United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. NUPRECON LP dba NUPRECON ACQUISITION LP, Respondent.	OSHRC Docket No. 08-1037

APPEARANCES:

Gary K. Stearman, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; Carol A. De Deo, Deputy Solicitor of Labor for National Operations; U.S. Department of Labor, Washington, DC
For the Complainant

Aaron K. Owada, Esq.; AMS Law, P.C., Lacey, WA
For the Respondent

DECISION AND REMAND ORDER

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

On April 21, 2008, the Occupational Safety and Health Administration ("OSHA") conducted a programmed inspection of the Whidbey Island Naval Air Station in Oak Harbor, Washington. Employees of Nuprecon LP ("Nuprecon"), a demolition contractor, were assigned to demolish two hangar bays, two floors of another hangar, and a tunnel at the Naval Air Station. As a result of the inspection, OSHA issued Nuprecon a citation alleging serious violations of two provisions of the construction standard, proposing a penalty of $1,875. Specifically, OSHA alleged that Nuprecon violated 29 C.F.R. § 1926.501(b)(1) by failing to protect its employees from a fall hazard, and 29 C.F.R. § 1926.503(c) by failing to retrain its employees to understand and use fall protection.

Following a hearing, Administrative Law Judge Benjamin R. Loye issued a decision in which he essentially amended the pleadings to change the description of Nuprecon's work at the Naval Air Station from "construction" to "demolition" based on his finding that the parties introduced "repeated and undisputed evidence . . . which unequivocally established that [Nuprecon] was engaged only in demolition work at this site." Alternatively, he found that § 1926.501(b)(1) was "preempted" by "one or both" of two "more specific demolition standards," which he stated "might apply more specifically to the conditions at issue here." As a result, the judge vacated the alleged fall protection violation[1] based on the Secretary's failure to establish applicability of the cited standard.[2]

For the following reasons, we reverse the judge's decision and remand the case to the judge for further proceedings.

ISSUES

At issue on review are two separate but interrelated *sua sponte* actions taken by the judge. First is the judge's decision to effectively amend Nuprecon's Answer. Second is his finding that one or both of two provisions under the demolition standard preempted the cited fall protection provision.

FINDINGS OF FACT

At the time of the inspection, Nuprecon's employees were working on the third floor of Hangar 5. On that floor, the OSHA compliance officer ("CO") observed a twenty-one-foot long, floor-to-ceiling open edge that Nuprecon used for pushing debris off its workspace to a lower level of the hangar, approximately thirty-six-and-a-half feet below. Nuprecon had secured across the opening a 5/8-inch thick cable, hung several feet above the floor, to prevent the Bobcat vehicle ("Bobcat") employees used to move debris from falling over the edge. Nuprecon had

[1] The judge also vacated the alleged retraining violation based on a lack of evidence. The Secretary did not petition for review of that item and it is therefore not at issue before the Commission.

[2] To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

also hung red plastic warning tape several feet above the floor from the walls near the open edge to and between stanchions standing in the passageway, creating a rectangular area in front of the open edge.

DISCUSSION

I. AMENDMENT TO THE PLEADING

PRINCIPLES OF LAW

Federal Rule of Civil Procedure 15(b) governs the amendment of pleadings in Commission proceedings.[3] *NORDAM Group*, 19 BNA OSHC 1413, 1414, 2001 CCH OSHD ¶ 32,365, p. 49,684 (No. 99-0954, 2001), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished); *see also Reed Eng'g Group, Inc.*, 21 BNA OSHC 1290, 1291, 2005 CCH OSHD ¶ 32,862, p. 53,087 (No. 02-0620, 2005) (abuse of discretion standard of review for judge's decision to amend a pleading). The Commission has stated that amendment under the provision now designated Rule 15(b)(2) "is proper only if two findings can be made—that the parties *tried* an unpleaded issue and that they *consented* to do so." *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984). "Consent will be found only when the parties 'squarely recognized' that they were trying an unpleaded issue." *NORDAM Group*, 19 BNA OSHC at 1414, 2001 CCH OSHD at p. 49,684 (citing *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990)). "Conversely, consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issues, at least in the absence of some obvious attempt to raise the

[3] Rule 15(b), revised for stylistic purposes in 2007, provides:

> **(b) Amendments During and After Trial.**
>
> **(1) *Based on an Objection at Trial*.** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.
>
> **(2) *For Issues Tried by Consent*.** When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

unpleaded issue." *McWilliams Forge Co.*, 11 BNA OSHC at 2130, 1984-85 CCH OSHD at p. 34,699.

Under the provision now designated Rule 15(b)(1), the Commission has stated that "[e]ven if a party objects to the use of evidence in support of an unpleaded charge, the pleadings may be amended . . . if the objecting party does not suffer prejudice." *NORDAM Group*, 19 BNA OSHC at 1414, 2001 CCH OSHD at p. 49,684 (citing *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1113, 1993-95 CCH OSHD ¶ 30,048, pp. 41,269-70 (No. 88-572, 1993)). "To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992).

ANALYSIS

Nuprecon explicitly admitted in its Answer that it was "engaged in the business of construction" at the worksite. Nuprecon, who has been represented by counsel throughout these proceedings, now claims its admission was a "mistake" that occurred "because it was unaware that OSHA standards made a distinction between 'demolition' and 'construction.'" Thus, it agrees with the judge's decision to *sua sponte* amend the pleadings because, it claims, the Secretary impliedly consented to try whether Nuprecon was engaged in demolition or construction.

Based on our review of the record, we find that neither party explicitly or impliedly consented to try the issue raised by the judge's amendment. *McWilliams Forge Co.*, 11 BNA OSHC at 2130, 1984-85 CCH OSHD at p. 34,669. Neither party's post-hearing brief addressed this issue; in fact, the Secretary's brief declared that "[i]t is undisputed that . . . [Nuprecon] was engaged in the business of construction." And as the Secretary notes, "Nuprecon's defense throughout was that it complied with the cited construction standard," not that the cited standard was inapplicable.

Absent some indication that Nuprecon learned of its "mistake" before the judge's decision issued, it could not have consented to the judge's line of reasoning about the nature of the company's work. Moreover, the Secretary could not have consented to try the issue when she lacked notice that the judge considered applicability to still be in dispute despite Nuprecon's conclusive admission. Indeed, we are not persuaded that references to demolition during the

proceedings and in the Secretary's post-hearing brief, as relied upon here by the judge, decisively support his conclusion that the parties "agreed . . . [Nuprecon] was engaged solely in demolition work." None of these passing references, which consist largely of statements describing the nature of Nuprecon's work as demolition, would have put either party on notice that there remained any dispute over whether the company was engaged in construction at the Naval Air Station or that the cited standard applied here. *See NORDAM Group*, 19 BNA OSHC at 1414, 2001 CCH OSHD at p. 49,684 (finding consent only where parties "squarely recognized" trying the unpleaded issue). Furthermore, the record contains references by the Secretary and Nuprecon that describe both the project and Nuprecon's work as construction, none of which were addressed by the judge.

We also find that the Secretary was prejudiced by the judge's amendment. As the Secretary notes, had she "been fairly apprised of the issue, she would have adduced evidence detailing the scope of the Hangar 5 renovation and Nuprecon's role in it" including Nuprecon's subcontract for the provision of construction services. Thus, the Secretary points to specific evidence she would have used to establish that Nuprecon's work was construction. *Cf. ConAgra*, 15 BNA OSHC at 1822, 1991-93 CCH OSHD at p. 40,592 (finding lack of prejudice where employer "pointed to no evidence that it would have introduced and makes no specific allegations to support its claim").

Under these circumstances, we find the judge abused his discretion in amending the pleadings *sua sponte*. Therefore, we find that Nuprecon's admission establishes that the work it performed at the Naval Air Station was construction work covered by Part 1926 and Subpart M - Fall Protection.[4]

II. PREEMPTION

PRINCIPLES OF LAW

Section 1910.5(c)(1) governs which standard or standards apply to a specific work practice or condition. *Cincinnati Gas & Elec. Co.*, 21 BNA OSHC 1057, 1058, 2005 CCH

[4] The judge also found that the cited fall protection standard did not apply to the demolition work Nuprecon performed at the Naval Air Station because the fall protection standard applies only to "construction workplaces" and the definition of "construction work" does not include "demolition." The Secretary argues on review that the judge misinterpreted the construction standard. Because we find that Nuprecon's admission in its Answer established that it was engaged in construction work here, we need not address this argument.

OSHD ¶ 32,836, p. 52,771 (No. 01-0711, 2005); *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2183, 1987-90 CCH OSHD ¶ 28,509, p. 37,796 (No. 85-1388, 1989). It provides that "[i]f a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable . . . ." 29 C.F.R. § 1910.5(c)(1). But "[a] general standard is not preempted by a specific standard when it provides meaningful protection to employees beyond that afforded by the more specific standard." *Cincinnati Gas & Elec.*, 21 BNA OSHC at 1058, 2005 CCH OSHD at p. 52,771.

ANALYSIS

The cited standard, a provision in Subpart M - Fall Protection of Part 1926, provides as follows:

> 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.

29 C.F.R. § 1926.501(b)(1). The judge found that this standard was preempted "by one or both" of two standards within Subpart T - Demolition of Part 1926: 29 C.F.R. § 1926.856(b) and 29 C.F.R § 1926.850(g).

We find that neither of these demolition standards apply to the hazardous condition and therefore do not preempt § 1926.501(b)(1). The first standard, § 1926.856(b), requires that floor openings "have curbs or stop-logs to prevent equipment from running over the edge." Here, there was no floor opening as described in the demolition standard: "[a]ny openings cut in a floor for the disposal of materials . . . ." 29 C.F.R. § 1926.853. Instead, Nuprecon's work area contained an unprotected, twenty-one-foot long, floor-to-ceiling edge. Section 1926.501(b)(1), the cited standard, specifically applies to such "[u]nprotected sides and edges."[5]

The other demolition standard identified by the judge, § 1926.850(g), requires employers to protect employees exposed to the hazard of falling through a "wall opening," which presumes the existence of a wall.[6] Here, there was no wall, only a floor with no side and an unprotected

[5] The fall protection subpart defines unprotected sides and edges as "any side or edge (except at entrances to points of access) of a walking/working surface, . . . where there is no wall or guardrail system at least 39 inches . . . high." 29 C.F.R. § 1926.500(b).

[6] Although not defined in the demolition subpart, an "opening" is defined in the fall protection subpart as "a gap or void 30 inches . . . or more high and 18 inches . . . or more wide, in a wall or partition, through which employees can fall to a lower level." 29 C.F.R. § 1926.500(b); *see*

twenty-one-foot long floor-to-ceiling edge. Section 1926.501(b)(1), clearly applies to such "an unprotected side or edge." And it requires fall protection consistent with the complete absence of a wall—"guardrail systems, safety net systems, or personal fall arrest systems." Thus, these standards complement each other by covering different types of fall hazards. *See* OSHA Construction Resource Manual, Overview for Subpart T - Demolition, T-2B, http://www.osha.gov/Publications/Const_Res_Man/index.html (last visited Nov. 20, 2009) (noting in overview of the demolition subpart that the requirements of the fall protection subpart "will provide further clarification of what measures are necessary to assure employees are protected from falling"); *see also McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1882, 1993-95 CCH OSHD ¶ 30,506, p. 42,167 (No. 90-2337, 1994) (stating that "general safety standards can complement specific standards by filling in the interstices necessarily remaining after the promulgation of the specific standards"), *aff'd*, 71 F.3d 208 (6th Cir. 1995).

Given that neither demolition standard applies to the cited condition, we find the judge erred in concluding that one or both of these standards preempted the cited fall protection standard.

Vanco Constr., Inc., 11 BNA OSHC 1058, 1061, 1983-84 CCH OSHD ¶ 26,372, p. 33,454 (No. 79-4945, 1982) (holding that standards containing broad or undefined terms may be given meaning by reference to other standards), *aff'd*, 723 F.2d 410 (5th Cir. 1984).

CONCLUSIONS OF LAW

Because the judge amended the pleadings to designate Nuprecon's work as demolition rather than construction without the parties' consent and with prejudice to the Secretary, we conclude that he abused his discretion. Additionally, we conclude the judge erred in finding that two demolition standard provisions preempted the cited fall protection standard. Therefore, we reverse the judge's vacatur, find the Secretary established the cited standard's applicability, and remand the case to the judge to consider whether the Secretary established the remaining elements of the violation alleged under § 1926.501(b)(1).

SO ORDERED.

/s/_____
Thomasina V. Rogers
Chairman

/s/_____
Horace A. Thompson III
Commissioner

Dated: 11/20/2009

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Room 407
Denver, Colorado 80202

Secretary of Labor, Complainant, v. Nuprecon, LP, Respondent.	OSHRC DOCKET NO. 08-1037

Appearances:

Abigail G. Daquiz, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington
For Complainant

Aaron K. Owada, Esq., AMS Law, P.C., Lacey, Washington
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Nuprecon, LP ("Respondent") worksite at a naval air station near Seattle, Washington on April 21, 2008. As a result of the inspection, OSHA issued a Citation and Notification of Penalty to Respondent alleging two violations of the Act. Citation 1 Item 1(a) alleges a serious violation of 29 C.F.R. §1926.501(b)(1). Citation 1 Item 1(b) alleges a serious violation of 29 C.F.R. §1926.503(c). A grouped penalty totaling $1,875 was proposed for both violations. Respondent timely contested the citation and an administrative trial was held on March 11, 2009, in Seattle, Washington. Both parties have filed post-trial briefs and this case is ready for disposition.

Jurisdiction

The parties agree that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also agree that at all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *(Complaint and Answer).*

Factual Findings

On April 21, 2008, OSHA Compliance Safety and Health Officer Kalah Goodman conducted an inspection of work activities at Whidbey Island Naval Air Station in Washington. (Tr. 14). The inspection was a programmed planned inspection of the site as a result of the location being listed on OSHA's Dodge Report. (Tr. 14). Respondent was one of the employers working on site that day. At the time of the inspection, Respondent had employees working on the third and fourth floors of Hangar Five. (Tr. 17, 26, 72). Respondent is a demolition contractor and does not perform any other type of work. (Tr. 72). Its job at this worksite was to demolish two hangar bays, two floors of another hangar, and a tunnel. (Tr. 73).

CSHO Goodman entered the third floor of Hangar Five and observed a 21-foot horizontal opening at one outer edge of the floor. (Tr. 20, 60; Ex. 2, 5). The floor opening had a 5/8-inch thick wire cable stretched across it, which was secured to the two columns on either side. (Tr. 20, 40, 74; Ex. 2, 4). There was also red plastic tape surrounding the floor opening in a rectangular pattern, approximately 15 feet from the edge. (Tr. 79-80). The distance from the edge of the third floor opening to the ground below was approximately 36 feet. (Tr. 75-76; Ex. 5).

CSHO Goodman learned that the 21-foot opening was being used by a Nuprecon employee operating a Bobcat front-end loader to push debris off the edge as part of the building demolition. (Tr. 25). However, at the time of her inspection, the Bobcat operator was not working near the edge. (Tr. 25, 43-44). He was working in an adjacent area of the third floor, piling up piping which was being removed from the building. (Tr. 25). CSHO Goodman observed another Nuprecon employee working near the red tape

barrier, but outside its boundaries, on a scissor lift. (Tr. 25, 29, 47; Ex. 4). There were also several Nuprecon employees who passed through the third floor of Hangar Five daily on their way up to the fourth floor. (Tr. 26, 47).

CSHO Goodman testified that the regulations, under these circumstances, provided for only three methods of acceptable fall protection for employees accessing the third floor: guardrail systems, safety net systems, or personal fall arrest systems. (Tr. 26, 28). She testified that the use of a wire rope and red tape to guard this open floor edge was not sufficient. (Tr. 26-29). The Secretary considered all employees working on the third floor of Hangar Five to be exposed to a fall hazard as a result of this condition. (Tr. 46, 48-49; Complainant's Post-Hearing Brief, p.6). The parties agree that a 36-foot fall would unquestionably result in serious injury or death. (Tr. 34, 115).

During the inspection, CSHO Goodman observed and video-taped the floor opening while standing just outside the red tape boundary. (Tr. 39). Although she testified that any employee who walked on the third floor was exposed to a fall hazard as a result of this condition, she did not consider herself personally exposed to the fall hazard while standing fifteen feet from the edge. (Tr. 39). She acknowledged that the red tape surrounding the edge indicated to her that she should stay out of that area. (Tr. 40). She further acknowledged that she never saw any employees working within the boundaries of the red tape. (Tr. 43).

Prior to the inspection, Respondent had implemented and trained its employees on a color-coded system regarding plastic tape boundaries. (Tr. 77). Red tape is recognized as the highest danger level and employees are trained to stay out of any area demarcated with red tape. (Tr. 77). The lone exception in this instance was the Bobcat operator, who actually maneuvered his machine inside the area so that debris could be pushed off the floor opening to the ground below. (Tr. 76, 80, 83-84, 95).

Respondent presented evidence and argument on a multitude of alternative fall protection methods identified in the regulations. However, Aaron Tomaras, Respondent's Superintendent on the day of the inspection, conceded that the wire rope stretched across the opening did not constitute a guard rail system,

that the Bobcat operator's use of a seat belt did not constitute fall protection, that the floor opening was not a leading edge, and that "warning line system" referenced in §1926.500 applies only to roof work. (Tr. 88, 90-91, 115). He also conceded that this location was not a roof. (Tr. 91). Avery Brown, Respondent's Field Safety Officer, maintained that the red-taped area surrounding the third floor opening was a "controlled access zone." (Tr. 101-102). However, I find that Respondent was not engaged in the type of activities referenced by the controlled access zone regulation [29 C.F.R. §1926.502(g)]: bricklaying, leading edge work, precast concrete erection work, or residential construction.

As a result of her observations during the inspection, CSHO Goodman recommended the two violations at issue in this case. Citation 1 Item 1(a) alleges that Respondent failed to implement an acceptable fall protection system at the 21-foot opening in the demolition area on the third floor of Hangar Five. (Tr. 26; Ex. 7). Citation 1 Item 1(b) alleges that Respondent failed to re-train employees on fall protection requirements. (Tr. 37-38; Ex.7). CSHO Goodman testified that the re-training violation was based only on the existence of the fall protection violation and that she would not have recommended it otherwise. (Tr. 49). In calculating the proposed $1,875 penalty, CSHO Goodman concluded there was a high severity of injury, but a low probability of an actual accident. (Tr. 35). She also applied a 15% penalty reduction for the Respondent's good faith during the inspection, and an additional 10% reduction for Respondent's lack of violations in the past three years. (Tr. 36).

Discussion

To establish a *prima facie* violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1(a)

The Secretary alleges in Citation 1 Item 1(a) that:

> *29 CFR 1926.501(b)(1): Each employee on a walking/working surface with an unprotected side or edge which was 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:*
>
> *(a) Third Floor Loading Zone, where the demolition work area and passageway were located adjacent to an unguarded open sided floor located 36½ feet above the lower level. Hazard: Fall from elevation.*

The cited standard provides:

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

The first issue that must be addressed is whether or not the cited standard applies. The Secretary asserts in her post-trial brief that "[t]his standard applied to construction workplaces, setting forth requirements and criteria for fall protection." The Secretary further states that "Respondent does not dispute that it was engaged in construction activities at the worksite on the day of the inspection." A review of Respondent's Answer, specifically in its response to Paragraph II of the Secretary's Complaint, supports that assertion.

The record, however, overwhelmingly establishes that Respondent was engaged only in demolition work at this site. (Tr. 7:22, 17:24, 18:15, 72-73; Ex. 1, p.4; Complainant's Post-Hearing Brief, pp. 7, 18). Even the language of the citation itself alleges that this was "a demolition work area." (Ex. 7). Counsel for the parties and every testifying witness agreed on that fact throughout the trial. Respondent further established that it is exclusively a demolition contractor and performs no other type of work. (Tr. 72-73).

Although Paragraph II of the Secretary's Complaint contains the word "construction", its primary focus is Respondent's engagement in a business affecting interstate commerce. It would be improper to ignore repeated and undisputed evidence, introduced by both parties during trial, which unequivocally established that Respondent was engaged only in demolition work at this site.

F.R.C.P. 15(b) allows pleadings to be amended to conform to the evidence presented at trial. The rule is "designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *U.S. v. Hougham*, 364 U.S. 310, 316 (1960). "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id*. Since the parties and witnesses all agreed that Respondent was engaged solely in demolition work, the Secretary will not be prejudiced by such a factual finding. Therefore, pursuant to F.R.C.P. 15(b), I find that Respondent was not engaged in construction work. Respondent was engaged in demolition work at this site.

29 C.F.R. §1926.500(a)(1) specifically defines the scope and application of the fall protection regulations applied to Respondent in this case. It provides that "[t]his subpart sets forth requirements and criteria for fall protection in ***construction workplaces*** covered under 29 CFR Part 1926" (emphasis added). The term "construction work" is defined as "construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. §1926.32(g). Several unreviewed Commission Administrative Law Judge decisions have recognized that the term "demolition" was not specifically included in the definition of "construction", but held that demolition should be implicitly included because it involves many of the same tools and equipment. *Anderson Excavating & Wrecking*, 16 BNA OSHC 1601 (Nos. 92-1899 & 2122, 1993); *S.G. Loewendick and Sons*, 6 BNA OSHC 1630, 1978 CCH OSHD ¶22,730 (No. 76-3064, 1978); see also *Haynes & Mouw, Inc*., 11 BNA OSHC 1125, 1983-1984 CCH OSHD ¶26,394 (Nos. 82-374 & 350, 1983). I respectfully disagree. The plain meaning of the words included, or excluded, by the Secretary in

regulations should be controlling. *Metwest, Inc*., 22 BNA OSHC 1066, 2008 CCH OSHD ¶32,942 (No. 04-0594, 2007). "Construction work" was defined by the Secretary in a manner that did not include demolition. In further support of the distinction, the term "demolition" was specifically added in other Part 1926 regulations, presumably to eliminate this problem in other contexts. *See* 29 C.F.R. §1926.150(a) *(fire protection standards encompassing both "construction" and "demolition")*; §1926.1101(a) & (b) *(asbestos standards specifying application to "construction" in one subpart and "demolition" in another)*; and §1926.62(a)(1) *(lead standards specifying the inclusion of "demolition" activities).*

Furthermore, the Secretary promulgated Subpart T of Part 1926 to address safety requirements for demolition work. Two of the demolition standards appear as if they might apply more specifically to the conditions at issue here, although neither was raised during this proceeding:

> *29 C.F.R. §1926.856(b): Floor openings shall have curbs or stop-logs to prevent equipment from running over the edge;* and/or
>
> *29 C.F.R. §1926.850(g): Where a hazard exists to employees falling through wall openings, the opening shall be protected to a height of approximately 42 inches.*

I find that the Secretary failed to establish that the construction standard in Citation 1 Item 1(a) applied to Respondent's demolition activities on this site. Alternatively, I find that the cited general fall protection standard is preempted in this instance by one or both of the more specific demolition standards identified above. *Lowe Construction Co.*, 13 BNA OSHC 2182, 1989 CCH OSHD ¶28,509 (No. 85-1388, 1989); *Bratton Corporation*, 14 BNA OSHC 1893, 1990 CCH OSHD ¶29,152 (No. 83-0132, 1990). Since neither party addressed either of these demolition standards at trial, I find that it would be prejudicial to both parties to amend Citation 1 Item 1(a), *sua sponte*, to allege a violation of the above-listed demolition regulations. *A.L. Baumgartner Const., Inc*., 16 BNA OSHC 1995 (No. 92-1022, 1994). Accordingly, Citation 1 Item 1(a) must be vacated.

Citation 1 Item 1(b)

The Secretary alleges in Citation 1 Item 1(b) that:

> *29 CFR 1926.503(c): The employer did not retrain affected employees who already had been trained but demonstrated inadequate understanding and skill required by paragraph (a) of this section:*
>
> *(a) Third Floor Loading Zone, where the demolition work area and passageway were located adjacent to an unguarded open sided floor located 36½ feet above the lower level. Hazard: Fall from elevation.*

The cited standard provides:

> *Retraining. When the employer has reason to believe that any affected employee who has already been trained does not have the understanding and skill required by paragraph (a) of this section, the employer shall retrain each such employee. Circumstances where retraining is required include, but are not limited to, situations where:*
>
> *(1) Changes in the workplace render previous training obsolete; or*
>
> *(2) Changes in the types of fall protection systems or equipment to be used render previous training obsolete; or*
>
> *(3) Inadequacies in an effected employee's knowledge or use of fall protection systems or equipment indicate that the employee has not retained the requisite understanding or skill.*

The Secretary offered no evidence in support of Citation 1 Item 1(b). The OSHA Compliance Officer testified that the only reason she recommended the training citation item was because she observed a fall hazard. Therefore, according to her, there must have been a failure to re-train employees on fall

protection. However, the mere existence of a violative condition does not, in and of itself, establish that employees were not trained (or in this instance, not re-trained) on a particular subject. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000). The Secretary failed to establish a violation of the cited regulation. Accordingly, Citation 1 Item 1(b) must be vacated.

Affirmative Defenses

Respondent did not argue the merits of any affirmative defenses in its post-hearing brief. Therefore, the affirmative defenses identified in Respondent's September 12, 2008 letter to the court are deemed abandoned.

ORDER

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

1. Citation 1 Item 1(a) is VACATED; and

2. Citation 1 Item 1(b) is VACATED.

Date: May 21, 2009
Denver, Colorado

/s/_____
Benjamin R. Loye
Judge, OSHRC