SECRETARY OF LABOR,

Complainant,

v.

M. DE MATTEO CONSTRUCTION COMPANY,

Respondent.

Docket No. 01-1749

APPEARANCES:

Natalia A. Baltizar, Esq.
Kevin S. Sullivan, Esq.
U.S. Department of Labor
Boston, MA
For the Complainant

Richard D. Wayne, Esq..
Hinckley, Allan & Snyder, LLP
Boston MA
For the Respondent

BEFORE: COVETTE ROONEY
Administrative Law Judge

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"). This case arose following an OSHA inspection conducted on July 24 and 25, 2001, at a work site in Boston, Massachusetts. Following the inspection, the Secretary issued M.. De Matteo Construction ("M. De Matteo") a citation alleging violations of 13 different standards. M. De Matteo filed a timely notice of contest, and a hearing was held on September 5, 2002. At the hearing, the parties settled all but two of the citation items. This partial settlement agreement was reduced to writing and executed by the parties on October 17, 2002, and its terms are approved and incorporated as part of this decision and order. The remaining contested citation items are Citation 1, Item 2a, which alleges a serious violation of 29 C.F.R. § 1926.502(d)(21), and

Citation 1, Item 4a, which alleges a serious violation of 29 C.F.R. § 1926.251(a)(1). Both parties have submitted post-hearing briefs with respect to these two items.

Jurisdiction

In its answer, M.. De Matteo admits that it is subject to the Act and to the jurisdiction of the Commission. It also admits that it is an employer which handles goods and materials that have crossed state lines, and I so find. I accordingly conclude that M. De Matteo is an employer within the meaning of section 3(5) of the Act and that the Commission has jurisdiction over the parties and the subject matter of this proceeding.

Background

The building under construction at the work site was a four-story structure measuring 100 feet wide by 300 feet long. Three companies were identified as general contractors for the job: M. De Matteo, Massachusetts Electric Construction Company, and Fischbach & Moor. The Secretary submitted no evidence relating to either the division of authority and control among these companies or M. De Matteo's relationship with any of the many on-site subcontractors. (Tr. 11, 106-108.)

The OSHA inspection was conducted by Compliance Officer ("CO") James Holiday, as part of the planned inspection program. During the inspection, CO Holiday discovered a lanyard with a broken safety latch draped over a wooden box located on the second floor, a come-along, or winch, with a broken spring-loaded safety latch inside a tool box on the top floor, and wire ropes that appeared to have bends in them located on the deck of a crane on the second floor. There was no evidence relating to which contractor used or controlled the wooden box on the second floor. An M. De Matteo employee, however, reported that company employees had a practice of obtaining needed gear from the tool box on the top floor, where the come-along had been found. (Tr. 12-17, 25-35, Exhs. C-7-9). Based on these discoveries, the CO recommended the issuance of the two subject citation items.

Citation 1, Item 2a

This item alleges a serious violation of 29 C.F.R. § 1926.502(d)(21), which provides that "personal fall arrest systems shall be inspected prior to each use for wear, damage and other deterioration, and defective components shall be removed from service." The Secretary did not submit evidence that M. De Matteo did not inspect its personal fall arrest systems prior to each use. Rather, this item was based solely on the defective safety latch on the lanyard that CO Holiday found

in the wooden box on the second floor.

I find that the standard applies to the cited condition, in that employees at the site used personal fall arrest systems during their work and a harness to such a system containing a defective safety latch was discovered on the site. The Secretary's evidence, however, did not persuade me that M. De Matteo violated the terms of the standard, as there was no proof that either the wooden box or the defective lanyard was controlled or used by M. De Matteo employees. On the contrary, M. De Matteo required its employees to return their personal fall protection systems to their crew trailer at the end of each shift, and there was unrebutted testimony that M. De Matteo did not in fact store lanyards in the subject wooden box. There was also no evidence pertaining to what authority M. De Matteo had, if any, in the area where the lanyard was found. Moreover, there were at least four other employers on the site who used lanyards, and any one of them could have been responsible for the lanyard or the wooden box. (Tr. 106-110).The Secretary has thus failed to establish her prima facie case, and, consequently, this citation item is vacated.[1]

Citation 1, Item 4a

This item alleges a serious violation of 29 C.F.R. § 1926.251(a)(1), which provides that:

> Rigging equipment for material handling shall be inspected prior to use on each shift and as necessary during its use to ensure that it is safe. Defective rigging equipment shall be removed from service.

CO Holiday recommended the issuance of this item based on the wire rope on the second floor crane and the come-along with the defective latch on the top floor. (Tr. 24-25, 32). Similarly to Item 2a, the Secretary did not submit evidence that M. De Matteo did not have a practice of inspecting rigging equipment prior to use. Instead, she relied solely on the existence of the conditions as the basis for this citation item.

As to the wire rope, I was not persuaded by the Secretary's evidence that the slight bends were a "defect" which would warrant removing the ropes from service. While the CO testified that the ropes were defective because they had "kinked" areas that had been "crushed," his photographs

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[1] To prove a 5(a)(2) violation, the Secretary has the burden of establishing that:

> (1) the standard applies, (2) the employer violated the terms of the standard, (3) Respondent's employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition.
> *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1052 (No. 86-1087, 1991).

depict only a slight bend in some areas of the ropes and do not reveal any fractured or frayed wire strands. Further, as Tim Toth, M. De Matteo's safety manager, testified, the photographs of the wire ropes do not depict a crushed rope, as the core was not visible. Rather, the photographs show bends that occur during normal use and do not warrant removal from service. (Tr. 37, 51-52, 92-93, Exhs. C-7-10). Notably, the CO did not explain how the "kinked" areas would have weakened the wire ropes. Accordingly, I conclude that the standard does not apply to the wire ropes.

I find that the come-along, on the other hand, was defective because the safety latch did not snap back into a closed position after being opened. This would have created a dangerous situation if, when in use, the hook had slipped off its anchorage point. (Tr. 24-27, 55).[2] The standard therefore applies to the come-along. Further, the Secretary submitted evidence that M. De Matteo's employees used the box where the defective equipment was found, and this proof was not rebutted by the company. (Tr. 28-30). I find, therefore, that the Secretary has made a nominal showing that, at the very least, a piece of defective rigging equipment was located in an area where Respondent's employees had access to it. The Secretary has thus shown, arguably, that Respondent failed to remove defective equipment from use and that employees had access to the cited hazard.

However, the Secretary failed to establish the knowledge element of her prima facie case. Commission precedent is well settled that the test in this regard is whether the employer knew, or with the exercise of reasonable diligence could have known, of the hazard. *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1976 (No. 97-0152, 1999), *citing Pride Oil Well Serv.*, 15 BNA OSHC 1809 (No. 87-692, 1992). Clearly, there is no proof of actual knowledge, as the CO obtained no statements or admissions that any of M. De Matteo's supervisory employees was aware that a defective come-along was located on the tool box. There is also no proof of constructive knowledge, because there was no evidence regarding how long the defective come-along had been in that location prior to the OSHA inspection; for example, the come-along could have been taken out of

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[2] M. De Matteo argues that the come-along was not defective because the CO could not identify an OSHA standard which requires that a come-along hook contain a safety latch. I am not persuaded by this argument. The fact is that this come-along had a safety latch, which was defective and created a hazard, as discussed, *infra*. Indeed, Toth agreed that the purpose of the safety latch was to keep the load from coming undone, and admitted that if he had found this safety clip in use, he would have removed it from service. (Tr. 73, 89-91, 111). M. De Matteo's secondary argument, that the Secretary did not establish that the come-along was rigging equipment, is similarly unpersuasive, in light of the evidence relating to how the come-along was used. (Tr. 25-26)

service and placed on the tool box only minutes or even seconds before the CO arrived. Further, the Secretary presented no evidence to support a finding of constructive knowledge based on any failure of M. De Matteo to adequately supervise or inspect the work site. In view of the evidence, I cannot find that M. De Matteo could have known of the alleged hazard with the exercise of reasonable diligence. This citation item is therefore vacated.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

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

1. Citation 1, Item 2a, alleging a serious violation of 29 C.F.R. § 1926.502(d)(21), is VACATED.

2. Citation 1, Item 4a, alleging a serious violation of 29 C.F.R. § 1926.251(a)(1), is VACATED.

3. The Settlement Agreement dated October 17, 2002 is approved, and its terms are incorporated in their entirety as part of this Order.

/s/
COVETTE ROONEY
JUDGE, OSHRC

Dated: December 20, 2002
Washington, D.C.