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SECRETARY OF LABOR, Complainant, v. RGM CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 91-2107

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

RGM Construction Company ("RGM") was widening a 2-lane bridge on a farm road about 30 miles from Austin, Texas, when two RGM employees filed a complaint with the Occupational Safety and Health Administration ("OSHA") about safety conditions at their worksite. In response to that complaint, two OSHA compliance officers went to the worksite to conduct an inspection, after which OSHA issued a citation alleging that RGM had violated a number of OSHA safety standards. RGM contested some items of that citation, and a hearing was held by Administrative Law Judge E. Carter Botkin of this Commission. Before Judge Botkin had the opportunity to issue his decision in this case, he died. The case was reassigned to Judge Stanley M. Schwartz, who issued a decision affirming all the contested items. The judge's decision has been directed for review pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

A threshold issue is presented by RGM's argument that this case should be remanded for a new hearing, because the judge who decided the case made credibility findings and

resolved conflicts in the evidence without having observed the demeanor of the witnesses. Section 10(c) of the Act, 29 U.S.C. § 659, requires that the Commission's hearings be conducted in accordance with 5 U.S.C. § 554, section 5 of the Administrative Procedure Act ("the APA"). Section 5(d) of the APA, 5 U.S.C. § 554(d), provides: "The employee who presides at the reception of evidence . . . shall make the recommended decision or initial decision . . . unless he becomes unavailable to the agency." The statute does not specify what must happen when the hearing official becomes unavailable. One court, however, has stated that an agency may make its own decision after determining whether it would change the outcome of the case if the credibility findings in question were resolved the other way. *Millar v. FCC*, 707 F.2d 1530, 1539-40 (D.C. Cir. 1983).

Here, the judge did make credibility findings, but they operated in RGM's favor. The judge found that the two former RGM employees who testified on behalf of the Secretary had animus toward RGM, and he found their testimony to be vague, contradictory, and not believable. He therefore discounted their testimony against RGM, and the Secretary has not challenged the judge's credibility findings on review. We accept the judge's determination and do not rely on the testimony of these two witnesses or on testimony by the compliance officer that is based on her conversations with these two individuals during the inspection. Our disposition of the issues below is based solely on the observations of the compliance officer and on the testimony of RGM's own witnesses. Under these circumstances, resolving the judge's credibility findings the other way would not alter the outcome of this case in RGM's favor. Consequently, the company's argument that it should be granted a new hearing is rejected.

We also reject RGM's request for a new hearing because we conclude that RGM failed to make a timely objection to the reassignment of the case or to file a timely motion for a rehearing with the second judge. On August 18, 1993, notice was sent to the parties about the death of the original judge and the reassignment. RGM asserts that it did not receive that notice until September 16, 1993. Accepting RGM's representation as correct, RGM still had substantially more than a month before the judge issued his decision to note its objection or to move for a rehearing. Under these circumstances, we find that RGM had waived its objection to the reassignment of the case. *Id.* at 1537-38; *Pigrenet v. Boland Marine*

& Mfg. Co., 656 F.2d 1091, 1095 (5th Cir. 1981) (en banc) (objection to new judge's credibility findings based on written record was not timely when made on appeal).

ITEM 3 OF THE CITATION

Item 3 of the citation alleged that RGM had committed a serious violation of 29 C.F.R. § 1926.105(a)[1] because "employees were required to position themselves on the horizontal beams to remove lumber from the underside of the bridge where no lifeline was available, exposing employees to the hazard of falls of approximately 30 feet to water surface."

In widening the bridge, RGM constructed wooden forms into which it poured concrete for the bridge surface. Once the concrete dried, the wooden forms, which were never intended to be a permanent part of the bridge, had to be removed, a process RGM's employees referred to as "wrecking" the forms, or "formwrecking." To wreck the forms, employees worked beneath the bridge, sitting on a "work platform" constructed at the worksite from two 2 x 4's and plywood. The ends of the platform rested on two concrete beams underneath the bridge, while the employee pulled down the lumber used to build the forms.

The surface of the bridge was approximately 32 feet above the surface of the water in the river below, so that, even working beneath the bridge, employees were exposed to a substantial fall. Before it began the formwrecking phase of the construction, RGM held a meeting at which it adopted two methods of protecting its employees performing

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[1]That standard provides:

> **§ 1926.105 Safety nets.**
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> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

formwrecking from falls, tying a lanyard attached to a safety belt to a wooden waler[2] overhead, and tying the lanyard to the work platform on which the employee was seated. RGM introduced photographs depicting both methods of tying off.

At the outset, we reiterate that section 1926.105(a) does not require the use of nets; it requires the use of one of the enumerated methods of fall protection, leaving nets as a last resort if none of the other methods can be used. *Peterson Bros. Steel Erect. Co.*, 16 BNA OSHC 1196, 1198-99, 1993 CCH OSHD ¶ 30,052, p. 41,298 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). We therefore accord little weight to RGM's evidence that it is not the practice of its industry to use nets. We must, however, examine the evidence about the fall protection methods adopted by RGM in order to determine whether its employees were adequately protected here.

OSHA's standards require employees who use safety belts and lanyards to be tied off overhead to anchorages capable of supporting substantial weights. *See* 29 C.F.R. § 1926.104(b). It appears that tying the lanyard to the walers would satisfy that requirement. Tying it to the work platform, however, does not. That method involves attaching the lanyard below the employee to a work platform that is not affixed to anything but rests on parallel concrete beams and can be slid along them as work progresses. If an employee were to reach too far and lose his balance, he could fall and pull the work platform down on top of himself. Such an unsafe condition does not satisfy the fall protection requirements of section 1926.105(a). We therefore find that, by adopting that technique, RGM was in violation of the cited standard.

A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), if it creates a substantial probability of death or serious physical harm. Given the distance of the potential fall and the possibility that the platform could fall on the employee, we find that, if such an accident did occur, there was a substantial probability that serious physical harm would result. We therefore find that the violation was serious.

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[2]The walers consist of two 2 x 6's nailed together and spaced 3 feet apart beneath the sheets of plywood to support the whole forming system until the concrete sets.

The judge found that a penalty of $1,000 was appropriate for this violation, and neither party has disputed the appropriateness of that amount. Our review of the evidence in the record relating to the factors to be considered in determining an appropriate penalty under section 17(j) of the Act, 29 U.S.C. § 666(j) (the gravity of the violation and the employer's size, good faith, and history of prior violations), leads us to conclude that the penalty assessed by the judge is appropriate. Accordingly, we affirm the judge's assessment of a penalty of $1,000.

ITEM 6 OF THE CITATION

Item 6 of the citation alleged that RGM had committed a serious violation of the standard at 29 C.F.R. § 1926.500(b)(1)[3]. The compliance officer testified that this citation was based solely on the exposure of RGM's foreman when he approached her at the beginning of the inspection. The judge stated that the testimony of RGM's management witnesses established that other employees also walked along this area. The testimony of these witnesses also indicated, however, that there was always a lifeline strung along this location and that RGM's workrules required employees to tie off to it. We therefore find that, although RGM's employees did walk along this area, the evidence does not establish that any of RGM's employees besides the foreman walked this area without fall protection. Therefore any violation of this standard turns on the circumstances of the foreman's exposure.

When the company's foreman arrived on the bridge at the beginning of the work day, he began to attach cables to a welding machine used to weld the reinforcing rods around which the concrete is poured. His next chore was to connect a cable along the traffic barrier

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[3]That standard provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
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> . . . .
>
> (b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

separating the new part of the bridge from the existing lanes that were open to traffic. This cable would serve as a lifeline, to which safety lanyards could be attached by employees walking along beams that would ultimately support the decking that RGM was going to pour. Because one or more cables had been stolen or dumped into the river, RGM took the lifeline down at the end of each workday and stowed it overnight in the storage area at its field office ¼ mile away. The lifeline was put up again each morning before work began.

The foreman testified that he first noticed the two OSHA compliance officers when the compliance officer called to him.[4] She was standing on the completed portion of the bridge and he was on the area that had not yet been decked, tied off to a bar, attaching the cables to the welding machine. He thought she was a motorist whose car had broken down, so he unhooked his lanyard and walked towards her along a beam. Because the deck had not been completed, there were a number of openings through which the foreman could fall. He had no fall protection because the lifeline had not yet been connected.

RGM does not dispute that the foreman's exposure occurred. It asserts, however, that the citation should be vacated because any violation was caused by the actions of the compliance officer. The Commission has held that an employee's exposure to a hazard that occurs when the employee complies with the request of an OSHA compliance officer during an inspection is not grounds for the issuance of a citation. *Inland Steel Co.*, 12 BNA OSHC 1968, 1983, 1986-87 CCH OSHD ¶ 27,647, p. 36,010 (No. 79-3286, 1986). Here, however, the violation occurred before the inspection had begun. The opening conference had not yet been held, and the foreman did not know that the compliance officer was from OSHA when he approached her. He testified that he believed she was a motorist who needed help. His decision to approach her by walking along the beam was not made in the belief that he was obeying the instructions of a government official. The foreman knew that he could not tie off because he had not yet erected the lifeline. He could just as easily have stepped over the barrier and used the roadway, which, according to the company's testimony, was the

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[4]The compliance officer denied that she had directed him to come to her. We need not resolve this conflict in testimony, however, because, assuming for the sake of argument that the foreman's statement is accurate, we would still find a violation.

usual course. He elected, however, to walk along the beam without fall protection, voluntarily causing his exposure to the hazard posed by the openings in the deck. On this basis, we must find a violation. The foreman was a supervisory employee with responsibility for the safety of RGM's employees. For someone charged with enforcing the company's safety rules to set such an example cannot be condoned. Item 6 of the citation is therefore affirmed. Because we find that the likely result of a fall through one of the holes would be death or serious physical harm, we find that the violation was serious.[5]

The judge assessed a penalty of $500 for this violation, and neither party has challenged the appropriateness of the judge's assessment. Accordingly, we deem the penalty assessed by the judge to be appropriate for this violation.

ITEM 7 OF THE CITATION

Item 7 alleged that RGM had committed a serious violation of the standard at 29 C.F.R. § 1926.500(d)(1) by exposing its employees to the unguarded edge of an open-sided floor or platform on the completed part of the bridge. On review, the Secretary has moved to amend the citation under Rule 15(b) of the Federal Rules of Civil Procedure to allege a violation of 29 C.F.R. § 1926.500(d)(2) for exposing employees to the unguarded edge of

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[5]Commissioner Montoya would vacate this item. In her opinion, the majority's reading of *Inland Steel* is too narrow. There, the Commission specifically held that "[e]xposure to hazards due to complying with an OSHA inspector's perceived requests is not grounds for issuance of a citation." 12 BNA OSHC at 1983, 1986-87 CCH OSHD at p. 36,010. Here, RGM's foreman was exposed to the cited hazard only because he responded to the presence of the compliance officer, apparently at her request. Though he had not yet learned that she was a representative of OSHA, it can safely be inferred that the compliance officer herself knew who her employer was. As any form of "entrapment" is always to be discouraged, Commissioner Montoya would not limit the *Inland Steel* doctrine to cases in which the exposed employee was actually aware of the compliance officer's identity.

a runway.[6] RGM has objected to this amendment, claiming that it comes too late and that RGM will suffer prejudice.

Under Rule 15(b), after a case has been tried, pleadings may be amended to conform the allegations therein to the facts established by the evidence when the record shows that the parties squarely recognized that they were trying an unpleaded issue, and consent to try the unpleaded issue may be implied from the parties' conduct. *Peavey Co.*, 16 BNA OSHC 2022, 2023, 1994 CCH OSHD ¶ 30,572, p. 42,320 (No. 89-2836, 1994). At the hearing, RGM's witnesses emphasized that its employees might use the cited area to walk from their work area to the other end of the bridge, but that the employees performed no work in the cited area. In other words, RGM asserted that the area in question was a walkway rather than a platform. The citation alleged that employees used the cited area to travel to their vehicles and equipment, and it appears that both parties considered this area to be a pathway to be traversed while traveling to and from the work area. Under these circumstances, we find that the parties knowingly tried the legal issues raised by the amended citation. Although the facts presented here are not identical to those in *Donovan v. Williams Enterp., Inc.*, 744 F.2d 170 (D.C. Cir. 1984), they are sufficiently similar that we

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[6]The standards in question provide:

> **§ 1926.500 Guardrails, handrails, and covers.**
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> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.
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> (2) Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

consider that case highly instructive. There, on appeal, the court *sua sponte* made the same amendment sought here.

Although RGM has alleged that it would be prejudiced by the requested amendment, it has not specified what evidence it would have presented in response to the amended charge that it has not presented already. Nor does it claim that the case would have been tried differently or that the legal issues presented are not the same. The requirements of the two standards are identical, and the only distinction is the characterization of the surface cited. Accordingly, the Secretary's motion to amend his pleadings is granted and we will consider whether the evidence establishes a violation of 29 C.F.R. § 1926.500(d)(2).

The surface covered by the citation is the completed portion of the bridge deck. During the time the area was being prepared for the concrete pour, and while the concrete was being poured and smoothed, there were wooden guardrails in place to protect the employees working there. After the concrete had dried, however, the guardrails were taken down and moved to the next section where work would be done. The edge was left open, and thus unguarded, so that another contractor could install the permanent railings. Because people not connected with the company might be on the bridge at night and on weekends, RGM had erected a cable with red plastic ribbons to "flag" the edge and warn people of the danger, but this cable was not positioned to restrain people from falling.

One of the elements of a violation which the Secretary must prove is that employees were exposed to the violative condition. *Gary Concrete Prod.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working 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 in a zone of danger. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86-247, 1990). The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to

employees which the standard is intended to prevent. *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976).

The record does not establish the exact width of the surface in question, but it appears from the exhibits to be slightly wider than the width of one traffic lane, because there was room at the edge for the permanent railings. RGM's employees had ample room to walk along the bridge surface without being in danger of falling off the edge. In the absence of evidence that the employees walked close to the edge, ran along the surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them, we find that the Secretary has not established that it is reasonably predictable that an employee would be in the zone of danger posed by the unguarded edge of the bridge. We therefore reverse the judge and vacate item 7.

ITEM 4a OF THE CITATION

Items 4a, 4b, and 4c of the citation all alleged violations of different subsections of 29 C.F.R. § 1926.106, which addresses the hazard of drowning for employees working over or near water.

Item 4a alleged a violation of section 1926.106(a),[7] which requires employers to provide life jackets to employees working over or near water who are exposed to the danger of drowning. The citation alleged that RGM's employees were working over or near water and were not wearing life vests.

The record establishes that RGM had life jackets at the worksite and kept them in the lifesaving skiff, which was in the storage area at the company's field office, about ¼ mile from the bridge. The company brought the skiff to the bridge when it believed there was a danger of drowning, such as when employees were working beneath the bridge wrecking

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[7]That standard provides:

> **§ 1926.106 Working over or near water.**
>
> (a) Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket[s] or buoyant work vests.

forms. According to RGM, the skiff was not at the bridge at the time of the inspection because all the work to be performed that day was to be done on the surface of the bridge behind guardrails, where, according to the compliance officer, there would be no danger of drowning.[8] We find that, because the vests were stored where it would require a ½-mile round trip to retrieve one, they were not readily available for use on the day of the inspection.

We find, however, no evidence that there was a danger of drowning to RGM's employees on the day of the inspection.[9] The employees who walked along the part of the completed bridge surface that had no guardrails were not shown to be exposed because there was no proof that they were in the zone of danger. We also find that the Secretary has not proved that the RGM employees who walked along the beam next to the traffic barrier on the unfinished portion of the bridge were exposed to the danger of drowning, because RGM's evidence establishes that the standard practice was for these employees to tie off to the lifeline strung along the traffic barrier. The only employee who was shown to be exposed to the hazard of the unprotected holes in the bridge deck was RGM's foreman, who was observed by the compliance officer when he approached her, but we do not find that the record supports a finding that the foreman was exposed to the danger of drowning. Exhibits C-1 and C-6 show that a good portion of the bridge is over land, and there is no evidence as to where the foreman was in relation to the river when the compliance officer observed him. It appears that, as he approached the compliance officer, the foreman was traversing the end of the bridge that was above land. To the extent that the foreman's path may have been over the water, it appears that he was at the end of the bridge outside the

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[8]On the day of the inspection, the work was being performed at the end of the bridge, where the water was at most 18 inches deep.

[9]Commissioner Montoya joins the finding that the Secretary has failed to prove that RGM's employees were exposed to the danger of drowning. She would also vacate this item because, in her view, RGM satisfied the requirement of 29 C.F.R. § 1926.106(a) by providing life jackets for its employees. This equipment was present at the worksite, available to the employees if they wanted it at RGM's field office a short distance away, where all the company's tools and equipment were also stored. She notes that the record indicates that employees frequently went to this area for equipment and materials.

bents,[10] where the water was at most eighteen inches. Under these circumstances, we do not find that there was a realistic danger of the foreman's drowning.[11] Accordingly, we must vacate item 4a of the citation for failure to establish that any of RGM's employees was exposed to the danger of drowning.

ITEM 4b OF THE CITATION

Item 4b alleged that RGM had violated section 1926.106(c)[12] because it did not provide and have readily available for emergency rescue operations ring buoys with at least 90 feet of line. The record indicates that RGM did not have a ring buoy at the worksite because the company did not think it was necessary to do so. At the hearing, the company's general superintendent described his reasoning that an employee who fell in could walk across the river, and that, if the employee were dazed or injured, he could not grasp the ring buoy. Either way, the company reasoned, having a buoy would not help. Unfortunately, that is a judgment that the company is not free to make under the standard, which mandates that ring buoys *shall be provided*. Because RGM did not have any ring buoys at the worksite, even when it was working in the middle of the bridge where the water was deepest, it failed

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[10]The bents are the concrete columns that support the bridge.

[11]At the hearing, the compliance officer referred to an RGM employee or employees working in a metal "cage" or "basket" suspended over the side of the bridge. We do not rely on that situation because the record establishes that the employee was fully protected from falls while entering and leaving the basket and while working in it. He was properly tied off when climbing into and out of the basket, and he was protected by a metal standard guardrail while he was in the basket.

[12]The cited standards provide:

> **§ 1926.106 Working over or near water.**
>
> . . . .
>
> (c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

to comply with the standard.[13] In view of the drowning hazard which the standard addresses, we find that the violation was serious.

The judge assessed a single penalty of $500 for items 4a, 4b, and 4c. Neither party has challenged that assessment on review, but we have vacated item 4a. Accordingly we must determine what penalty is appropriate for item 4b. Having considered the factors set out in section 17(j) of the Act, as well as the parties' failure to challenge the judge's assessment, we deem an apportioned penalty of $175 to be appropriate for this violation.

ITEM 4c OF THE CITATION

Item 4c alleged a violation of 29 C.F.R. § 1926.106(d)[14] because RGM did not have a lifesaving skiff immediately available when employees were working over or adjacent to water. RGM did have two boats stored at the company's field office on the day of the inspection, a lifesaving skiff and a flat craft used for retrieving lumber from the river. They were not at the worksite, because RGM did not believe that there was a danger of drowning, as the employees were not working on the water or under the bridge. Unfortunately, the company misconstrued section 1926.106(d) which makes no reference to the danger of drowning. The standard requires that the skiff must be at the worksite at all times when employees are working over or adjacent to water, including when they are working on the deck of the bridge, even if they are working behind guardrails or are otherwise protected by a fall-protection system.

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[13]Because it does not appear from the record that RGM *ever* had a ring buoy on the bridge, we need not decide whether the standard requires that one be present at all times that employees are working over water or it requires a ring buoy only when there is a danger of drowning.

[14]That section provides:

> **§ 1926.106 Working over or near water.**
>
> . . . .
>
> (d) At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

The record clearly establishes that RGM's employees were working over water. Although the work being performed on the day of the inspection took place at the end of the bridge, where the water was at most 18 inches deep, the water averaged 4½ feet in depth in the dredged channel in the center of the river between the bents. The compliance officer testified that earlier the employees had been at the middle of the bridge. The bridge itself was approximately 32 feet above the river's surface. In light of all of the above, RGM was in violation.

We find that the violation was serious. The danger the standard addresses is drowning. RGM's employees may have been working at the time over water 18 inches deep at most, but the water in the river was up to 4½ feet deep or more. There was therefore a substantial probability that, if an accident occurred, the consequences of not having a lifesaving skiff readily at hand would be death or serious physical harm.

In determining an appropriate penalty for this violation, we note that RGM has evidenced a good faith effort to comply with what it believed to be the requirements of the standard by obtaining a skiff, bringing it to the worksite, and having it at the bridge at times when the company perceived that there was a danger of drowning. Having considered the evidence in the record on the penalty factors in section 17(j) of the Act, we deem a penalty of $175 to be appropriate.

CONCLUSION

For the reasons above, we affirm items 3, 4b, 4c, and 6 of the citation as serious violations and vacate items 4a, and 7. We assess penalties of $1,000 for item 3, $175 each for items 4b and 4c, and $500 for item 6.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 24, 1995

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-2107
RGM CONSTRUCTION CO., INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 24, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

April 24, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2107

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.

RGM CONSTRUCTION CO., INC.
Respondent.

OSHRC DOCKET
NO. 91-2107

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 1, 1993. The decision of the Judge will become a final order of the Commission on January 3, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 21, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 1, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-210

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. RGM CONSTRUCTION COMPANY, INC., Respondent.	OSHRC DOCKET NO. 91-2107

APPEARANCES:

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For the Complainant.

Jan P. Patterson, Esquire
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For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz[1]

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") inspected a bridge-widening project located on the Colorado River outside of Bastrop, Texas, on June 5, 1991, pursuant to employee complaints about the job; as a result, Respondent RGM was issued a serious and an "other" citation. RGM contested items 3, 4, 6 and 7 of the serious citation,

[1]Although this case was heard by Administrative Law Judge E. Carter Botkin, it was reassigned to the undersigned for decision due to the death of Judge Botkin. The parties were notified of the reassignment, and over thirty days have elapsed without comment from either party.

and a hearing in this regard was held January 6-7, 1992. Both parties submitted post-hearing briefs.[2]

Item 3 - 29 C.F.R. § 1926.105(a)

The record shows that the project, which began in the fall of 1990 and was substantially completed at the time of the hearing, required the removal of the lumber form work, called form wrecking, from under the bridge after each newly-poured slab of concrete had set. The record further shows the water under the bridge was about 4.5 feet deep at the time of the inspection, and that the bridge was around 32 feet above the river's surface.[3] (Tr. 150-151; 198; 268-69; 274-75; 319; 325-26; 333; 351; 383; 409).

Elizabeth Slatten, the OSHA compliance officer ("CO") who inspected the site, testified that while no form wrecking occurred when she was there two RGM employees, Froylan Penaloza and Salvador Benitez, told her they had done such work without fall protection. Slatten further testified that employees could have broken bones or drowned had they fallen, that she saw no acceptable way to tie off under the bridge, and that a safety net was the only practical fall protection. Slatten said working on the board as shown in R-4-5 would not have abated the hazard; the board, which she understood to be two-by-fours nailed to 3/4-inch plywood, was not secured and could have supported only about 1,000 pounds of dead weight, and wrapping a lanyard around it was unacceptable. (Tr. 142-44; 150-56; 196-98; 203-05).

Salvador Benitez and Froylan Penaloza testified they wrecked forms under the bridge.[4] According to their testimony, the job was done with a hammer, bar and wrench while seated on a concrete beam with the feet on another; when removed over the river, the

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[2]RGM's motion to strike the Secretary's brief because it was filed late is denied. The Secretary's brief was filed on May 4, 1992, one business day after the due date, and I find no prejudice to RGM's case because of the late filing.

[3]The river's average depth was 4.5 feet, although it could be a foot or two higher or lower, but in times of heavy rainfall it could be up to 10 feet deeper. (Tr. 198; 333-39; 351; 383; 409).

[4]Benitez and Penaloza, who testified through an interpreter, are the employees who reported RGM to OSHA. Benitez was on the job from about November 1990 until April 1991, and Penaloza was there from about March through June 1991. (Tr. 19-23; 74; 82-87; 137).

lumber was retrieved by a worker in a boat. Benitez and Penaloza said they did not use safety belts for this work because there was nothing to tie off on, and that they did not use the board as in R-2-3.[5] They also said they complained to their foreman, Bernardo Sandoval, who told them to go home if they were afraid and did not want to work. Benitez and Penaloza noted they sometimes used safety belts for other tasks, but that they had to borrow them from other employees; when they requested belts Sandoval told them there weren't any more and to use those of others.[6] (Tr. 23-45; 48-52; 55-62; 67-70; 75-78; 84-85; 88-96; 100-01; 113; 129).

Benitez and Penaloza further testified they received R-1, RGM's safety manual, and that they attended safety meetings at the site; Nick Johnson, the job superintendent, held the meetings in English and no one interpreted for them, and once they were told to sign a number of sheets for meetings that had not occurred.[7] Benitez and Penaloza said no one instructed them to tie off, that Sandoval only told them to be careful and not fall off the bridge, and that Johnson and Bill Mayfield, the general superintendent, saw them working without fall protection under the bridge. (Tr. 41-42; 47-48; 54-56; 71-73; 78-79; 94; 102-04; 121-23; 133-36; 139).

Steve Muckleroy, RGM's vice president, testified the company has been engaged in heavy construction for ten years, that its safety record is outstanding, and that its only significant injury has been one back injury.[8] He further testified that most of RGM's past

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[5]Benitez and Penaloza testified they sometimes used the board to set tools on, but that they could not sit on it while wrecking forms; Benitez said there was too little space to work if he sat on the board, while Penaloza said it could have been knocked down. Penaloza then indicated he had worked as in R-3, that he had used the board as in R-2 to do patching work after the lumber was removed, and that while there were grooves on the beams the board fit into it still could have fallen when moved. Penaloza noted they were discouraged from using the board because it slowed them down, but that after the citations the company insisted on its use. (Tr. 56-62; 65-67; 70; 76-81; 90-91).

[6]Benitez said he did not use a safety belt most of the time; however, he agreed he was tied off in R-7-8, and Penaloza said he and Benitez tied off to a lifeline when on top of the bridge. (Tr. 75-76; 100; 122-26).

[7]Penaloza said he went to two safety meetings, and Benitez said he went to "about three." Penaloza indicated he understood the safety manual and meetings, while Benitez indicated he did not. (Tr. 47; 54-55; 71-73; 103; 121; 133-35).

[8]For the last year and a half, 80 percent of RGM's business has been building bridges. (Tr. 255-56).

business was with the Army Corps of Engineers ("Corps"), and that he used the Corps' safety manual and requirements to develop RGM's manual and program, which he described. Safety is stressed at interviews, with applicants' backgrounds often being checked, R-1, which addresses hazards common to RGM's jobs, is given to and discussed with new hires, and an interpreter is present when a Spanish speaker is hired. Supervisors have quarterly meetings, and both he and they monitor sites for safety; supervisors also hold weekly safety meetings at jobsites and have preparatory discussions with workers before each new phase of a job. Muckleroy identified R-17 as records of meetings held at the subject site, and said he had no doubt the information was communicated effectively due to his emphasis on safety and Johnson's responsible nature. (Tr. 240-53; 293-98; 301-02; 305-06; 309-12).

Muckleroy said rule 37 of R-1 addresses personal protective equipment, that the company policy is to have a protection plan for every aspect of a job presenting a fall hazard, and that employees at the subject site were protected by guardrails, lifelines, safety belts and lanyards. Muckleroy knew there were adequate belts at the job due to the invoices he received, and belts were even made available to the State Highway Department inspectors who observed the job daily and issued monthly reports; he identified R-13-15 as the reports for February through April, 1991, noted the positive comments about safety, and said he had received no complaints in that regard. Muckleroy also identified R-16, which says to "hook up or get off," as a closeup of the sign in C-4; he visited the site every seven to ten days and had himself told workers to hook off, which was easily done. He did not recall seeing any form wrecking. (Tr. 253-61; 266-74; 282; 297; 300-05).

Nicholas Johnson, a superintendent with RGM for about a year and a half, has 10 years experience in construction and bridge building. He testified safety is RGM's first consideration and that he has had no lost time accidents or injuries, that there was a strict attitude towards safety at the subject site, and that he encouraged workers to talk about safety concerns. He further testified he was at the site essentially full time except for April and May of 1991, when he went to the site periodically due to his overseeing another job, and that before starting form wrecking he had a meeting with employees, including Benitez

and Penaloza, and discussed how it would be done; an interpreter was present, feedback was solicited, and R-2-3 depict the measures decided upon.[9] (Tr. 317-28; 332-33; 351-52; 360).

Johnson said the boards fit into the haunch of the beams such that they could not slip out with someone sitting on them, that employees tied off to the boards or to the span-alls or "walers" in the slab above, and that when tied off to the boards they moved by crawling along the beams and pulling the boards along; the boards were made at the site, and while they were not tested such boards have been used by RGM and the industry for several years. Johnson saw no one wrecking forms without a board, and said the job could not be done for any length of time while sitting on one beam with the legs extended to another. He also said all the employees wrecked forms, that no one liked it as it was one of the hardest jobs, and that although Benitez and Penaloza might have done this work more than others they never complained or told him they were afraid. (Tr. 329-32; 352-53; 358-60).

Johnson noted he provides safety belts to employees upon hire and buys replacements as needed, and that while belts are sometimes borrowed this is not very common; he never asks anyone to work without one, and belts were also provided to the State inspectors who visited the site. Johnson tried to hold weekly safety meetings but was not always able to due to his being away; the meetings he did hold, shown in R-6 and R-17, had interpreters, were usually on Fridays before paychecks were distributed, and generally addressed fall hazards in addition to the subject topic. Johnson pointed out that several meeting sheets had the same date because he covered all the topics at once, although he spent the same time he normally would have on each topic, that the foreman sometimes held meetings in his absence, and that he himself reminded workers of fall hazards when he was at the site. (Tr. 340-51; 354-55).

John William Mayfield, a general superintendent with RGM for over a year and half, has worked in bridge construction since 1971. He testified he has never had any lost-time accidents or safety citations, that RGM gives safety a very high priority, and that he was hired because of his safety background. He further testified he oversaw the subject site, that

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[9]Johnson noted that while stretching a rope or cable from span to span along the bridge to which employees could have tied off was considered, this idea was rejected because there would not have been enough tension to effectively break a fall. (Tr. 329).

he visited it weekly when Johnson was there and daily when he was not, and that he had no safety complaints from employees or the State inspectors, who were there every day. Mayfield said there was fall protection for each activity at the site, that every employee was issued a safety belt, and that he and Johnson decided upon the use of the boards, which, in his opinion, was the only safe means of doing the job.[10] He also said employees had to tie off to the boards some of the time because the walers, which were 3 feet apart, were part of the form work being removed. Mayfield did not recall observing any form wrecking during his visits to the site. (Tr. 363-79).

Bernardo Sandoval testified he was present when Johnson discussed how to wreck forms, and that the procedure used the board shown in R-3.[11] He said the job could not be done without one, and that he never told Benitez or Penaloza to not use one or to go home if they were afraid; he did tell them, pursuant to his regular practice, that there were other duties if they were afraid, as it is unsafe for persons fearful of heights to do such work. He also said each employee had a safety belt, that the sign in R-16 was at the site daily, and that neither Benitez nor Penaloza ever complained to him about safety. (Tr. 405-09; 416-17).

The subject standard provides as follows:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The Commission has held that an employer will not be found in violation of the standard as long as an effective means of fall protection was used. *State Sheet Metal Co., Inc.*, 16 BNA OSHC 1155, 1161, 1993 CCH OSHD ¶ 30,042, p. 41,227 (Nos. 90-1620 & 90-2894, 1993). RGM contends employees used the boards as described by Johnson and Mayfield, and that the boards were an effective means of protection. The Secretary

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[10]Mayfield noted that an employee attempting to wreck forms without a board would have slipped off the concrete beams. He also noted he and Johnson had considered installing I-bolts under the bridge and running a safety line through them, but that this idea was rejected because of the potential for falling lumber to catch on the rope. (Tr. 373-74).

[11]Sandoval testified through an interpreter. (Tr. 399).

contends the boards were not used, based on the testimony of Benitez and Penaloza, but that even if they were they were not an effective means of fall protection. Accordingly, as a preliminary matter, a determination must be made in regard to the credibility of Benitez and Penaloza.

Although both witnesses denied sitting on the boards while wrecking forms they acknowledged using them to set their tools on. Moreover, the testimony of Benitez as to why he could not work on the boards was vague and that of Penaloza was contradictory, particularly since he indicated he had, in fact, used the boards as shown in R-2-3. Finally, the witnesses' description of how they wrecked forms was simply not believable, particularly in light of the testimony of Johnson, Mayfield and Sandoval that an employee could not have done the job in that manner for any length of time.

In addition to the foregoing, I note that the record reflects animus on the part of Benitez and Penaloza towards their former employer, and that a number of their responses indicate a lack of candor and a deliberate attempt to discredit RGM. (Tr. 24; 39-41; 45; 61-62; 66-68; 72-81; 91-95; 100-04; 113-26; 129-39). This is especially true of Benitez, whose statements about going to "about three" safety meetings and not wearing a safety belt most of the time are contradicted by R-17, which shows he attended seven meetings, and by his own testimony and that of Penaloza about his wearing a belt. For these reasons, the testimony of Benitez and Penaloza is not credited, and it is found that employees used the boards as described by Johnson and Mayfield.

Turning to the issue of whether the boards were an effective means of fall protection, I find that tying off to the form work as in R-3 complied with the standard, but that tying off to the boards themselves, as in R-2, did not. This conclusion is supported by 1926.104(b), which provides as follows:

> Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

It is clear that when employees wrapped their lanyards around the boards they were not tied off "above the point of operation to an anchorage or structural member" as required. Moreover, the CO testified that the boards, which were two-by-fours nailed to

3/4-inch plywood, would only have been able to support about 1,000 pounds, and RGM presented no evidence to rebut her testimony. Finally, even assuming *arguendo* the boards could have supported the required 5,400 pounds, it is apparent that a board could have fallen when an employee was tied off to it and crawling along a beam dragging it behind him, as Johnson testified.[12]

In defense of this citation item, Muckleroy and Mayfield testified it is not the industry practice to use safety nets other than to protect the public from falling materials.[13] (Tr. 275; 281; 379). However, Commission precedent is well settled that an employer cannot use the failure of other members of its industry to comply with a standard as a defense where the standard specifically requires a different course of action. *See, e.g., State Sheet Metal Co., Inc.*, 16 BNA OSHC 1155, 1159, 1993 CCH OSHD ¶ 30,042, p. 41,225 (Nos. 90-1620 & 90-2894, 1993), and cases cited therein. Further, since it is clear RGM was cited for not using safety nets, the Secretary's burden has been met in this case by establishing that employees were exposed to a fall in excess of 25 feet without adequate protection. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1189, 1993 CCH OSHD ¶ 30,059, p. 41,337 (Nos. 89-2883 & 89-3444, 1993).

Turning to the assessment of an appropriate penalty, I note the record, based on the testimony of management employees, shows RGM's concern for safety in general as well as specific efforts to provide a safe work environment. I note also that RGM had adequate fall protection for most aspects of the job and that the hazard of drowning during form wrecking was diminished by the presence of a lifesaving skiff and life jackets.[14] Upon consideration of these factors and RGM's size, history, and good faith, it is concluded a penalty of $1,000.00 is appropriate for this item.

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[12]*See A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1986-87 CCH OSHD ¶ 27,786 (No. 83-1189, 1987), in which the Commission, based on facts similar to those in this case, found a violation of 1926.104(b).

[13]RGM was not allowed to present evidence in support of a greater hazard or infeasibility defense as it failed to raise those issues in its pretrial submissions. (Tr. 276-80; 284-88; 379-80).

[14]This conclusion is based on my findings in regard to items 4, 6 and 7, *infra*, and on Mayfield's testimony about other types of fall protection at the site. (Tr. 371-72; 387-89).

Items 4(a)-(c) - 29 C.F.R. §§ 1926.106(a), (c) and (d)

The subject standards provide as follows:

> 1926.106(a) - Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.
>
> 1926.106(c) - Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.
>
> 1926.106(d) - At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

Elizabeth Slatten testified that employees were exposed to a drowning hazard and that she saw no lifesaving skiff, ring buoy or life jackets on the jobsite. She said Mayfield indicated that a skiff and jackets were provided at certain times and that he did not realize they had to be there all the time, but that he admitted there was no ring buoy; Mayfield showed her a skiff in an equipment hut about 7/10 of a mile away. (Tr. 156-69; 228-29).

John William Mayfield and Nicholas Johnson testified that a skiff with life jackets in it was on the site when work was done on the water or under the bridge, such as form wrecking or column cleaning; Johnson said the skiff was not there the day of the inspection as no such work was being done, and Mayfield said the water at the end of the bridge where employees were working was only about 18 inches deep. Mayfield also said the field office where equipment was kept was about 1/4 of a mile away, and that RGM also had a flat-bottomed boat used to retrieve lumber during form wrecking. (Tr. 361-62; 380-83; 387-88).

Based on the foregoing, RGM had no ring buoy at the subject site.[15] Further, while the company had a skiff with life jackets in it at the worksite when employees worked on the water or under the bridge, based on the testimony of Johnson and Mayfield, no such equipment was there the day of the inspection. RGM contends, essentially, that it was not required to comply with the standards that day because there was no drowning hazard. I disagree. Although Mayfield testified the water was only about 18 inches deep at the end

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[15]Although RGM contends Mayfield testified there was a ring buoy at the site, it is apparent he was merely discussing the purpose of having one. (Tr. 385-86). Further, that neither Mayfield nor Johnson affirmatively testified as to there being a ring buoy at the site, as they did regarding the skiff and jackets, convinces the undersigned of the lack of a ring buoy.

of the bridge where employees were working that day, the CO testified they were earlier at about the middle of the bridge, where the river, as Mayfield himself stated, was about 4.5 feet deep. (Tr. 148-49; 383). It was reasonably foreseeable that an employee could have fallen into the river and drowned, particularly in light of my findings regarding items 6 and 7 below; accordingly, RGM was in serious violation of the subject standards.[16]

In regard to an appropriate penalty for these items, the CO's belief as to the gravity of the hazard was based on what Benitez and Penaloza told her about wrecking forms and working on top of the bridge without protection; she also saw Sandoval walking by floor openings in the bridge without fall protection and a worker in a basket on the side of the bridge who was not tied off to the bridge.[17] (Tr. 149-69; 177-82; 191-92; 214-15; 225-26). That RGM had the skiff at the site during form wrecking reduces the hazard of drowning for this activity, and although violations have been found as to items 6 and 7 the record shows RGM had adequate protection for most aspects of the job. Moreover, the CO's opinion that the worker in the basket was required to be tied off was not supported by a citation, and Muckleroy and Mayfield testified that the basket provided adequate protection, that the employee tied off when entering and exiting, and that tying off while in the basket was not required. (Tr. 283 84; 289; 377). In light of these factors, as well as RGM's size, history and good faith, a penalty of $500.00 for these three grouped items is appropriate.

Items 6 and 7 - 29 C.F.R. §§ 1926.500(b)(1) and (d)(1)

The subject standards provide, in pertinent part, as follows:

1926.500(b)(1) - Floor openings shall be guarded by a standard railing and toeboards or cover....

1926.500(d)(1) - Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent....

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[16]That drowning could have resulted is supported by the CO's testimony that a falling employee could have been knocked out and unable to swim and by Sandoval's testimony that some of the workers at the site could not swim. (Tr. 160; 409).

[17]The CO also saw Sandoval working over the employee in the basket, but could not tell if he was tied off or not. (Tr. 163; 214; 226).

Elizabeth Slatten testified that after her arrival at about 8:30 a.m. Sandoval approached her by walking along the beam next to the concrete wall shown in C-4, near the floor openings in the bridge, without fall protection; she concluded employees regularly walked along the beam, based on what Benitez and Penaloza told her and the equipment in the area, and while Mayfield indicated a cable to which employees tied off was normally put up she saw no such cable when she was there. Slatten further testified that although some areas of the open side of the bridge had guardrails others did not, as shown in C-1 and C-6, and that Benitez and Penaloza told her they had walked and worked near unguarded edges. Slatten said guardrails could have been installed along the entire open side, and that while a safety cable was another possibility the warning line that had been put up was insufficient to support the required weight. (Tr. 157; 168-83; 191-96; 209-10).

Steve Muckleroy and John William Mayfield testified that on the areas of the bridge where work was taking place guardrails were installed or employees tied off to a lifeline on the deck. They further testified that C-6 showed a completed section lacking only the outside traffic rail a subcontractor put on later, and that while employees walked past the steel loops and flagging they did not work in such areas.[18] Mayfield said employees did use the beam shown in C-4 as a walkway but more commonly used the road, and that when working in such areas they tied off to either the hoop bars in the beams or a lifeline; he explained that the lifeline was installed through holes in the concrete barrier, that it was only put up when needed, and that it was taken down at night to avoid its being stolen. (Tr. 272-74; 389-94).

Bernardo Sandoval testified he arrived at the site at about 7:30 a.m., and that when Slatten called to him he was in the process of hooking up a cable for the blue welding machine shown in C-4 as well as a cable for workers to tie off on; he said he was tied off to a bar on the beam at the time, that he untied himself so he could walk over to see what she wanted, and that he always untied himself when carrying materials. (Tr. 401-05; 409-16).

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[18]Williams said the flagged line was to warn the public, since employees were already aware of the hazard. (Tr. 393-94).

The CO concluded RGM violated the standards based on Sandoval walking along the beam in C-4 without protection and on Benitez and Penaloza telling her that employees regularly did so and that they themselves had walked and worked near the unguarded edge shown in C-1 and C-6. Although statements made by Benitez and Penaloza are not given much credence for my reasons set out *supra*, the testimony of RGM's management witnesses establishes that employees walked by the unguarded sides of the bridge as well as the floor openings without fall protection. Commission precedent is well settled that exposure to a cited hazard is met by showing that "employees either while in the course of their assigned working duties ... or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1976 CCH OSHD ¶ 20,448 p. 24,425 (No. 504, 1976). Exposure to the cited hazards is demonstrated, and RGM was in serious violation of the standards.

As to an appropriate penalty for these items, I note the consistent testimony of Muckleroy, Mayfield and Sandoval about the fall protection used on top of the bridge. I note also that while the record clearly shows employees walked by the unguarded side of the bridge and the floor openings, it also shows that for the most part they were protected by guardrails or by tying off when performing actual job duties in those areas.[19] Based on the record, the gravity of the violations was considerably lower than the CO believed; accordingly, a penalty of $500.00 is assessed for item 6 and a penalty of $400.00 is assessed for item 7.

Conclusions of Law

1. Respondent, RGM Construction Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.105(a), 1926.106(a), 1926.106(c), 1926.106(d), 1926.500(b)(1) and 1926.500(d)(1).

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[19]That guardrails were used in work areas is supported by C-4 and by R-10-12, which Johnson took in early 1991; moreover, Penaloza himself testified that he and Benitez tied off to a lifeline when on top of the bridge. (Tr. 75-76; 269-71).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 3, 4, 6 and 7 are AFFIRMED as serious violations, and penalties of $1,000.00, $500.00, $500.00 and $400.00, respectively, are assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: November 16, 1993