, 21. Exhibit C-4 depicts the fire extinguisher and shows that the gauge reads "discharged." Exhibit C-5 shows the location of the kettle and propane tanks.

Respondent does not deny that the extinguisher was discharged. However, Respondent argues that it could not have known about the discharged extinguisher if it had been discharged earlier in the morning. T-124. Further, it argues that, because of possible delays in discovering discharged extinguishers, other precautions were taken: the kettle was set up next to a doorway which contained a fire extinguisher and a fire hose (T-124); and extra extinguishers were kept on site (T-124-125).

Accepting all of this as true does not obviate the violation. The standard requires that fire extinguishers be maintained in operating condition and immediately replaced if not operable. This item is affirmed.

2. Subitem 2b.

On the roof, Mr. Ross found an extinguisher which was overcharged. Its gauge read slightly over the green safe zone, indicating that the extinguisher was under too much pressure. Tr. 23, 24. Exhibit C-6 shows the unit near two propane tanks located on the roof, while Exhibit C-7 depicts the gauge reading "overcharged.".

There was flammable material on the roof, including propane, other cans marked "flammable," and roofing materials. Tr. 24 - 26. In addition, the hoist had a gasoline motor. Tr. 32. The extinguisher was defective in that its utility was impaired, although it is safe to assume that that hazard was minimal given the slight overpressurization.

Items 2a and 2b were grouped and a single penalty of $675 proposed. Respondent has not contested this amount; it is assessed.

C. Item 3.

This item concerns the employer's failure to use fall protection at the hoist area and on the roof.

1. Subitem 3a.

Section 1926.501(b)(3) states:

> Hoist areas. Each employee in a hoist area shall be protected from falling 6 feet (1.8m) or more to lower levels by guardrail systems or personal fall arrest systems. If guardrail systems,[or chain, gate, or guardrail] or portions thereof, are removed to facilitate the hoisting operation (e.g., during landing of materials), and an employee must lean through the access opening or out over the edge of the access opening (to receive or guide equipment and materials, for example), that employee shall be protected form fall hazards by a personal fall arrest system.

The roof of the building was 18-20 feet high. Tr. 28 - 29. Mr. Ross testified that he observed foreman Smith at the hoist at the edge of the roof, breaking its vertical plane, without any fall protection. Tr. 28, 30. He further testified that exhibits C-8 and C-9 depict this violation. Respondent counters that Exhibits C-3, C-8, C-9, and R-1 all show Mr. Smith behind the rail of the hoist. Mr. Smith testified that he did not break the plane. Tr. 125, 127.

Mr. Smith's statements to the contrary notwithstanding, Exhibits C-8, C-9, and R-1 all show that Mr. Smith's right leg is over the rail supporting the hoist and his right foot is resting on the parapet of the roof. Indeed, C-9 confirms Mr. Ross's testimony that Mr. Smith broke the plane. This item is affirmed.

2. Subitem 3b.

Section 1926.502(f)(1)(iii) states:

> Points of access, materials handling areas, storage areas, and hoisting areas shall be connected to the work area by an access path formed by two warning lines.

Mr. Ross testified that there were no access warning lines connecting the ladder area to the rest of the roof. Tr. 36 - 37. The purpose of the lines is to prevent workers from straying to the roof edge as they wait to descend. The lines help ensure that only one person at a time approaches the ladder. Tr. 37. Exhibits C-10, 11, and 12 establish that there were no access warning lines in use.

Respondent's position is not entirely clear. Respondent says that Exhibit C-11 clearly shows that the access to the path is delineated by the chimney and hoist to one side, and the chimney and roof break to the other. Brief, p.15. This ignores ' 1926.502(f)(2), which requires that "[w]arning lines shall consist of ropes, wires, or chains, and supporting stanchions ...." Respondent does not suggest that such warning lines were present. This item is affirmed.

Items 3a and 3b were grouped and a single penalty of $900 proposed. Respondent has not contested this amount; it is assessed.

D. Item 4.

This item concerns the fact the roof safety monitor failed to warn an employee of a fall hazard, was not in visual contact with the employee, and was too far from the employee to communicate with him.

Subitem 4a cites a violation of §1926.502(h)(1)(ii), which states:

> The safety monitor shall warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner.

Subitem 4b cites a violation of §1926.502(h)(1)(iii), which states:

> The safety monitor shall be on the same walking/working surface and within visual sighting distance of the employee being monitored.

Subitem 4c cites a violation of §1926.502(h)(1)(iv), which states:

> The safety monitor shall be close enough to communicate orally with the employee.

Mr. Ross testified that he observed respondent's employee Ramos kneeling and doing flashing work at the edge of the roof for a period of three minutes. While Mr. Ramos was at the roof edge, the roof monitor, Mr. Oullette, was 100 feet away at the opposite end of the roof and had no clear line of sight. Tr. 41, 43 - 47, 50, 96, 100. Exhibit C-13 shows Mr. Oullette's sight line, and Exhibit C-15 shows Mr. Ramos' sight line if he stood up. Mr. Smith testified that Mr. Ramos was not working, but rather, having received permission to leave the roof, was on his way to the ladder and had stopped to pick up some papers. Tr. 130 - 31. Mr. Ross testified that the location at which he observed Mr. Ramos was not on the way to the ladder. Tr. 99-100.

Exhibit C-15, when viewed in connection with Exhibits C-11 and C-12, tends to confirm Mr. Smith's explanation of this event. It appears that Mr. Ramos was at a point to access the ladder when spotted by Mr. Ross. Accordingly, this item is vacated.

E. Item 5.

This item concerns the employer's use of a ladder having bent rungs which were pulling away from the ladder's rails, as well as the employer's failure to have a competent person inspect the ladder. Subitem 5a cites a violation of §1926.1053(b)(15), which states:

> Ladders shall be inspected by a periodic basis and after any occurrence that could affect their safe use.

Subitem 5b cites a violation of §1926.1053 (b)(16), which states:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

Mr. Ross testified that the ladder used to access the roof had bent and split rungs, and a rung which was pulling away from the rail on the right. Tr. 55-56, 110-11. Exhibits C-16 and C-17 depict these conditions. Mr. Ross testified that these conditions deprived the ladder rungs of their original strength and made the ladder defective under §1926.32(h). Tr. 106-07. According to Mr. Ross, the hazards posed by these defects included a fall, which could result in broken bones or death. Tr. 56-57. Mr. Smith testified that he had been aware of the condition of the rungs, had jumped on them to test them, and had concluded that the ladder was safe. Tr. 133-34.

The only evidence offered by the Secretary to support item 5a is the ladder itself. Thus the Secretary concludes that if the ladder is defective, it could not have been inspected by a competent

person. This does not follow. Anyone can make a mistake, including a competent person. In the absence of evidence going to Mr. Smith's competence, this item must be vacated.

With regard to item 5b, Respondent argues that the ladder was not shown to be incapable of sustaining the loads to which it was exposed and therefore should not be judged to be defective under ' 1926.1053(b)(16). However, this position ignores the plain wording of the standard. The standard does not require that a judgment be made as to the ladder's structural integrity, only that it be taken out of service. The ladder in question was clearly defective, but not so defective as to pose "... a realistic possibility of the occurrence of an accident posing the threat of death or serious harm ...." *Pratt & Whitney Aircraft, Etc., supra*. This item is affirmed, but as an other-than-serious violation. The damaged rungs were not severely deformed, and Mr. Ross did not regard them as constituting so great a hazard that he refused to use the ladder. Consequently, I impose a penalty of $00 for this item.

IV. AFFIRMATIVE DEFENSES.

A. Background.

Respondent raised four affirmative defenses. These were infeasibility of compliance, greater hazard, lack of knowledge, and employee misconduct. I struck the greater hazard defense and the employer withdrew the infeasibility defense. Tr. 174-77. The lack of knowledge defense has no basis given the fact that Mr. Smith was on site, and admittedly saw the violative conditions. Respondent did not brief it and hence has abandoned it.

B. Employee Misconduct.

An employer, in order to prove the unforeseeable employee misconduct defense, must establish that 1)it had established work rules to prevent the violation; 2) the rules were adequately communicated to employees; 3) it took steps to discover violations; and 4) it effectively enforced rules when infractions

were discovered. *Secretary of Labor v. Nooter Construction Co*.; 16 BNA 1572, 1578 (1994). Respondent maintains that he has satisfied these requirements.

Respondent relies on Exhibits C-1, R-2, R-3, R-4, R-5, R-6, R-7, R-8, and R-9 to establish that safety rules existed and were communicated to the workers, and on the testimony of Mr. Rich, a company supervisor, who has responsibility for enforcing the rules. Tr. 160-61. Respondent also points to the testimony of Mr. Mancinone, the Company President, who described industry-wide safety rules. Tr. 170. Respondent notes that this evidence was not controverted. Respondent argues that, in order to discover violations, its job supervisor conducts start-up and weekly inspections (Tr. 161), and it employs independent outside firms who conduct unannounced inspections of its worksites (See Exhibits C-1 [Metzler inspection of April 29, 1997] and R-9 [Hanover Insurance inspection of April 16, 1997]). With regard to enforcement, Respondent points to actions taken against Mr. Smith, who was demoted for a short period of time for a violation found by OSHA at another job (Tr. 135), and verbally reprimanded for violations noted during independent inspections (Tr. 158). Also, following the instant inspection, Mr. Smith received a written disciplinary slip, introduced as Exhibit C-19.

The Secretary points out that the Hanover Insurance inspection of April 16 found four types of unsafe practices, including employees working under a load. Mr. Smith was yelled at for this violation, but suffered no other discipline. Tr. 154-55. Mr. Metzler's inspection of April 29 found five types of infractions. Mr. Smith was not disciplined for these violations. Tr. 154-55. Although Mr. Smith asserted that the company safety manual required a verbal and a written warning for a first offense, and suspension for a second offense (Tr. 138), nothing in the record indicates that this policy was followed. The violations enumerated by Mr. Metzler include, *inter alia*, failure to wear a hard-hat; the presence of a discharged and inoperable fire extinguisher at the kettle and absence of

extinguishers on the roof; and lack of any safety monitors. Given the record in this matter, it appears that these three safety shortcomings had continued unaddressed from April 29 to May 15, 1997. Exhibit C-19, a document placing Mr. Smith on probation and suspending him as a foreman, shows that Mr. Smith was not disciplined until after the May 15, 1997 OSHA inspection had been completed. This strongly indicates that Respondent's safety program existed on paper but not in practice. Respondent's employee misconduct defense is rejected.

V. CONCLUSIONS OF LAW

Respondent was in serious violation of the standard set out at 29 CFR ' 1926.100(a) as charged in item 1. A penalty of $1,575 is appropriate.

Respondent was in serious violation of the standard set out at 29 CFR ' 1926.150(a)(4) as charged in items 2a and 2b. A penalty of $675 is appropriate.

Respondent was in serious violation of the standards set out at 29 CFR " 1926.501(b)(3) and 1926.502(f)(1)(iii) as charged in items 3a and 3b. A penalty of $900 is appropriate.

Respondent was not in serious violation of the standards set out at 29 CFR " 1926.502(h)(1)(ii), 1926.502(h)(1)(iii), and 1926.502(h)(1)(iv), as charged in items 4a, 4b, and 4b.

Respondent was not in violation of the standards set out at 29 CFR " 1926.1053(b)(15) as charged in item 5a. Respondent was in other-than-serious violation of the standard set out at 1926.1053(b)(16) as charged in item 5b. A penalty of $00 is appropriate.

VI. ORDER

Citation 1, items 1, 2a, 2b, 3a, and 3b are affirmed as serious violations of the Occupational Safety and Health Act of 1972, as amended. Citation 1, item 5b, is affirmed as an other-than-serious violation of the Act. A total civil penalty of $3,150 is assessed.

JOHN H FRYE, III
JUDGE, OSHRC

Dated:
Washington, D.C.