UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. GLENCO CONSTRUCTION SERVICES, INC. Respondent.	OSHRC DOCKET NO. 97-0135

Appearances: For Complainant: Allison Anderson Acevedo, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA.; For Respondent: Paul R. Bashore, Vice President, Project Manager, and Keith D. Johnson, Risk Manager/Safety Director, Lewistown, PA.
Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Glenco Construction Services, Inc.("Glenco"), at all times relevant to this action maintained at a workplace at the Bloomsburg University Library Center, Bloomsburg, PA., where it was engaged in steel erection activities. Glenco does not deny that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

BACKGROUND

From November 13, 1996 to November 14, 1996, Compliance Safety and Health Officer ("CO") Robert J. Farronato conducted a general scheduled inspection of the aforementioned worksite. The general contractor on the worksite was Mar-Paul Construction, Inc. During this inspection, Glenco, a subcontractor on this worksite was performing steel erection work on the top floor of the library - penthouse level (Tr. 119, 131). At the opening conference Al Quercia, the foreman on site informed CO Farranoto that Glenco had five employees on site working on the penthouse level (Tr. 17-18)[1]. As a result of this investigation, on December 11, 1996, Glenco was issued two citations alleging serious and other violations with a proposed total penalty in the amount of $6,450.00. By timely Notice of Contest, Glenco brought this proceeding before the

[1] The term "Tr." refers to the transcript of the hearing in this matter.

Review Commission. A hearing was held before the undersigned on July 15-16, 1997. During the course of the hearing on July 15, 19976, counsel for Complainant withdrew Citation 1, Items 2b and 2c, Accordingly, Citation 1, Items 1 and 2a alleging serious violations of 29 C.F.R.§§ 1926.1053(b)(9) and 1926.501(b)(1), and Citation 2, Item 1 alleging an other-than-serious violation of §1926.501(b)(4)(ii) remain before the undersigned. The parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

SECRETARY'S BURDEN OF PROOF

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

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

DISCUSSION

Citation 1, Item 1: Alleged Violation of §1926.1053(b)(9)

The standard provides in pertinent part:

Ladders. (b) (9) The area around the top and bottom of ladders shall be kept clear.

The Secretary's Citation sets forth:

> a) Portable extension ladder accessess, North side of building, ground to 3rd floor and East side of building, 3rd to 4th floor: ladder access to\from upper elevations were obstrcted at the top by cable guard rails at the open sides requiring employees to step over the cables going to/from the ladders exposing employees to a 14 foot and 18 foot fall hazard.

Applicability

Respondent has attempted to argue that the cited standard is inapplicable.(See Respondent's Brief, pp. 7-8) Respondent had argued that the regulation pertaining to stairways - §1926.502(a)(1) and/or the standards set forth at Subpart R-Steel Erection are applicable (Tr. 79; Exh. R-9. The undersigned finds no merit in Respondent's arguments. CO Farronato testified that the cited area was not a stairway landing but a ladder landing which was obstructed and thus there was no clear access on or off the ladders (Tr. 93). Respondent's foreman Alvaro Quercia acknowledged that there were no stairways anywhere on the premises of the subject worksite at the time of the inspection (Tr. 124, 158). Accordingly, the undersigned finds that the standards pertaining to stairways are inapplicable. Respondent also argues that because it was involved in steel erection, Subpart R's steel erection standards are applicable, and they were exempt from the fall protection standards where the fall hazard is less than 25 feet per OSHA policy (Tr. 84-86; 206-212; Exh R-8). The record is clear that the only area where Respondent was involved in steel erection activity was the penthouse floor. The ladders were not in that area (Tr. 87-88, 120). The undersigned finds that this argument is misplaced. The undersigned finds that the steel erection standards do not encompass hazards involving ladders. The hazard which the citation addressed was the obstruction of the area around the ladder access. The cited standard requires that said area be kept clear and Respondent was responsible for protecting its employees who used the

cited ladders. CO Farronato's reference to the fall hazard created by the obstructed access area was not a mandate for fall protection as a means of abatement. The citation was abated when the Respondent removed the cables which provided for clear access to the ladders (Tr. 82). Accordingly, the undersigned finds that the cited standard was applicable.

Noncompliance and access

CO Farranato testified that during the course of his walkaround on December 13, 1996, he observed construction workers coming down off the third level of the north side of the building onto a ladder to reach the ground level. He observed that in order to get onto the ladder, the workers had to swing their legs over two steel cables that were positioned at the perimeter of the open side of the third floor and then maneuver their way over to the ladder and then proceed to ground level. The workers were exposed to an 18 foot fall hazard while maneuvering themselves over the cables which obstructed the landing. CO Farronato videotaped this hazard at this time (Tr. 20, 32, 43; Exh[2]. C- 3). Later that day, upon completion of the inspection of the second floor, he was to proceed to the third level. However, to obtain access he would have had to use the ladder that he had observed employees accessing earlier that day which went from the ground level to the third level. He asked the superintendent if there was any other way to the third floor and was told no. At that time CO Farronato refused to put himself in a hazardous situation and terminated his inspection for the day (Tr. 21). The next day as he parked his car on the east side of the building, he obseved a ladder on the east side of the building going from the third to the fourth floor which presented the same hazardous condition observed on the north side. Again this ladder had two cables which ran parallel to the edge of the floor obstructing the landing and requiring employees to swing over and become exposed to a 14 foot fall hazard (Tr.22-23, 28, 32, 44 Exh. C-3).

In its Answer to the Complaint in this matter, Glenco asserted that the landings were offset from the cables with a clear horizontal distance of 12 inches and 18 inches from the face of the cable to where the ladder was propped. During the hearing Glenco through the testimony of Paul Bashore,Vice President and a demonstration maintained that the access or platform area at the ladder measured 22 inches by 30 inches (Tr. 197; Exh. R-10, pp. 7-8). Glenco contends that its trained steel workers were not exposed to a hazard, and that upon coming off the ladder one would have an area measuring 22 inches by 29 inches to position himself (Tr. 195).

The undersigned finds that Respondent's argument that there was sufficient clearance at the landing is misguided. The standard mandates that the area be "kept clear", i.e., free of obstructions and impediments. Respondent's Exhibit 10 and Secretary's Exhibit 3 (video) clearly demonstrate that the cited area was not clear but encumbered by the presence of the cables. The presence of these cables prevented free movement about the ladder landings. Employeees had to step over these cables in order to gain access to and from the landings of the ladders (Tr. 32-33,43- 44). Respondent has failed to refute these findings. Accordingly the standard was not complied with.

CO Farronato testified that Glenco employees, including the foreman, were exposed to this condition because they were working on the penthouse level which was above the fourth

[2] The term "Exh." refers to Exhibit.

level, and the only way to access the penthouse was via the use of the ladders referenced in the citation (Tr. 34-36). CO Farronato determined from his converstions with Glenco foremen that there were five Glenco employees exposed to this condition on December 13th, and three employees exposed on December 14th. These employees were exposed to an 18 foot fall on the north side and a 14 foot fall on the east side (Tr. 34). The foreman, Al Quercia, testified that they were performing steel erection on the penthouse level and cooroborated the fact that there was no other means of access to the penthouse other than the ladders present on each floor (Tr. 125). He testified that there were no stairways in the building as of the date of the inspection and that they used the ladder on the north side of the building for access to the building, and the ladder on the east side for access to the penthouse (Tr. 125,158). He also verified that in order to use the ladders one had to manever the cable to get on and off of the ladder (Tr. 126). He acknowledged that employees would typically wear tool belts with tools while stepping over the cables. He testified that employees would go over or under the cables, however, he preferred to step through the two lines while holding onto the ladder (Tr. 142-144, 159-169, 161-162, 163). He acknowledged that the tool bag could weigh as much as 100 pounds and sometimes it was an encumbrance while "just plain walking" (Tr. 162).

The undersigned finds that the testimony of both CO Farronato and Mr. Quercia establish employee exposure to a hazardous condition.[3] The ladders adjacent to the cited areas were the only means of access and egress to the assigned work Glenco employees were performing on the days of the inspection These employees were exposed to tripping and falling 28 feet and 14 feet while manuvering over the cables. Furthermore, the foreman, Mr. Quercia admitted that he as well as his employees engaged manuvering over the cables

Knowledge

The undersigned finds that Foreman Querica's testimony also establishes employer knowledge.[4] His testimony reveals that he had actual knowledge of the hazardous condtion and

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[3] The Secretary may prove employee exposure to a hazard by showing that during the course of their assigned duties, their personal comfort activities on the job,or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be a zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993).

[4] To satisfy the element of knowledge, the Secretary must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer).

readily exposed himself as well as the employees to the cited condition. His acknowledgement that the ladders were the only means to the penthouse level and his description of the manner in which he manuvered the cables reveals that he was fully knowledgeable of the prresence of the cables which prevented clear access at the ladder landings.

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation.[5] The evidence in this case shows that death or serious physical harm due to a fall caused by an obstruction at the landing of both ladders. CO Farronato testified that employees as a result of this condition employees were subject to falls of 18 feet from the ladder on the third floor and 14 feet from the ladder on the fourth floor (Tr. 69). Accordingly, the undersigned finds that the cited condition was accurately classified this violation as serious.

Penalty[6]

The gravity of this violation reflects a high severity because there was exposure to 18 and 14 foot fall hazards while maneuvering the ladders with the cables which could result in serious physical harm or death. The probability of injury was great because the fall exposure was present immediately upon accessing the ladders (Tr. 62-63). The gravity-based penalty, $5,000.00, was appropriately adjusted by 40% to reflect Glenco's size, i.e., 65 employees (Tr. 17, 63). There was no adjustment in the penalty for good faith because the gravity of the violation was great; and there was no adjustment to the penalty for history because Glenco had been issued serious violations in the past three years (Tr. 66-67; Exh. G-4). Accordingly, a penalty in the amount of $3,000.00 is appropriate.

Citation 1, Item 2: Alleged Violation of §1926.501(b)(1)

The standard provides:

> *Fall Protection.* (b)(1) "*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.

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[5] In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. 29 U.S.C.§ 666(k).

[6] Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992).

The Secretary's Citation sets forth:

> a) West side of 4th floor, stairwell opening: open west and east sides wre not guarded by a standard guard rail system, steel cables used had excessive slack (top cables were at 28 inches and 27 1/2 inches above the floor)

Applicability

Respondent argues that as a steel erector it was not subject to any OSHA standards other than those set out at Subpart R -Steel Erection. It is Respondent's position that its employees are only subject to the steel erection standards, even as they travelled to and from their work stations. *See* Respondent's Brief pp. 17. Review Commission precedent has established that "the steel erection standards in Subpart R do not preempt application of the general constrction standards to steel erection work"where general standards provide meaningful protection to employees beyond the protection afforded by the steel standards". *Bratton Corp.* 14 BNA OSHC 1893, 1896 (No. 83-132, 1990); see also *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804,807 [12 BNA OSHC 1393] (3rd. Cir. 1985). Subpart M - Fall Protection sets forth criteria for fall protection for construction sites. Subpart R does not address the particular hazards addressed by the instant standard. Where the particular standard does not apply to the unsafe working conditions in question then any standard shall apply according to its terms to any employment and place of employment even though particular standards are also prescribed for the industry. 29 C.F.R.§ 1910.5(c)(2). The undersigned finds that the record establishes that Respondent's employees were exposed to the cited hazards to and from their steel erection activities. Respondent was responsible for ensuring that their employees were not exposed to hazards while travelling to and from their worksite. The cited standards address the hazards CO Farronato testified that Respondent's employees were exposed while participating in activities in locations other than the penthouse where steel erection activities were going on..

Counsel for the Complainant also notes in her brief that Respondent also argues that because it was involved in steel erection they were exempt from the fall protection standards where the fall hazard is less than 25 feet per OSHA policy (Tr. 84-86; 206-212; Exh R-8). However, counsel explains that the memo which Respondent relies upon "does not, however, exclude an employer from Subpart M erection standards solely based on the type of business in which the employer is engaged. Rather the memo excludes use of Subpart M for specific activities of an employer." Complainant's Post-Hearing Brief , p. 9. The undersigned concurs with this interpretation of the memo. Accordingly, in view of the aforementioned the instant standard is applicable.[7]

Noncompliance and Access

CO Farronato testified that the only ladder which provided access to the penthouse, was

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[7] The undersigned notes that counsel for Complainant has accurately pointed out in her Brief that if we accepted Respondent's argument that because it was a steel erector it was exempt from fall protection standards, the subject citation would still be applicable because the fall hazard in Citation 1, Item 2a was in excess of 25 feet, i.e., 28 feet. Mr. Johnson testified that under the Stanley memo they did not have to provide fall protection under Subpart M for anything less than 25 feet (Tr. 83). Mr. Bashore admitted that the fall hazard from the fourth floor was 28 feet (Tr. 247). See Complainant's Post-Hearing Brief, p.12.

on the west side of the fourth floor near a stairwell opening where there was a potential fall hazard of 28 feet (Tr. 24, 57-58[8]). The stairwell opening measured 19 feet 4 inches (Tr. 50). He determined that the guard rail system was inadequate because the top steel cables were loose and had excessive slack. The top cable slacked down to 27 1/2 inches on the east side and 28 inches on the west side (Tr.28, 49, 55; Exh. C-3). He used a tape measure to determine the height of the cables and size of the opening and the videotape depicits the slack in the top cable(Tr. 49, 56; Exh C-3). In order to maintain fall protection, the top rail of a guardrail should have been 42 inches in height. *See* 29 C.F.R. §1926.502(b)(1).

Glenco does not dispute the presence of the sagging cables. Respondent did not produce any evidence to refute CO Farronato's observations. Both Mr. Johnson and Mr. Quercia testified that Glenco had erected the guardrails in a manner which ensured that the cables were tight (Tr. 150, 226). Respondent's safety manual acknowledge's Glenco's responsibility for installation of guardrails in accordance with OSHA standards (Exh. R-1). Both Mr. Johnson and Mr. Quercia testified that the problems with the height of the cables were caused by the other contractors on the worksite who continually removed the cables to bring materials on and off the worksite. Accordingly, the noncompliance with the cited standard is established.

The record also demonstrates that Glenco employees were exposed to the fall hazard created by the sagging guardrails. Glenco's employees were using the ladder positioned on the east side of the stairway to gain access to the penthouse level where they were engaged in steel erection activities (Tr. 50-51). The bottom of the ladder was approximately ten feet away from the stairwell opening, thereby exposing employees to the stairway opening (Tr. 51, 57; Exh. C-3). Mr. Quercia acknowledged that they used the ladder to gain access to the penthouse level, and that was this only ladder going from the fourth floor to the penthouse level (Tr. 126). He also acknowledged that they passed by the stairway opening on their way to the ladder (Tr. 154). The Respondent has maintained that the distance from the stairway to the ladder was such that there was no exposure.[9] The undersigned finds that there is no safe distance from unprotected side that would render fall protection. Respondent's employees were exposed to the cited condition whenever they travelled to and from the ladder. Furthermore, the record is void of any evidence that Respondent either warned employees of the possible hazard or provided alternative protection. (See "Affirmative Defenses" *infra*)

Knowledge

The testimony of Glenco's witnesses establishes employer knowledge of the cited condition. Mr. Quercia testified that there was an ongoing policy of retightening the guardrails by Glenco because the subcontractors kept removing the cables - the subcontractor would not tighten the cables when reinstalling them after removing them to move materials on and off the worksite (Tr. 152). He believed that at this particular opening the concrete finishers were responsible for not reinstalling the cables in a tight manner. Mr. Bashore also testified that the cited condition was the result of subcontractors'moving equipment over the top of the rail (Tr.

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[8] He viewed the blueprints to determine the fall hazard (Tr. 58).

[9] Mr. Bashore estimated that the ladder was 11 feet 10 inches from the cited cable (Tr. 219).

219). The undersigned finds that the aforementioned testimony and obvious location of the cited hazard establish employer knowledge.

Classification

The undersigned finds that a preponderance of the evidence establishes a serious violation. The evidence in this case shows that death or serious physical harm due to a fall hazard of 28 feet caused by the inadequate guard railings. Accordingly, the Complainant properly classified this violation as serious.

Penalty

The gravity of this violation reflects a high severity because there was exposure to a 28 foot fall hazard which could result in serious physical harm or death. The probability of injury was great because of the proximity of the ladder which was being used to the stairwell opening. The gravity-based penalty, $5,000.00, was appropriately adjusted by 40% to reflect Glenco's size, i.e., 65 employees (Tr. 17, 63). There was no adjustment in the penalty for good faith because the gravity of the violation was great; and there was no adjustment to the penalty for history because Glenco had been issued serious violations in the past three years (Tr. 66-67; Exh. G-4). Accordingly, a penalty in the amount of $3,000.00 is appropriate.

Citation 2 Item 1 Alleged Violation of §1926.501(b)(4)(ii)

The standard provides:

Fall Protection.(b)(4) "*Holes*." (ii) Each employee on a walking/working surface shall be protectedfrom tripping in or stepping into or through holes (including skylights) by covers.

The Secretary's Citation sets forth:

a) East side of the 3rd and 4th floors, (3) 9-inch diameter and (1) 12-inch diameter pipe openings:holes were not covered.

Applicability

See discussion above with regard to Citation 1, Item 2a. The undersigned again affirms the applicability of the instant standard to the cited condition.

Noncompliance, Access and Knowledge

CO Farronato testified that on the east side of the third and fourth floors, there were three 9-inch diameter pipe openings and one 12-inch diameter pipe opening that were not covered. He believed that employees were exposed to these openings because they were using the ladders on the east side to gain access to the ladder between the third and fourth floors and these holes were in the pathway of travel to these ladders. Anyone using this ladder had to pass these holes (Tr. 250). He testified that the holes were not in the direct line with the pathway, but were to the side and one had to walk carefully in order to avoid them (Tr. 251). Again this was the only access to that level. He determined that the foremen who were working with the employees also had to use this ladder for access. The holes presented a tripping hazard to the employees going from the third to fourth floors (Tr. 59). Respondent presented no evidence to refute the presence of the holes.

Mr. Quercia acknowledged the presence of the holes and testified that he was aware that the holes were present and the holes had been installed approximately one week before the instant inspection (Tr. 156-157). He stated that he used this ladder to go from the third to fourth floor. He acknowledged that the holes were in an access area. They were in the vicinity of the ladders, when one came off the ladder the holes were in front of you. He testified that although

the holes were not directly in front, one would walk towards the holes when going to the ladder (Tr. 127-128, 156-157). The testimony of the foreman establishes knowledge of the cited condition.

The undersigned finds that the aforementioned testimony unequivocally establishes the noncompliance, employee exposure and employee exposure.

Classification

It was not substantially probable that in these circumstances the resulting injury would have been serious in nature. Based upon the evidence there was a possibility of a bumpor bruise, or twisted ankle. Accordingly, this violation was appropriately classified as other-than-serious.

Penalty

The gravity of this violation reflects a minimal severity because the most likely injury would be a twisted ankle or bump or a bruise if someone tripped (Tr. 72). The probability of injury was high because the pipe openings were directly in the path of travel to and from the ladder (Tr. 73). The gravity-based penalty, $1,000.00, was appropriately adjusted by 40% to reflect Glenco's size, i.e., 65 employees (Tr. 17, 63). There was an adjustment, 15%, in the penalty for good faith because the employer had a safety program on site and held job safety meetings. There was no adjustment to the penalty for history because Glenco had been issued serious violations in the past three years (Tr. 66-67; Exh. G-4). Accordingly, a penalty in the amount of $450.00 is appropriate.

AFFIRMATIVE DEFENSES

Citation 1, Item 1

Respondent maintained that posts which it erected to hold the cables from the perimeter guarding, and thus eliminated cables from going across to the vertical column created a greater hazard.(Respondent's Brief, p. 5). In order to establish the greater hazard affirmative defense, the employer must prove that: (1) the hazards caused by complying with the standard are greater than those encountered by not complying, (2) alternative means of protecting employees were either used or were not available, and (3) application for a variance under section 6(d) would be inappropriate. *Peterson Bros. Steel Erection Co., 16 BNA OSHA 1196, 1993 CCH OSHD ¶ 30,052 (No. 90-2304, 1993).* Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore all possible alternatives and is not limited to those methods of protection listed in the standard. *State Sheet Metal Co., 16 BNA OSHA 1155, 1159, 1993 CCH OSHD ¶ 30,042 (No. 90-2894, 1993)* The record is void of any evidence which indicates that the Respondent had implemented any alternative means of protection and applied for a variance. Accordingly, Respondent has not met its burden of proof with regard to this affirmative defense.

Citation 1, Item 2a

Glenco attempted to assert the multi-employer worksite defense by removing itself of any responsiblity for maintaining the guarddrails after installing them. To establish this defense, an employer must prove that: (1) it did not create the violative condition to which its employees were exposed; (2) it did not control the violative condition, so that it could not itself have performed the action necessary to abate the conditon as required by the standard; and (3) it took all reasonable alternative measures to protects its employees from the violative condtion.*Capform,*

Inc., 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994).

Mr. Bashore testified that Respondent's safety manual requires other contractors to be responsible for monitoring the cables once Respondent constructed them (Tr. 151, 226-227; Exh. R-11). It is well settled that an employer may not avoid its responsibilities under the Act, by contractually assigning required safety measures to another party. *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992). See also, *Lee Roy Westbrook Construction Company, Inc*., 13 BNA OSHC 2104 (No. 85-601, 1989) [holding subcontractor responsible for violation of §1926.500(b)(1), though general contractor was expressly bound by contract to provide and be responsible for guardrails]. Futhermore, the record is void of any evidence that Respondent took any alternative measures to protect its employees from the cited condition. The Respondent has not met its burden of proof with respect to this defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation 1, Item 1 , alleging a serious violation of §1926.1053(b)(9) is AFFIRMED with a penalty of $3,000.00.

Citation 1, Item 2a, alleging a serious violation of §1926.501(b)(1) is AFFIRMED with a penalty of $3,000.00.

Citation 2, Item 1, alleging an other-than-serious violation of §1926.501(b)(4)(ii) is AFFIRMED a penalty of $450.00.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.