SECRETARY OF LABOR,

Complainant,

v.

CB&I CONSTRUCTORS, INC.,

Respondent.

OSHRC Docket No. 99-1710

ORDER

This matter is before the Commission on a Direction for Review entered by Commissioner Gary L. Visscher on April 14, 2000. The parties have now filed a Stipulation and Settlement Agreement.

Having reviewed the record, and based upon the representations appearing in the Stipulation and Settlement Agreement, we conclude that this case raises no matters warranting further review by the Commission. Accordingly, the Stipulation and Settlement Agreement is approved.

We incorporate the terms of the Stipulation and Settlement Agreement into this Order and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Stipulation and Settlement Agreement. This is the final order of the Commission.

Date: October 3, 2000

/Signed/
Thomasina V. Rogers
Chairman

/Signed/
Gary L. Visscher
Commissioner

/Signed/
Stuart E. Weisberg
Commissioner

99-1710

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Ann Z. Cook
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APPEARANCES:

For the Complainant:
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For the Respondent:
Carl B. Carruth, Esquire, McNair Law Firm, Columbia, South Carolina

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

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"). Respondent CB&I Constructors, Inc., ("CB&I") is a corporation engaged in construction. On July 19, 1999, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at CB&I's work site at a wastewater treatment facility in Bellaire, Ohio. As a result of the inspection, OSHA issued CB&I a two-item serious citation. CB&I filed a timely notice of contest, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and the hearing in this matter was held in Columbus, Ohio on February 1, 2000.

Respondent is an employer engaged in a business affecting interstate commerce and is an employer within the meaning of section 3 of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter. (Tr. 11, 78-79.)

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

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

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.350(a)(10)

Citation 1, Item 1 alleges as follows:

> At the site just south of the material trailer, the employer did not assure that oxygen and acetylene were separated at least twenty feet in distance or by a noncombustible barrier of at least five feet high exposing employees to a fire hazard.

29 C.F.R. 1926.350(a)(10) provides that:

> Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1m) or by a noncombustible barrier at least 5 feet (1.5m) high having a fire-resistance rating of at least one-half hour.

The uncontradicted evidence establishes that two cylinders of oxygen were 6 feet 10 inches away from an acetylene cylinder at CB&I's work site. Between the oxygen and acetylene cylinders were two larger cylinders filled with carbon dioxide; one was strapped to the acetylene cylinder, and the other was located slightly in front of the oxygen and acetylene cylinders. Aside from the two carbon dioxide cylinders, there were no barriers between the acetylene and oxygen cylinders. Acetylene is a fuel gas and is combustible. The OSHA compliance officer ("CO") who conducted the inspection concluded that the oxygen cylinders were in storage because they were capped, the regulators were off, and the hoses were disconnected. The CO also inferred that CB&I's foreman considered the cylinders to be in storage in view of the latter's assertion that the carbon dioxide tanks provided a noncombustible barrier. The CO testified that the cylinders were in plain sight and that

CB&I's employees were in the vicinity of the cylinders; he also testified that the foreman was aware of the arrangement of the cylinders and that the condition created the danger of an explosion and/or fire. (Tr. 11, 17-28; CX-2A-2C.) Based on this evidence, the Secretary has made a prima facie showing of a violation of the cited standard.

CB&I first argues that the standard is inapplicable because the cylinders were not in storage. It points to an OSHA Standards Interpretation and Compliance Letter dated December 31, 1998, stating that, for purposes of the cited standard, oxygen cylinders are not considered to be in storage when it is reasonably anticipated that gas will be drawn from them within 24 hours. The foreman, Tom Bauer, testified that later in the day of the inspection the acetylene cylinder and both oxygen cylinders were used to cut an especially thick piece of metal. Bauer said that using two oxygen cylinders simultaneously was unusual but necessary for the job. Bauer, however, did not adequately explain why he did not tell the CO that he intended to use the cylinders later in the day, instead of telling him only that the carbon dioxide cylinders provided a noncombustible barrier. Given that Bauer's testimony on the storage issue was uncorroborated, that he failed to tell the CO about his plan to use the cylinders later that day, and that he himself conceded that using two oxygen cylinders simultaneously was unusual, I find Bauer's testimony unpersuasive and conclude that the cylinders were in fact in storage.[1] (Tr. 26, 127-32; RX-1.)

CB&I also argues it met the standard because the two carbon dioxide cylinders constituted a noncombustible barrier within the meaning of the standard, in that carbon dioxide is nonflammable and the cylinders would not burn through in 30 minutes. The standard specifies that the barrier must be at least 5 feet tall and have a fire-resistance rating of at least one-half hour. There is no direct evidence of the cylinders' height, and the CO's nonexpert opinion that the carbon dioxide cylinders would not burn through in half an hour is not a fire-resistance rating. Moreover, as the CO noted, the word "barrier" connotes a degree of strength, stability and protection not provided by movable, unsecured cylinders which would be easily displaced in an explosion, and which, in any event, only partially shielded the acetylene from the oxygen cylinders. (Tr. 27, 48-53.) CB&I has failed to demonstrate that a noncombustible barrier separated the cylinders, and I find that the Secretary has

[1]Bauer's testimony on another point was also questionable. Bauer testified he first learned the CO was on the site when the general contractor called him to the scaffolding during the walk around. However, the CO twice testified unequivocally that Bauer had represented CB&I at the opening conference. (Tr. 14, 123, 152-53.)

established a violation of the cited standard. In addition, because the violation posed explosive and fire dangers capable of causing severe injuries, the violation was serious.

The Secretary has proposed a penalty of $2,625.00 for this item. However, the Commission is the final arbiter of penalties in contested cases, and section 17(j) of the Act, 29 U.S.C. § 666(j), states that penalty assessment requires due consideration to be given to the employer's size, good faith and prior history of violations, and to the gravity of the subject violation. Gravity, usually the most significant factor, is judged by the number of employees exposed, the duration of the exposure, precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary's proposed penalty was based upon assessing the severity of any injury as medium and the probability of injury as great and according adjustments for CB&I's good faith and lack of citations in the last three years. Because employees were not working near the hazard, but were directly exposed to it only as they walked nearby, I find the probability of injury to be medium. I also believe that greater credit should be given for CB&I's safety program, and I conclude that a penalty of $1,750.00 is appropriate for this item.

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.451(b)(3)

Citation 1, Item 2 alleges as follows:

> At the waste water treatment tank being built, the employer did not enforce the spacing between the platform and the wall which was more than 14 inches on the fixed bracket scaffold, exposing employee to a 46 foot fall hazard.

29 C.F.R. 1926.451(b)(3) provides in relevant part that:

> [T]he front edge of all platforms shall not be more than 14 inches (36cm) from the face of the work, unless guardrail systems are erected along the front edge and/or personal fall arrest systems are used in accordance with paragraph (g) of this section to protect employees from falling.

The evidence shows that one of the two boards forming the top platform of a scaffold on the side of a wastewater tank had been removed, leaving a gap about 10 feet long and over 14 inches wide between the tank and the platform. The platform was 46 feet above the ground, and the platform boards were each about 10 feet long and 12 inches wide. The board that had been removed had been placed on top of the adjacent board to allow access to the platform from a ladder below. CB&I had a work rule directing replacement of the board whenever an employee was on the platform, but, for

ease of access, also allowing the board to remain on top of the other board when no one was on the platform. The CO observed CB&I employee Brad Bowers climb up the ladder and onto the platform; he then observed Bowers walk on top of the stacked boards and along the platform to retrieve a grinder before returning and replacing the board. Bowers testified that he knew he should have replaced the board immediately but that he had been very anxious about the grinder and had consciously disregarded the work rule. Bauer, the foreman, was working some distance away, and he assumed the board was stacked in compliance with the work rule and did not think that any employee would access the upper platform that day. (Tr. 32-44, 92-107, 121-25; CX-4; RX-2.)

CB&I first contests the applicability of the standard. It argues that since no work was being done to the outer surface of the tank there was no "face of the work." It also argues that the platform was only a walkway and that the standard thus did not apply. The record shows that on the day of the inspection, employees were working on lower scaffold platforms and no work was being done from the top platform. However, the record also shows that employees had worked on the tank surface from the top platform one week earlier and that they did so again two weeks later. (Tr. 59-60, 92, 133, 136-37; RX-2.) For purposes of the standard, a "walkway" is a portion of a scaffold platform used only for access and not as a work level. *See* 29 C.F.R. 1926.450(b). Based on the evidence of record, I find that the top platform was not used only for access and that the cited standard applied to the top platform.

CB&I next argues that it had neither actual nor constructive knowledge of the hazard because, although the foreman was on site and expected the board would be stacked, he had not assigned work which would cause anyone to be on the top platform that day. I disagree. Employees were working on the two lower scaffold platforms and could easily access the top platform. In fact, Bowers climbed up from a lower scaffold and exited by climbing over the top of the tank and into the tank interior where others were working. (Tr. 106, 121-23, 137-38.) While the foreman may have had no cause to believe Bowers would violate the work rule, he knew of the hazardous condition and that employees were in the area. I find that the Secretary has established the violation and, as serious injuries could have occurred had an employee fallen from that height, the violation was serious.

Lastly, CB&I asserts that the violation was due to unpreventable employee misconduct. To prevail in this affirmative defense, CB&I has the burden of showing: (1) that it had a work rule designed to prevent the violation; (2) that it had adequately communicated the rule to its employees;

(3) that it had taken steps to prevent violations of the rule; and (4) that it had effectively enforced the rule when violations were discovered. *Jenson Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). James Rhudy, the safety, health and environment manager of CB&I's parent corporation, and four CB&I employees who were at the site on the day of the inspection, testified convincingly about CB&I's safety program. Their testimony shows that CB&I had an effective training program, that it had a work rule which, if observed, would prevent the violation, and that both the program and the work rule were effectively communicated to its employees. (Tr. 78-86, 97, 124-26, 140-46.)

Bowers' testimony that he knew he was violating the rule when he did so was direct and credible. CB&I's witnesses described various means the company used to discover and discipline violations. However, no corroborating disciplinary records were offered, which could be because safety rules were always followed or because lapses were either not detected or not documented.[2] That the latter was the reason is supported by the fact that, while CB&I's program directs that safety rule infractions be noted on the employee's "A card," no record of this instance was made on Bower's card, although he was evidently "chewed out. " (Tr. 88-89, 134-36.) On the basis of the evidence of record, I find that CB&I has not met its burden of showing that it effectively enforced its disciplinary rules when violations were discovered. Its affirmative defense consequently fails.

The Secretary assessed the gravity of this violation as high and has proposed a penalty of $4,500.00. In view of the very short duration of the exposure of a single employee, the employee's knowing disregard of a work rule, and the fact that no actual work was being done from the platform at the time, I view the gravity as low. For this reason, and for the reasons set out in the penalty discussion for item 1, *supra*, I conclude that a penalty of $2,500.00 is appropriate for this item.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.

2. Respondent was in serious violation of 29 C.F.R. 1926.350(a)(10), and a penalty of

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[2]The CO testified that Bowers told him that the rule at issue was seldom obeyed. Bowers, on the other hand, testified that he made no such statement. Both appeared to testify truthfully, and both had an interest in their recollection being accepted. As I have decided this matter on other grounds, I decline to credit the testimony of one over the other.

$1,750.00 is appropriate.

3. Respondent was in serious violation of 29 C.F.R. 1926.451(b)(3), and a penalty of $2,500.00 is appropriate.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Item 1 of Citation 1 is affirmed, and a penalty of $1,750.00 is assessed.

2. Item 2 of Citation 1 is affirmed, and a penalty of $2,500.00 is assessed.

Ann Z. Cook
Judge, OSHRC

Dated: 20 MAR 2000
Washington, D.C