OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, NW, Ninth Floor

Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 03-1816
	:	
S & F CONCRETE CONTRACTORS,	:	
	:	
Respondent.	:	

Appearances: Christine T. Eskilson, Esq.
U.S. Department of Labor
Office of the Solicitor
New York, New York
For the Complainant.

James F. Grosso, Esq.
O'Reilly Grosso & Gross, P.C.
Framingham, Massachusetts
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"). Respondent, S & F Concrete Contractors, Inc.("S & F"), at all times relevant to this case maintained a work site at 32 Fruit Street in Boston, Massachusetts. The parties have agreed that S & F is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act. Accordingly, the Commission has jurisdiction over this proceeding.

On April 28, 2002, Compliance Officer ("CO") James Mulligan of the Occupational Safety and Health Administration ("OSHA") conducted a programmed planned inspection of S & F's work site. As a result, S & F was issued one citation alleging two serious violations of the Act. The total proposed penalty for the citation was $2,750.00. By filing a timely notice of contest, S & F brought

this proceeding before the Commission. This matter was designated for E-Z Trial pursuant to Commission Rule 203, and, on February 24, 2004, a hearing was held in Boston, Massachusetts. Counsel for the parties have briefed the issues, and this matter is ready for disposition.

Background

The subject job site involved the construction of a clinical outpatient building for Massachusetts General Hospital; the building was an eight-to-twelve-story steel and concrete structure with five or six parking levels beneath it. S & F was the concrete contractor on site and was responsible for placing the concrete on the steel decks as the building went up and on the parking levels as they were dug down. Upon his arrival at the site, CO Mulligan introduced himself to the general contractor, Walsh Brothers Construction, and he then conducted an opening conference with all of the contractors on site. S & F's site superintendent, Joe Pacheco, attended the opening conference and accompanied CO Mulligan during the walk-around. At the time of the inspection, S & F had 30 to 40 employees on the site; the employees were working on a column in the parking garage, and they were also pouring concrete on the seventh floor. (Tr. 10, 13-17).

Burden of Proof

To establish a violation of a standard, the Secretary must show (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).[1] *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1 Item 1 - 29 C.F.R. § 1926.416(e)(1)

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[1]"Reasonable diligence" includes more than the actual knowledge possessed by the employer; it also encompasses "the obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). An employer has a duty to inspect its work area for hazards, and an employer who lacks actual knowledge can nevertheless be charged with constructive knowledge of conditions that could be detected through inspection or examination of the work site. *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050 (No. 93-3467, 1995). An employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980). *See also Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221 (No. 86-758, 1991).

This item alleges a violation of 29 C.F.R. 1926.416(e)(1), which provides as follows:

Worn or frayed electric cords or cables shall not be used.

In her citation, the Secretary alleges that on the ramp to the P-4 parking garage, an extension cord being used to power a reciprocating saw was damaged.

CO Mulligan testified that during his walk-around in the parking garage he observed S & F employee Luis Cabral working with a power tool, a Saws-All, in connection with his work on a column. The Saws-All was plugged into an extension cord which he had picked up from the gang box that morning. The CO observed that the strain relief for the cord had pulled away from the cord cap, which exposed the color-coded conductors. He was concerned that the conductors could become loose and potentially expose the employee to a shock hazard during use. At the hearing, the CO acknowledged that the conductors were not cut, frayed or exposed; thus, no shock hazard was present if someone had touched one of these wires. (Tr. 17-21, 38-41, 60; Exh. C-1 and C-2).

S & F does not dispute the applicability of the cited standard or the fact that one of its employees was observed using the cited extension cord; rather, S & F contends that it had no knowledge of the hazard. S & F presented testimony that employees had been instructed to inspect their equipment prior to use and to remove damaged electrical cords from service. S & F also contends that the extension cord could have been in perfectly good condition at the beginning of the day and become damaged while in use. (Tr. 68-69, 83-85). I find that the damaged extension cord was in use and in plain view of the CO during the inspection. Where a cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994), citing *Hamilton Fixture,* 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993), *aff'd on other grounds,* 28 F.3d 1213 (6th Cir.1994). Furthermore, with respect to S & F's work rule for inspecting cords before use, the record lacks evidence that the rule was adequately communicated to employees, that S & F took steps to discover violations of the rule, and that S & F effectively enforced the rule. *See Hackney, Inc.*,16 OSHC BNA 1806,1810 (No. 91-2490, 1994). The Secretary has shown noncompliance with the standard's terms, and she has also shown employee exposure and employer knowledge. This citation item is therefore affirmed.

In view of the fact that the damaged extension cord presented no shock hazard in the condition in which the CO found it, I find that the record demonstrates that the cited condition was other-than-serious; that is, there was a direct and immediate relationship between the violative condition and occupational safety and health, but not a relationship such that a resultant injury or illness was death or serious physical harm. This item is accordingly affirmed as an other-than-serious violation, and no penalty is assessed.

Citation 1 Item 2 - 29 C.F.R. § 1926.502(b)(1)

This item alleges a violation of 29 C.F.R. 1926.502(b)(1), which provides as follows:

> Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

In her citation, the Secretary alleges that on the seventh floor, shaft C, the guardrails at the shaft were 31 inches high.

CO Mulligan testified that on the day of his inspection, S & F was placing concrete on the steel decking of the seventh floor. Upon arriving at that floor, the CO observed that compressor hoses, along with a piece of pipe used to blow debris off the deck, had been placed next to a shaft where the guardrails were sagging and were approximately 31 inches high. During the course of his inspection, laborers informed him that in preparation for the pouring of concrete that morning, the foreman had instructed them to go to the seventh floor and blow off debris to make sure the deck was clean for the concrete placement. They were further instructed to wrap up everything afterwards, and the employees told the CO that they had placed the hoses in the cited area. The CO also observed plywood next to the shaft, which laborers and carpenters had loaded onto the seventh floor that morning. He spoke to the carpenter foreman, Joe Londre, who told him that he had not gone up onto the floor that morning prior to assigning employees to work there. The fall hazard was 12 to 14 feet. CO Mulligan acknowledged that S & F did not install the guardrail and that he did not cite any other contractor for this violation. (Tr. 22-29, 48-50; Exh. C-3, C-4, and C-5).

S & H does not dispute the applicability of the cited standard; instead, S & H argues that because the CO never actually saw S & F employees working in the cited area, he could not have known how far from the shaft employees were when they placed the materials in that area. S & F

also relies upon the multi-employer work site defense and contends that in light of the fact that it did not install the guardrails and was not responsible for maintaining them, it should not be found in violation of the cited standard.[2] I find that the unrebutted statements by the laborers to the CO in regard to their duties that morning, together with the photographic evidence entered into evidence, prove that S & F employees were exposed to the inadequate guardrails during the course of their assigned duties.[3] It is clear that S & F did not create the cited condition, however, the record is also clear that S & F did not take any steps to protect its employees from the cited condition. (Tr. 45-47, 53). I find that the record establishes that the violative condition was in plain view, and had the employer exercised reasonable diligence, *i.e.*, had it inspected the area prior to the assignment of work that morning, the violative condition would have been discovered. The Secretary has established noncompliance with the standard's terms, and she has also established employee exposure and employer knowledge. This citation item is therefore affirmed.

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. To demonstrate that a violation was serious, the Secretary need not establish that an accident was likely to occur, but, rather, that an accident was possible and that it was probable that death or serious physical harm could have occurred. *Flintco, Inc.*, 16 BNA OSHC 1404, 1405 (No. 92-1396, 1993). In the particular circumstances of this case, I find that the violation was serious. The Secretary appropriately classified the violation in this case as serious because the violative condition was one that could have resulted in death or serious physical harm.

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[2]To establish this defense, an employer must prove that (1) it did not create the violative condition to which its employees were exposed, (2) it did not control the violative condition, so that it could not itself have performed the action necessary to abate the condition as required by the standard, and (3) it took all reasonable alternative measures to protect its employees from the violative condition. *Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994).

[3]The Secretary may prove employee exposure to a hazard by showing that during the course of their assigned 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 it is reasonably predictable that they will be a zone of danger. *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521 (No. 90-2866, 1993); *Armour Food Co.*, 14 BNA OSHC 1817, 1824 (No. 86-247, 1990).

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. As to the gravity of this item, I find the severity high, due to the fact that falling 12 to 14 feet could cause death or serious injury, and the probability of an injury occurring as lesser, due to the short time of exposure and the limited number of employees exposed.[4] The record indicates that no adjustment for size or history is appropriate; however, an adjustment for good faith is warranted in light of S & F's good safety and health program. (Tr. 31-34, 55). A penalty of $1,875.00 is accordingly assessed for this citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.416(e)(1), is AFFIRMED as an other-than-serious violation, and no penalty is assessed.

2. Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.502(b)(1), is AFFIRMED as a serious violation, and a penalty of $1,850.00 assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: April 26, 2004
Washington, D.C.

[4]The CO's recommended penalty was based upon medium severity and lesser probability.