UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.

ANDERSON EXCAVATING & WRECKING COMPANY,
Respondent.

OSHRC DOCKET
NOS. 92-1899
92-2122

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 20, 1993. The decision of the Judge will become a final order of the Commission on November 19, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 9, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 20, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 92-1899 & 92-2122

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

William H. Berger
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Christopher W. Phillips, Esquire
F. Saunders Aldridge, III, Esquire
Hunter, MacLean, Exley & & Dunn
Post Office Box 9848
Savannah, GA 31412 0084

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00109007955:04

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX
COM (404) 347-011
FTS (404) 347-0113

SECRETARY OF LABOR, Complainant, v. ANDERSON EXCAVATING & WRECKING COMPANY, Respondent.	OSHRC Docket Nos. 92-1899 & 92-2122 (Consolidated)

APPEARANCES:

Michael K. Hagan, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Christopher W. Phillips, Esquire
F. Saunders Aldridge, III, Esquire
Hunter, MacLean, Exley & Dunn, P.C.
Savannah, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Anderson Excavating & Wrecking Co. (Anderson), a demolition contractor, contests serious citations issued to it on May 15, 1992 (Docket No. 92-1899), and on June 12, 1992,[1] (Docket No. 92-2122), under the Occupational Safety and Health Act of 1970 (Act). The May 12 citation alleged violations of (1) §1926.105(a) for failure to provide safety nets for

[1] The citation was amended at the hearing to reflect the correct date of issuance as June 12, 1992, rather than June 12, 1969.

workers exposed to falls of greater than 25 feet; (2) § 1926.100(a) for failure to wear hard hats; and (3) § 1926.1051(a) for failure to provide a ladder or safe access between elevations. The June 12 citation alleged only a violation of § 1926.105(a). The cases were consolidated for hearing and decision. Jurisdiction and coverage are admitted.

Anderson was the prime contractor for demolition of the old Talmadge Bridge which spanned the Savannah River between Georgia and South Carolina. The Talmadge Bridge had been damaged and was to be replaced by a newly constructed bridge. Both the old and new bridges were a part of the Interstate Highway system. On February 28, 1992, compliance officers of the Occupational Safety and Health Administration (OSHA), Luis Ramirez and David Baker, conducted a complaint inspection of Anderson's worksite at the north (South Carolina) end of the Savannah River. Anderson's employees were in the process of removing pavement from the steel frame of the bridge (Tr. 71). On April 16, 1992, Baker returned to Anderson's site on the south (Georgia) side of the river to conduct a second inspection.

Do the construction standards apply to Anderson's demolition worksite?

Anderson argues that since its work was "purely demolition" and not "work for construction, alteration, and/or repair" [§ 1910.12(b)], the construction standards of §1926 do not apply.[2] The argument is rejected.[3] The construction standards were adopted to apply "to every employment and place of employment of every employee engaged in construction work" [§ 1910.12(a)]. To the extent that the issue turns on whether the site was a "place of employment," the construction standards unquestionably apply to Anderson's worksite. *See Simpson, Gumpertz & Heger, Inc.*, __ F.2d __ (1st Cir. 1993), 16 BNA OSHC 1313, 1993 CCH OSHD ¶ 30,180 (No. 92-2237, 1993).

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[2] Anderson does not argue that Subpart T - Demolition (§ 1926.850-860) pre-empts the cited standards but rather that the construction standards, by definition, cannot apply to "pure" demolition projects.

[3] In addition to this analysis, unreviewed decisions of Review Commission judges rejected similar arguments. *S. G. Loewendick and Sons, Inc.*, 2 BNA OSHC 3197, 1974-75 CCH OSHD ¶ 18,632 (No. 6120, 1974) (although construction standards did not specifically reference demolition, processes for both were so similar that there was no basis for exemption); *S. G. Loewendick and Sons, Inc.*, 6 BNA OSHC 1630, 1978 CCH OSHD ¶ 22,730 (No. 76-3064, 1978) (considering the statutory precedents "the construction standards implicitly include demolition operations").

Even under a narrower analysis, the standard applies. Anderson's employees performed the work, followed the work practices, and used the tools of the construction trades (crane operators and welders, among others). It utilized construction trade subcontractors. Anderson argues that its work was "pure demolition" since its contract called for demolition of the old bridge and not construction of the replacement bridge. Anderson's attempt to distinguish between "pure" demolition and that performed as part of "an overall construction project" is misplaced. Anderson's project cannot be considered "pure" demolition. When properly viewed as a whole, demolition is only one portion of the project to replace the interstate bridge over the Savannah River. Demolition and construction are inextricably combined. Anderson's interpretation would deny its employees protection of the standards when removing the "old" bridge while employees performing substantially similar work on the "new" bridge 75 feet away would be covered. There is nothing so inherently distinct in the demolition industry which could provide a philosophical basis for the type of wholesale exemption Anderson proposes.

The construction standards of §1926 suggest that §107 of the Contract Work Hours and Safety Standards Act [40 U.S.C. 333], §1 of the Davis-Bacon Act [40 U.S.C. 276a], §1 of the Miller Act [40 U.S.C. 270a], and other specified labor law statues are of "considerable precedential value" in defining "construction" [§1926.13]. Although these earlier statutes did not further define "construction, alteration, or repair," Anderson argues that "demolition" did not fall within the definition of those terms. Anderson supports this broad proposition with an opinion letter written in 1935 by the then United States Attorney General. The opinion, which analyzed application of the Davis-Bacon Act to a governmental entity, offers little assistance in defining the terms "construction, alteration, and/or repair" since this was not a focus of the opinion. It also suggests that demolition "as an incident" of a building project may come within the coverage definition. Contrary to Anderson's argument, the present facts appear to support demolition as "an incident" to the construction of the new bridge. Finally, interpretative rules from the referenced labor laws need not have any direct application to interpretations under the Act. *Bechtel Power Corp.*, 4 BNA OSHC 1005 at 1008, 1975-76 CCH OSHD ¶ 20,503 at p. 24,500 (No. 5064, 1976),

aff'd per curiam, 548 F.2d 248 (8th Cir. 1977). The Secretary has established that the construction standards apply to respondent's operation.

ALLEGED SERIOUS CITATION

ITEM 1: § 1926.105(a)

The Secretary alleges that Anderson violated § 1926.105(a) during both inspections because its employees were exposed to falls from the bridge. Anderson counters that the Secretary has failed to prove a violation and that compliance was infeasible and would have created a greater hazard. The standard requires:

> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground . . . where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

Anderson primarily asserts that § 1926.105(a) requires only the use of safety nets. Since §§ 1926.28(a) and 1926.104 were not cited, it posits that the Secretary was precluded from arguing for the use of safety belts, lifelines and lanyards. The Secretary disagrees. Both parties cite many of the same cases in support of their positions. *See Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567 (11th Cir. 1987); *L. E. Myers Company, High Voltage Systems Division*, 12 BNA OSHC 1609, 1986-87 CCH OSHD ¶ 27,476 (No. 82-1137, 1986), *rev'd on other grounds*, 1986-87 CCH OSHD ¶ 27,919; *Bratton Corp.*, 14 BNA OSHC 1893, 1990 CCH OSHD ¶ 29,152 (No. 83-132, 1990).

Anderson misunderstands the import of § 1926.105(a), as interpreted by the courts and the Commission. The "standard provides that safety nets are required where other devices are impractical, not that safety nets are required unless other devices are practical." *Falcon Steel Co.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶ __ (Nos. 89-2883 & 89-3444, 1993). *See also State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161, 1993 CCH OSHD ¶ 30,042 (Nos. 90-1620 & 90-2894, 1993); *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1165 (5th Cir. 1981); *Peterson Bros. Steel Erection Co.*, __ BNA OSHC __, 1991 CCH OSHD ¶ 29,549 (No. 90-2304, 1991).

Falcon clarifies the standard's mandate that safety nets are "the device of last resort, required if the other enumerated devices, including belts, are impractical." 16 BNA 1179, 1993 CCH at 1189. Thus, if one of the other methods specified in the standard can be used, the standard requires that it should be used. *State Sheet Metal Co., supra*. Under *Falcon*, the Secretary sustains a violation of § 1926.105(a) by showing that employees were subject to falls of 25 feet or more; that none of the safety devices listed in the standard was used; and, if safety belts are proposed as abatement, that safety belts were practical. The Secretary bears the burden of proof on each issue. Only if the evidence establishes that safety belts are impractical will the issue of safety nets be evaluated. The facts of this case demonstrate that safety belts were practical.

On February 28, 1992, Ramirez and Baker inspected Anderson's bridge demolition worksite. The compliance officers videotaped the operation from the new bridge (Exh. C-1). At least three employees were on the bridge roadway. One employee was on a lower level pier (or support column) beneath exposed steel girders. The employee on the pier, William Green, accessed the pier by burning holes in and climbing on the steel. He was not tied off during the burning operation (Tr. 310). Green walked back and forth along the 9-foot wide by 40-foot long pier (Tr. 300). Green initially removed concrete from the pier and was not tied off at that time (Tr. 300). He did tie off when he began burning off the bolts on each side of the pier, which took 30 to 40 minutes to complete (Tr. 291, 312, 322). After burning the bolts, Green climbed up, crawled, and then walked along one of the steel girders to the roadway (Exh. C-1). He used no fall protection while he moved from the pier to the roadway. Another employee, Jack Levell, "safety walked" or "cooned" back along the girders without fall protection. He also tied off before welding (Exh. C-1; Tr. 299-300).

A crane positioned on the roadway lifted large sections of pavement from the bridge. Employees present were preparing to break the pavement into smaller sections (Exh. C-1 thru C-3). The roadway work area had three open sides, one across the north edge (where the roadway had been completely removed), and two sides along the east and west perimeter of the bridge (where guardrails had been removed extending 40 to 50 feet) (Tr. 40-41, 283). On February 28, a fall hazard existed at the east and west sides because Anderson's subcontractor prematurely removed too many guardrails. Employees came close

to the unprotected edges at all three open sides. While on the roadway, none of the employees used any form of fall protection.

Employees on the roadway were at least 108 feet above ground level (Tr. 43, 283). On the pier below, Green was approximately 95 feet above ground level (Exh. C-1). The roadway had several large cracks on the walking surface, with wire rope and equipment stored near the open edges. There were tripping hazards, and it was windy on the bridge (Tr. 260). Fall hazards existed for employees on the bridge roadway, the girders, and the pier during the first inspection. Safety belts and lanyards were practical during portions of the employees' exposure but were not used.

On April 16, 1993, Baker conducted a second inspection. He saw three Anderson employees working 85 feet above ground level at the Georgia side of the old bridge. No roadway remained at the work area at that point. Employees were working from one of the horizontal main support beams, which was 14 to 18 inches wide (Tr. 192, 193). With the exception of a gap, guardrails were in place to protect from a fall to the outside of the horizontal support beam. Baker noted employees passing back and forth in front of the guardrail gap and incorrectly assumed that they were not tied off or protected from interior falls from the beam. The testimony of employee Green, among others, established that a ⅛-inch steel cable had been strung along the bottom of the guardrail "so we wouldn't have to be tying in at every little stop" (Tr. 316). Employees snapped their lanyards to the line and moved with fall protection. Green testified that other than the time necessary to access the work area, "they had been tied off all day" (Tr. 306, 314, 325, 326). Green was a forthright and credible witness. Since Baker was at least 85 feet from the work area, his observation could have been inaccurate. Baker also misunderstood when an employee on the bridge held up a lanyard for Baker to see. Contrary to Baker's assumption, the employee's lanyard had not been disconnected from the lifeline (Tr. 326, 334).

However, although employees were protected while moving at their work stations, they used no fall protection to access the work area. Green explained that Anderson "liked employees to be tied off once we got to our [work] stations " (Tr. 313). Green was not aware of any requirement to be tied off while getting to and from the work area. Green and other employees walked the beam for approximately 600 feet before they reached their work

area. Their only fall protection at that time was holding onto the guardrails with their hands. Since interior falls were possible in such circumstances, employees were exposed to a fall hazard while they accessed their work.

PRACTICALITY OF SAFETY BELTS

Each party considered it to be the other's burden to prove the practicality of using safety belts. The burden correctly rests with the Secretary.[4] After the first inspection, Anderson began stringing ⅛-inch steel cable across the end of the bridge where the roadway was removed, "so nobody could walk off and men could hook lanyards to it" (Tr. 247). Cables were also run along the east-west side of the bridge by the time of the second inspection (Tr. 181, 348). There was no reason why cables could not have been utilized as lifelines at the time of the initial inspection. A lifeline would provide equal protection for the exposed employees who traversed 600 feet to get to their work stations as it did for them while at their work stations. Even if guardrails were not available as anchor points for the north or east-west lifelines, vertical member stanchions could have been erected as attachment points where necessary (Tr. 198, 199). Anderson had the cable, welding tools, and experienced employees to facilitate erecting such a system. Also, a lifeline would have permitted Green to remain tied off while he removed concrete and walked along the pier. Anderson's vice-president, Lanny Levell, admitted that "we could have put [a cable] down there" (Tr. 251, 258, 259, 317). Green's failure to tie off while burning access holes was also practical and was a violation of Anderson's work rule.

Considering the specific work being performed in each instance of exposure, the potential interference with that work by use of safety belts, and the physical capability to provide the protection, the record as a whole establishes that it was practical to use safety belts during both inspections. However, during the specific times that Green, and later Levell, moved over the steel beams, the Secretary has not met its burden of proving that

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[4] Since the Secretary did not accept that he had the burden of proving practicality, some of Ramirez's testimony seemed cavalier. A suggestion that lanyards could be tied to an operating crane is not sensible.

safety belts were practical. Although a similar lifeline system might have been used, there is insufficient evidence to prove that this was practical on the steel beams.

VIOLATION OF ANDERSON'S SAFETY BELT REQUIREMENT

Anderson's vice-president, Lanny Levell, acknowledged that safety belts should be used (Tr. 195). He primarily stressed that workers tie off when they reach a work location. Contrary to Anderson's policy, Green removed concrete on the pier and burned access holes but was not tied off. Levell also expected his men to tie off if they approached the edge where the guardrails had been removed. They did not do so (Tr. 256-57, 283).

KNOWLEDGE OF SERIOUS VIOLATION

Anderson's superintendent, Gus Bailey, was on the site at the time of both inspections. Levell was aware the day before that his employees would be working where the guardrails had been improperly removed. He did not believe that the lack of guardrails required any additional precautions (Tr. 273). Anderson had knowledge of the violations.

ANDERSON'S DEFENSES OF GREATER HAZARD AND INFEASIBILITY

Anderson argues that use of safety belts was both infeasible and would create a greater hazard. Would compliance so interfere with performance of necessary work as to be infeasible under the circumstances? *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1956-59, 1986-87 CCH OSHD ¶ 27,650, p. 36,024-27 (No. 79-2553, 1986), *rev'd on other grounds*, 843 F.2d 1135 (8th Cir. 1988). Anderson failed to establish that it implemented an alternative protective measure or that there was no feasible alternative measure. It likewise failed to meet the greater hazard defense by proving that (1) the hazards of compliance were greater than noncompliance; (2) alternative means of protection were unavailable; and (3) a variance was unavailable or inappropriate. *E.G., Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225, 1991 CCH OSHD ¶ 29,442, p. 39,682 (No. 88-821, 1991);

State Sheet Metal Co., supra (employer must show that it explored all possible alternatives, not only those methods of protection listed in the standard). It is insufficient to meet the defense that a safety belt system requires some planning and must have the safety lines retrieved.

CLASSIFICATION AND PENALTY

An 85- to 108-foot fall from the bridge would likely result in death. A serious violation of § 1926.105(a) is affirmed as alleged in both the first and second citations. The Commission is the final arbiter of penalties in all contested cases. *Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Anderson had from 60 to 80 employees at the time of the inspections and had no previous citations under the Act (Tr. 296). The high gravity of the violation is a primary consideration. The full proposed penalty of $875 is assessed for the first citation. A penalty of $2,000 is assessed for the second citation.

ITEM 2: § 1926.100(a)

The Secretary alleges Anderson violated § 1926.100(a) on February 28, 1992, because its employees were not wearing hard hats on the bridge. Anderson admits that some of its employees were not wearing head protection but asserts that there was no possible danger of head injury. The standard requires:

> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects . . . shall be protected by protective helmets.

Anderson's employees were involved in "snatching" large pieces of pavement from the bridge roadway. Green was on the pier, and at least three others were behind the crane on the roadway waiting to assist with the lift. None of the four employees wore a hard hat. Jack Levell's testimony that his hard hat could not be distinguished in Exhibit C-1 because he had a sweatshirt hood pulled over the hard hat is not credible since it is contrary to physical evidence and common experience. Lanny Levell asserted that his superintendent and another employee lost their hard hats because it was so windy that day (Tr. 260). In

any event, if there was "possible danger of head injury," employees should have worn protective helmets. Working under and around the crane, as is depicted in Exhibit C-1, and being in close vicinity as large sections of pavement were pulled from the roadway, exposed employees to impact from flying concrete or injury from equipment. Ramirez observed pieces of pavement "flying all over with the tension of this sling against the concrete" (Tr. 95). The pieces flew 10 to 15 feet when the slab was lifted (Tr. 96). Employees on the roadway were exposed to head injury from flying objects. Likewise, Green, working 20 to 30 feet away and below the crane, was subject to being hit by pieces of concrete. Employees should have worn head protection during the lift and afterward to protect themselves from debris which could occur with an accidental drop of the slab (Exh. C-1).

Lanny Levell noted that his employees should have worn hard hats during the job (Tr. 281). At the time of the violation Anderson's superintendent, Gus Bailey, was on the bridge and his knowledge is imputed to Anderson (Tr. 55, 284). An impact caused by flying debris could result in a head injury causing hospitalization or death. A serious violation of ¶1926.100(a) is affirmed. Considering factors previously discussed, a penalty of $500 is assessed.

ITEM 3: § 1926.1051(a)

Anderson allegedly violated this standard by burning holes into the vertical steel to use as an accessway. The Secretary contends that a ladder should have been provided. Anderson claims that the holes were safer than a ladder and, thus, it met the intent of the standard. The standard specifies:

> (a) A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Anderson's brief does not assert the greater hazard defense, but argues that the method used by Green complied with the definition of "equivalent" in § 1926.1050(b):

> *Equivalent* means alternative designs, materials, or methods that the employer can demonstrate will provide an equal or greater degree of safety for employees than the method or item specified in the standard.

Both parties assume that the definition of "equivalent" applies to § 1926.1051(a).

Green walked out on the beam, sat down, and burned two holes in the 8-foot vertical beam (Tr. 301, 307). Each hole was 2 inches by 4 inches; the first hole was 1½ feet from the top (Tr. 308). Green descended the beam by using these handholds and then stood on the gusset and windbracing. Green used the handholds only once to descend and to return to the roadway (Tr. 309). Ramirez advised Levell that a ladder should be used to provide safe access. Green described how he tried to rig a ladder "in the hole" after the first inspection (Tr. 302). The ladder reduced the opening to 18 inches (Tr. 303). It was impossible for him to descend through the reduced opening (Tr. 262, 303).

Anderson argues that the method used by Green is industry practice. This is not supported in the record. All that it shown is that Anderson regularly used this method over a number of years. Simply because workers may be experienced with an alternate, though not preferred method of accessing work from vertical steel, does not mean the alternate method is safer. Ladders are considered a safer means of access. *Taylor Building Associates*, 5 BNA OSHC 1083, 1977-78 CCH OSHD ¶ 21,592 (No. 3735, 1978) (ladders safer no matter how skillfully steelworkers climbed steel); *National Industrial Constructors, Inc.*, 583 F.2d 1048 (8th Cir. 1978). At this worksite, however, the restricted opening on the beam prevented the ladder from being properly secured (Tr. 302-303). There was insufficient space for employees to actually use the ladder. The swamp-like conditions below the bridge prevented Anderson from reaching the pier from below with an aerial lift, for example. In such circumstances, use of the ladder was infeasible and the method employed by Green provided equivalent safe access. The alleged violation 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 on the foregoing decision, it is ORDERED:

(1) That the violation of § 1926.105(a) alleged in the citation issued on May 15, 1992 (Docket No. 92-1899), and the citation issued on June 12, 1992 (Docket No. 92-2122), are affirmed and penalties of $875 and $2,000, respectively, are assessed.

(2) That the violation of § 1926.100(a) is affirmed, and a penalty in the amount of $500 is assessed.

(3) That the violation of § 1926.1051(a) is vacated.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: October 12, 1993