Secretary of Labor, Complainant, v. Recchi America, Inc. - GLF Construction Corporation, A Joint Venture, Respondent.	OSHRC Docket No. **02-0667**

Appearances:

Millard P. Darden, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For Complainant

Donald R. McCoy, Esq., Donald R. McCoy, P.A., Ft. Lauderdale, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

RECCHI America, Inc./GLF Construction Corporation (RAI/GLF), is a joint venture formed to construct the Sidney Lanier Bridge in Brunswick, Georgia, replacing the existing lift bridge that spans the Brunswick River. The bridge project began in 1998 and was scheduled to be completed by February 2003. The Occupational Safety and Health Administration (OSHA) had issued citations resulting from safety inspections of RAI/GLF's bridge project on August 18, 1999, and June 1, 2000. On October 24, 2001, OSHA compliance officer (CO) Ronald Byrd began a follow-up inspection at the bridge construction site, which resulted in the Secretary issuing the instant citations for serious and repeat violations of the Occupational Safety and Health Act of 1970 (Act) on April 10, 2002. RAI/GLF timely contested the citations and proposed penalties.

Citation no. 1 contains one item alleging a serious violation of 29 C.F.R. § 1926.701(b) for failing to guard protruding reinforcing steel into which employees could fall on or about November 16, 2001. The Secretary proposed a penalty of $2,000 for this item.

Citation no. 2 contains three items. Item 1 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(4)(ii) for failing to protect walking/working surfaces to prevent employees from tripping in or stepping into holes on or about November 16, 2001. Item 2 alleges a repeat violation

of 29 C.F.R. § 1926.550(a)(9) for failing to barricade accessible areas within the swing radius of the rear of a crane's rotating superstructure on or about October 24, 2001. Item 3 alleges a repeat violation of 29 C.F.R. § 1926.550(f)(1)(iv) for failing to positively secure a mobile crane to a barge on October 24, 2001. The Secretary proposed a penalty of $25,000 each for items 1 and 2, and a penalty of $70,000 for item 3.

The court held a hearing in this matter on December 10 and 11, 2002, in Savannah, Georgia. The parties stipulated to jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

RAI/GLF contests only the amount of the proposed penalty for item 1 of citation no. 1 (RAI/GLF's brief, p.1). For citation no. 2, RAI/GLF denies that it failed to comply with the standards cited in items 1, 2, and 3. RAI/GLF also contends that CO Byrd's inspection was flawed and that the Secretary failed to issue the citations with reasonable promptness.

For the reasons discussed, RAI/GLF's procedural objections are rejected. Item 1 of citation no. 1 and item 2 of citation no. 2 are affirmed. Items 1 and 3 of citation no. 2 are vacated.

Background

RAI/GLF is a joint venture formed to construct the Sidney Lanier Bridge in Brunswick, Georgia. Construction began in 1998 and was scheduled for completion in February 2003. The Sidney Lanier Bridge is to replace an existing lift bridge that "impedes marine and vehicular traffic." The new bridge is a high-rise structure connecting the southern end of Brunswick to an unpopulated area on the south side of the Brunswick River (Tr. 22). The completed Sidney Lanier Bridge will be approximately 10,000 feet (almost 2 miles) long and approximately 200 feet wide (Tr. 23).

OSHA first inspected the project on June 25, 1999. As a result of the inspection, the Secretary issued two citations to RAI/GLF on August 18, 1999 (Exh. C-1, pp. 25-30). Citation no. 1 alleged, among other violations, serious violations of § 1926.501(b)(4)(ii) (item 4), § 1926.550(a)(9) (item 6a), and § 1926.550(f)(1)(iv) (item 6b). The parties settled the citations on August 18, 1999, with a reduction in penalty and reclassification of item 6a from serious to other-than-serious (Exh. C-1, pp. 12-14). The settlement was approved by Order dated December 2, 1999 (Exh. C-1, p. 10).

OSHA CO Ronald Byrd inspected the bridge project beginning on April 3, 2000, through May 25, 2000. Following this inspection, the Secretary issued three citations to RAI/GLF on June 1,

2000, alleging serious, repeat, and other-than-serious violations of the Act. These citations were settled with the withdrawal of two items and a reduction in penalty (Exh. C-1, pp. 171-173). The court approved the parties' settlement agreement by Order dated February 27, 2001 (Exh. C-1, p. 170).

On October 24, 2001, CO Byrd began a follow-up inspection of the bridge project. The inspection was limited to items found in the previous inspection and unsafe conditions in plain view. At that time RAI/GLF had completed the superstructure crossing the river and 85% of the approach spans (Tr. 24). RAI/GLF had approximately 125 employees on the construction site. It was using both land-based and marine-based equipment, including cranes mounted on barges (Tr. 25).

Upon arrival on site, CO Byrd went to the construction office located in a trailer on Lanier Boulevard, where he met RECCHI's safety manager Sonia Lawrence. She took Byrd to the office of project manager Brian West, where Byrd held an opening conference. Lawrence then accompanied CO Byrd to the dock area on the north side of the river (Tr. 64-67).

At the dock Byrd observed a 40-ton American Crawler Crane on a 180-foot long barge (Tr. 346). The crane was unloading rebar steel from a trailer on shore to a barge on the other side of the crane. The swing radius barricade of the crane did not completely extend beyond the crane's rotating superstructure. The crane operator and two other employees were on the barge (Tr. 68-70). One of the anchor points securing the crane to the barge had become dislodged (Tr. 69, 75).

CO Byrd returned to the bridge site on November 16. He bypassed the office trailer and went directly to the bridge deck on the south side of the river. Byrd introduced himself to deck superintendent Richard Warrell, who called West to the site. West arrived and gave Byrd permission to inspect the area (Tr. 86, 156).

CO Byrd observed uncovered access holes over the span of the bridge. Some of holes were marked with yellow caution tape, but most were not and were not otherwise guarded. Approximately 20 employees were walking in the area of the access holes. The employees were not wearing fall protection (Tr. 296). Byrd also observed protruding rebar throughout the south deck which was not covered with protective caps (Tr. 101, 303-304).

As a result of CO Byrd's inspection, the Secretary issued the citations that gave rise to this case.

Reasonable Promptness

The citations were issued on April 10, 2002, approximately 2 weeks shy of the 6 month mark since the October 24 inspection. RAI/GLF claims that the delay in issuing the citations prejudiced it in preparing its defenses, particularly with regard to the conditions observed on November 16, 2001, because the conditions had undergone drastic changes between the inspection and the issuance of the citations.

Section 9(a) of the Act provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated . . . any standard . . . of this Act . . ., he shall with reasonable promptness issue a citation to the employer.

Section 9(c) of the Act provides:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

The purpose of the six-month limitation is "to ensure that claims are prosecuted while the events are still fresh, and the witnesses and evidence can be obtained." *Safeway Store No. 914*, 16 BNA OSHC 1504 (No. 91-373, 1993). Where the citations are issued within the six-month period after the inspection, the employer must rebut the presumption that they were not issued with reasonable promptness.

In the present case, RAI/GLF has failed to show that it was prejudiced in preparing its defense. Deck superintendent Warrell was present with CO Byrd throughout his November 16 inspection and Byrd held a closing conference with project manager West where the alleged violations were discussed. Both Warrell and West testified at the hearing. In its post-hearing brief, RAI/GLF states that it "might well have come to the hearing with photographs and videos of the actual operation instead of having to rely on drawings" to dispute Byrd's measurements and estimates (RAI/GLF's Brief, p. 13). However, RAI/GLF was on notice as to what conditions were at issue. It controlled the work schedule and knew when the conditions at issue were likely to change. RAI/GLF was no stranger to OSHA proceedings, having been subjected to two previous inspections in the previous 2 years at the same site. It was RAI/GLF's responsibility to document the conditions at the time of the inspection if it believed that no violative conditions existed.

RAI/GLF appears to believe that the rapidly changing nature of its work entitles it to "express" citations, but any employer engaged in a construction project oversees rapid changes in the physical work environment. RAI/GLF was on notice of the inspection findings and could have taken action to document the conditions, if needed.

RAI/GLF's claim that the Secretary failed to issue the citations with reasonable promptness is rejected.

Improper Inspection

RAI/GLF also contends that Byrd's inspection was improper. The company contends that Byrd was required to provide copies of the complaint against it that prompted Byrds's November 16 visit. This argument is also without merit.

Byrd testified that he returned to the bridge on November 16, 2001, in response to a number of anonymous telephone calls received at his office expressing concern about fall hazards from the bridge deck. Byrd had not yet held a closing conference with an RAI/GLF representative and he considered his November 16 visit to be a continuation of his inspection begun on October 24 (Tr. 242, 247-254). It was not a complaint inspection.

RAI/GLF also argues that Byrd should not have bypassed its office trailer and gone to the bridge deck. It cites Chapter 2 of OSHA's Field Inspection Reference Manual (FIRM), which provides (Exh. R-2):

> At the beginning of the inspection, the CSHO shall locate the owners representative, operator, or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

RAI/GLF's argument fails on a number of counts, starting with the fact that an allegation that the Secretary violated § 8(a)(1) by conducting an unreasonable inspection is an affirmative defense that must be plead in the answer. RAI/GLF failed to raise the issue prior to the hearing and did not move to amend its answer during the hearing. As such, this issue should not be considered by the court. *National Engineering & Contract Co.*, 16 BNA OSHC 1778, 1779 (No. 92-73, 1994).

Even if the court were to consider this issue, RAI/GLF would fail. It is a well-established precedent of the Review Commission that OSHA's guidelines and internal documents, including the FIRM, do not confer procedural or substantive rights on employees. *Caterpillar, Inc.*, 15 BNA

OSHC 2153, 2160 (No. 87-922, 1993). Furthermore, it is undisputed that Byrd did present his credentials and hold an opening conference at RAI/GLF's trailer on October 24, which fulfills Byrd's obligation to do so "[a]t the beginning of the inspection." Even though he bypassed the office trailer on November 16 as he continued his inspection, Byrd met with West after the deck superintendent radioed for him.

RAI/GLF's argument that the Secretary conducted an unreasonable inspection is rejected.

CITATION NO. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

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

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.701(b)

The Secretary alleges that RAI/GLF committed a serious violation of § 1926.701(b), which provides:

> All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

On the first page of its brief, RAI/GLF states: "The citations allege a serious violation of 29 CFR 1926.701(b) for having unguarded, protruding rebar (Citation 1, Item 1). Respondent contests only the proposed penalty as to this citation." RAI/GLF does not further address either the merits of citation no. 1 or the proposed penalty of $2,000.00.

It is undisputed that the cited standard applies to the cited conditions. Photographs taken by CO Byrd document that the protruding rebar on the south bridge deck was not capped or otherwise guarded to prevent employees from falling and being impaled on the rebar (Exhs. C-2, C-3, C-4). Byrd observed 25 to 30 employees working on the south deck, exposed to the hazard of impalement. The uncapped rebar was in plain view, and its condition was known to RAI/GLF's management personnel (Tr. 101, 303-304). The Secretary has established a violation of § 1926.701(b).

The Secretary classified the violation as serious. A violation is serious under § 17(k) of the Act if it creates a substantial probability of death or serious physical harm. In determining whether a violation is serious, the issue is not whether the accident is likely to occur, but whether the result would be death or serious physical harm if an accident should occur. *Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

As the photographic exhibits show, the uncapped rebar was spread over a large area of the south bridge deck. Up to 30 employees were exposed to the hazard of impalement. If an employee fell onto the rebar, the likely result would be death or serious physical injury. The violation is correctly classified as serious.

The Secretary proposed a penalty of $2,000. The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

RAI/GLF had approximately 125 employees on the site at the time of the inspection (Tr. 42). The cost of the bridge project overall, including the demolition of the old bridge, was approximately $110,000,000. RAI/GLF's contract for the main span crossing and one portion of the approach was $68,000,000 (Tr. 54). OSHA had inspected the bridge project and issued citations to RAI/GLF in 1999 and 2000. The Secretary issued the instant citations as a result of a follow up to the 2000 inspection (Exh. C-1). RAI/GLF is entitled to some credit for good faith because it has a written safety program and an onsite safety manager (Tr. 201-202, 205-206). The gravity of the violation is high. There were a large number of employees working around a large number of uncapped vertical rebar, increasing the chances that an accident could occur. It is determined that a penalty of $2,000 is appropriate.

CITATION NO. 2

The Secretary classifies the three violations cited in citation no. 2 as repeat violations. A violation is considered a repeat violation "if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation." *Potlatch Corp.,* 7 BNA OSHC 1061, 1063 (No.16183, 1979). "A prima facie case of substantial similarity is

established by a showing that the prior and present violations were for failure to comply with the same standard." *Superior Electric Company*, 17 BNA OSHC 1635, 1638 (No. 91-1597, 1996).

Item 1: Alleged Repeat Violation of 29 C.F.R. § 1926.501(b)(4)(ii)

Section 1926.501(b)(4)(ii) provides:

> Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers.

The citation alleges that on the south side of the bridge, "[s]everal holes in the walking working area were not protected exposing employees to an 8 foot fall onto a four foot wide wooden platform and to a 180 foot fall to the water or ground, on or about 11/16/01." As CO Byrd was walking with Warrell on the south bridge deck, he noted several uncovered access holes. Some of the holes had yellow caution tape around them, but most had no tape or other barricade guarding them. Two or three employees working in access holes were tied off; the other employees walking in the area were not (Tr. 294-296).

Section 1926.500(b) defines "walking/working surface" as "any surface, whether horizontal or vertical, on which an employee walks or works, including but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties." There is no dispute that the south bridge deck is a walking working surface.

Section 1926.500(b) defines "hole" as "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface." Byrd measured the access holes as 7 feet, 8 inches long and 44 inches wide (Tr. 299). The access holes were holes within the meaning of the standard. Byrd and concrete foreman Donnie Haase used a tape measure to measure the depth of the holes, and found them to be 7 feet, 8 inches deep (Exh. C-23; Tr. 500).

RAI/GLF contends that the cited standard is not applicable to the cited conditions. It argues that the more applicable standard is § 1926.501(b)(4)(i) which provides:

> Each employee on walking/working surfaces shall be protected from falling through holes (including skylights) more than 6 feet (1.8m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes.

The standards address two different hazards. Section 1926.501(b)(4)(i) addresses a fall hazard, *i.e*, falling completely through the hole from its level to the level below. Section 501(b)(4)(ii) addresses a tripping hazard or "stepping into or through holes," where the employee's body remains on the same level as the hole, with only his foot or leg dropping down. Where the hole is large enough for an employee to fall through to the level below, § 1926.501(b)(4)(i) is the applicable standard. *Lancaster Enterprises, Inc., d/b/a Orbit Roofing Co.*, 19 BNA OSHC 1033, 1036, fn.13 (No. 97-0771, 2000). The holes on the bridge deck were 7 feet, 8 inches long and 3 feet, 8 inches wide, more than sufficient for an average-sized man to fall through.

CO Byrd testified that he cited RAI/GLF for a tripping hazard rather than a fall hazard because he thought tripping was more likely to happen. However, his testimony makes clear that what concerned him was the possibility of an employee tripping on something else and falling through the hole (Tr. 250-251):

> [T]he workers that were working right at the hole of the openings, those workers were protected; they were tied off. I was relating my citation versus the guys that were walking by the opening. And, they had a greater potential of tripping over rebar or even that piece of wood that came across the walk path.

The standard the Secretary cited does not address the tripping hazard as described by CO Byrd. Section 1926.501(b)(4)(ii) addresses the hazard of tripping in the hole itself, not tripping on some other object and falling into the hole. The cited standard is not applicable. Item 1 is vacated.

Item 2: Alleged Repeat Violation of 29 C.F.R. § 1926.550(a)(9)

The Secretary alleges a repeat violation of § 1926.550(a)(9), which provides:

> Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

On October 24, Byrd went to the dock area where he observed a 40-ton American Crawler Crane mounted on a 180-foot long barge. The crane was being used to unload rebar from a trailer to another barge (Tr. 69). Crane operator James Oxner testified that the crane was barricaded with four pieces of PVC pipe staked and strung with yellow caution tape or yellow rope. Initially, Oxner testified, this was sufficient to prevent employees from accessing the areas within the swing radius of the rear of the crane's rotating superstructure (Tr. 347). Later, around the time of Byrd's

inspection, more employees were working on the barge and Oxner conceded that the barricade was insufficient to prevent employees from exposure to the hazard of being struck by the rotating superstructure of the crane (Tr. 348):

> [W]e didn't have quite as much materials on the barge, we had more people on the barge and [the swing radius barricade] needed to be wider, so when I swung, at least the counterweight would be a little bit inside the caution tape.

RAI/GLF had moved the barge from the bridge area to the dock area for the purpose of making repairs, including the widening of the barricade (Tr. 348-349). However, at the time of Byrd's inspection, the barricade had not been widened and the crane was in use. Byrd observed two employees working on the barge while Oxner operated the crane. The superstructure of the crane extended beyond the barricade approximately 2 feet. The two employees were working approximately 6 feet from the accessible area (Tr. 73). Oxner conceded that he was aware that the superstructure of the crane swung outside the barricade radius at a certain point (Tr. 375).

RAI/GLF argues that its employees were trained to avoid areas where they could come in contact with the rotating superstructure of the crane. This argument is without merit. Compliance with the cited standard cannot be achieved through employee training; the standard requires the installation of a physical barricade.

The Secretary has established a violation of § 1926.550(a)(9). She alleges that it is a repeat violation.

On August 18, 1999, the Secretary cited RAI/GLF for a violation of § 1926.550(a)(9) because on or about July 1, 1999, the company failed to properly guard the swing radius of the rear of a crane's rotating superstructure. RAI/GLF abated the violation and, on November 19, 1999, entered into a Stipulation and Joint Motion with the Secretary for final disposition of the matter, affirming the violation as other than serious. Judge Nancy Spies issued an order approving the stipulation on December 2, 1999 (Exh. C-1).

On June 1, 2000, the Secretary cited RAI/GLF for a repeat violation of § 1926.550(a)(9) because on or about April 14, 2000, RAI/GLF failed to properly guard the swing radius of a crane's rotating superstructure. RAI/GLF abated the violation during the inspection. On February 21, 2001, RAI/GLF entered into a Stipulation and Joint Motion with the Secretary for final disposition of the

matter, affirming the violation as repeat. This court issued an order approving the stipulation on February 27, 2001 (Exh. C-1).

The Secretary has established that RAI/GLF committed a repeat violation of § 1926.550(a)(9). Item 2 is affirmed.

The Secretary proposed a penalty of $25,000. Failing to barricade all accessible areas of the swing radius of a crane's rotating superstructure exposes employees to the hazard of being struck or crushed, putting them at risk for death or serious physical injury. RAI/GLF had twice before been cited for the same violation at the same site. A penalty of $25,000 is appropriate.

Item 3: Alleged Repeat Violation of 29 C.F.R. § 1926.550(f)(1)(iv)

Section 1926.550(f)(1)(iv) provides:

Mobile cranes on barges shall be positively secured.

It is undisputed that when CO Byrd observed the American Crane Crawler on October 24, one of the four pad eyes used as anchor points to secure the crane to the barge was broken (Tr. 69, 75). Byrd stated, "When we went up to the barge at the dock, on one side of the crane, it looked good; it was secured. And, as I continued my walk-through and walk-around the crane, the other side did not have the cable attached to the crane" (Tr. 75).

RAI/GLF contends that § 1926.550(f)(1)(iv) is not applicable to the cited crane. Noting that § 1926.550(f) is captioned "Floating cranes and derricks," RAI/GLF argues that, at the time of the inspection, the barge was moored to another barge (effectively docked), it was grounded on mud, and the Brunswick River was at low tide. Thus, the barge was not floating.

It is immaterial whether or not the barge was floating at the time of the inspection. Although the caption to the standard refers to "floating cranes," the standard itself does not contain the word "floating." It is the standard itself, and not the caption, that determines the scope of the standard. *Chesapeake Operating Company*, 10 BNA OSHC 1790, 1793 (No. 78-1353, 1982). The standard plainly addresses "mobile cranes on barges." Undoubtedly, the crane in question was a mobile crane on a barge. The cited standard is applicable.

RAI/GLF argues that the barge had been towed in to effect various repairs, including the broken pad eye. But, as noted in the previous section, the crane was being used to hoist rebar before any repairs were made (Tr. 355).

Oxner testified that as a temporary measure, he "put a chain in through the eye around the corner bit of the barge. . . . A corner bit is where you would put more in the line to secure it to like another barge or a dock" (Tr. 357). Oxner testified that the chain around the corner bit secured the crane as well as a cable through the repaired pad eye would (Tr. 359-360).

The Secretary offered no rebuttal to Oxner's testimony at the hearing and does not address it in her post-hearing brief. It is the Secretary's burden to establish that RAI/GLF failed to positively secure the crane to the barge. She has not shown that temporarily chaining the crane to a corner bit on the barge is less secure than anchoring the crane through the pad eye. Therefore, the Secretary has failed to establish that RAI/GLF failed to comply with the terms of the standard. Item 3 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1. Item 1 of citation no. 1 is affirmed, and a penalty of 2,000 is assessed;
2. Item 1 of citation no. 2 is vacated, and no penalty is assessed;
3. Item 2 of citation no. 2 is affirmed, and a penalty of $25,000 is assessed; and
4. Item 3 of citation no. 2 is vacated, and no penalty is assessed.

/s/
KEN S. WELSCH
Judge

Date: May 12, 2003