UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,
Complainant,

v.

PM CONSTRUCTION & REHAB, L.P., a Subsidiary of INLAND PIPE REHABILITATION, LLC,
Respondent.

Docket No. **15-0014**

Attorneys and Law firms

Dolores G. Wolfe, Attorney, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Complainant.

George R Carlton, Jr., Attorney, Godwin Lewis PC, Dallas, TX, for Respondent.

DECISION AND ORDER

John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

PM Construction & Rehab, L.P., a subsidiary of Inland Pipe Rehabilitation, LLC (PM), is a Texas pipe bursting contractor, which was engaged in changing a sewage drainage pipe at a worksite in Houston, Texas, on August 13, 2014, when one of its crew was fatally injured. The United States Department of Labor's Occupational Safety and Health Administration (OSHA) conducted an investigation and issued PM a three-item citation for alleged violations of three of OSHA's safety and health standards, with proposed penalties totaling $14,700.00. After PM timely contested the citation, the Secretary of Labor filed a formal complaint with the Commission charging the company with violating the Act and seeking an order affirming the citation and proposed penalties.

The three citations in this case were initially cited under the general industry standard. The Court subsequently granted the Secretary's unopposed motion to amend his complaint and citation from the general industry standard to the construction standards, which did not amend

the proposed penalties. (Order Grant'g Sec'y's Mot. to Am. Compl.). As amended, the citation alleges serious[1] violations of the Fall Protection Standard, 29 C.F.R. § 1926.501(b)(4)(i), the First Aid Standard, 29 C.F.R. § 1926.50(c), and the Power-Operated Hand Tools Standard, 29 C.F.R. § 1926.302(b)(10).

The parties stipulated and the Court agrees that PM was engaged in a business affecting interstate commerce and was an employer covered under section 3(5) of the Act, § 652(5), and that the Commission has jurisdiction of this action under section 10(c) of the Act, § 659(c).[2] A one-day bench trial was held in Houston, Texas. After hearing and carefully considering all the evidence[3] and the arguments of counsel, the Court issues this Decision and Order as its findings and conclusions.[4] Fed. R. Civ. P. 52(a). For the reasons indicated *infra*, the Court concludes the Secretary failed to prove any of the alleged violations. Accordingly, the citation is **VACATED**, and no penalty is assessed.

II. FINDINGS OF FACT

On August 13, 2014, PM was in Houston, Texas, engaged in changing city drainage pipes. (Tr. 10-11). PM's supervisor, Saul Torres, was supervising a crew of 10 or 11 employees that day working in different area laying the 400 feet of pipe. (Tr. 10–11). Three of PM's employees, [redacted], Castro and Hernandez, were working in a smaller group at a manhole, which is the specific worksite at issue. (Tr. 14-15). PM's employees had cut a hole in a pipe running through the bottom of the manhole for the purpose of giving the City of Houston a way to clean the manhole in the future. (Tr. 19-20). The manhole was approximately eight or nine feet deep and two feet across at the opening. (Tr. 15, 18).

Prior to the accident the crew had been cleaning mud from the manhole with buckets. (Tr. 19). The washing was to be done by using a water truck that was parked approximately forty to

[1] A "serious" violation is one that carries a substantial probability that death or serious physical harm could result unless the employer did not, and could not with the exercise of "reasonable diligence," know of the presence of the violation. 29 U.S.C. § 666(k).

[2] *See* Compl. ¶¶ I, II; Answer ¶¶ I; Jt. Pretrial Order ¶ 4; Compl't's Req. Admis. ¶¶ 1, 2; Resp't's Resp. to Compl't's Req. Admis. ¶¶ 1, 2.

[3] Having observed the testimony and demeanor of the witnesses for each party, the Court has weighed all the evidence in reaching its findings and has weighed the credibility of each of the witnesses. Conflicts in the evidence were resolved based on consideration of the evidence admitted at trial, and the Court's determination of the credibility of witnesses.

[4] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

sixty feet from the manhole. (Tr. 33). The truck has a pump integral to it. (Tr. 51, 87). A hose was attached to the truck on one end and had a pipe attached to the other end. (Tr. 49). The end of the pipe had been slightly flattened so as to spread out the water for the purpose of washing and watering. (Tr. 50-51). Hernandez was assigned to be the "hole watcher." (Tr. 52). Castro was standing at the back of the truck operating the control panel on the truck. (Tr. 29).

[redacted] was instructed by Torres to complete the cleaning by washing the mud down the hole that had been cut in the pipe and was directed to do this cleaning from outside the hole. (Tr. 28). After giving these instructions, Torres left the worksite. (Tr. 12, 28). Against Torres's instructions, [redacted] entered the hole and subsequently suffered a fatal injury.[5] (Tr. 28, 71, 73; Compl't's Req. Admis. ¶ 3, 4, 13, 14; Resp't's Resp. to Compl't's Req. Admis. ¶ 3, 4, 13, 14). There is no evidence in the record as to the actual cause of the accident.[6] (Tr. 54-55,128).

The manhole in use at the time of the accident was guarded by a cover, which was always in place unless the manhole was in use. (Tr. 12-13, 37, 45, 63-64, 139-140; *see also* Govt. Ex. 5). At the time of the accident, [redacted] was wearing a body harness while working in the manhole, which was connected to a tripod setup over the hole, rated at a 5,000 pound maximum weight capacity. (Tr. 39-40, 46-7). The legs of the tripod were chained together to prevent them from spreading out when pressure was placed on the tripod and had an "automatic lockout" mechanism, which prevented [redacted] from falling down into the hole. (Tr. 48).

III. CONCLUSIONS OF LAW

Under both Commission precedent and the law of the Fifth Circuit,[7] in order to prove a violation of a cited standard, the Secretary "must show by a preponderance of the evidence: (1) that the cited standard applies; (2) noncompliance with the cited standard; (3) access or exposure

[5] Notwithstanding this fact, PM did not raise "unpreventable employee misconduct" as an affirmative defense in its answer. Commission Rule 34(b)(3).

[6] Neither party called an eye witness to the accident to testify at trial. The Secretary asserts in his post-trial brief that [redacted] "proceeded to go into the hole with the jet hose, as they turned on the pressure the hose got loose, whip-lashed around inside of the manhole striking [redacted] in the face." (Sec'y's Post-Hr'g Br. at 1). This is mere speculation based on an unsigned incident report prepared by PM. (*See* Sec'y's Proposed Findings at 2; Tr. 71, 72-73; Gov't Ex 13). At trial, when asked if that was PM's understanding of what happened in this accident, PM's Director of Operations, testified, "This is really speculative. This is what could've happened. . . . It was never really discovered what caused the -- the injury to [redacted]'s face." (Tr. 73).

[7] The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, the Court applies the precedent of the Fifth Circuit Court of Appeals, where the violation is alleged to have occurred, and where it is highly probable that a case will be appealed to. *See* 29 U.S.C. §660(a) & (b).

to the violative conditions; and (4) that the employer had actual or constructive knowledge of the conditions through the exercise of reasonable due diligence." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016) (*citing Jesse Remodeling, LLC*, 22 BNA OSHC 1340 (No. 08–0348, 2006); *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90–1747, 1994)).

A. Amended Citation 1, Item 1

In amended Item 1 of the citation, the Secretary asserts at the worksite, on August 13, 2014, "Employees were working on a surface and were not protected from falling through a manhole that had a drop in excess of 6 feet *by a guardrail system* erected around it." (Order Grant'g Sec'y's Mot. to Am. Compl. at 1) (emphasis added). OSHA's Fall Protection Standard relating to holes mandates that "Each employee on walking/working surfaces shall be protected from falling through holes more than 6 feet (1.8 m) above lower levels, by personal fall arrest systems, covers, or guardrail systems erected around such holes." 29 CFR § 1926.501(b)(4)(i). "Walking/working surface" means "any surface" that "an employee walks or works" on where "employees must be located in order to perform their job duties." 29 C.F.R. § 1926.500(b). "Hole" means "a gap or void 2 inches (5.1 cm) or more in its least dimension, in a floor, roof, or other walking/working surface." 29 C.F.R. § 1926.500(b). PM's employees were walking and working around the manhole on the worksite, which was approximately eight or nine feet deep and two feet across at the opening. (Tr. 15, 18). Therefore, the cited standard applied.

As indicated *supra*, OSHA's Fall Protection Standard permits employees to be protected from falling through holes not only by the use of a "guardrail system," but also by "personal fall arrest systems" or "covers" erected around such holes. While there is no dispute regarding the Secretary's assertion—that employees were not protected from falling through the manhole by a guardrail system erected around it— the Secretary must also prove PM's employees were not protected by "personal fall arrest systems" or "covers" erected around the manhole.

A "personal fall arrest system" means "a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body belt or body harness and may include a lanyard, deceleration device, lifeline, or suitable combinations of these." 29 C.F.R. § 1926.500(b). It is undisputed that at the time of the accident, [redacted] was wearing a body harness while working in the manhole, which was connected to a tripod setup over the hole. The legs of the tripod were chained together to prevent them from spreading out when pressure was placed on the tripod. The tripod had an "automatic lockout" mechanism that did exactly what it

was supposed to do—it arrested [redacted]'s fall when the accident occurred. Therefore, [redacted] *was* protected by a "personal fall arrest system." It is also undisputed that when not in use, the manhole at issue was covered and while in use, the tripod remained in place over the manhole. (Tr. 40, 45-6).

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). To establish exposure, "the Secretary ... must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated*, 18 BNA OSHC at 1074). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)).

In his brief, the Secretary asserts both Torres and Hernandez "were exposed to this hazard as they were working around the manhole." (Sec'y's Br. at 4) (*citing* Tr. 14-15). According to the Secretary, "while Torres was present at the manhole to supervise employee [redacted] cut a 6" hole in the pipe at the bottom of the manhole, he was exposed to the hazard of falling into the manhole." (*Id.*) (*citing* Tr. 16, 37). Likewise, according to the Secretary, "Hernandez worked as a 'hole watch' in the immediate vicinity of the manhole while Mr. [redacted] was in the manhole" and was also exposed to the hazard of falling into the manhole. (*Id.*) (*citing* Tr. 54).[8] This is true, the Secretary asserts, because "[i]t is undisputed that, on both occasions, the manhole cover would have to be off the top." (*Id.*)

However, as the Commission noted in *Gilles & C*otting, 3 BNA OSHC 2002, 2003 (No. 504, 1976), the scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. Here, the zone of danger presented was the surface around the manhole. "Our inquiry then is whether the employees' proximity" to the surface around the manhole "makes it reasonably predictable that they will enter these zones of danger by slipping or falling." *Fabricated Metal*, 18 BNA OSHC at 1076.

In *RGM Constr. Co.*, 17 BNA OSHC 1229, 1235 (No. 91-2107, 1995), the Commission held, "[i]n the absence of evidence that the employees walked close to the edge, ran along the

[8] The correct citation is Tr. 52.

surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them, we find that the Secretary has not established that it is reasonably predictable that an employee would be in the zone of danger posed by the unguarded edge of the [manhole]." Here, as in *RGM*, there is no evidence that Torres and Hernandez "walked close to the edge, ran along the surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them." Therefore, the Secretary failed to prove employee exposure since he has not established that it is "reasonably predictable" that these employees "would be in the zone of danger posed by the unguarded edge of the [manhole]." *Id.* Thus, Citation 1, Item 1 must be vacated.

B. Amended Citation 1, Item 2

In amended Item 2 of the citation, the Secretary asserts PM committed a serious violation of section 1926.50(c), the First Aid Standard, because, according to the Secretary, there "was no infirmary, clinic, hospital or physician reasonably accessible in terms of time and distance to the worksite that was available for the treatment of injured employees; nor was there any person with a valid certificate in first aid training available at the worksite to render first aid to employees." (Order Grant'g Sec'y's Mot. to Am. Compl. at 1). Section 1926.50(c) mandates:

> *In the absence of* an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

29 C.F.R. § 1926.50(c) (emphasis added). Therefore, the Secretary must first prove that an infirmary, clinic, hospital, or physician (1) was not reasonably accessible in terms of time and distance to the worksite or (2) was not available for the treatment of injured employees. If the Secretary is successful in this portion of his case-in-chief, he must then prove a person who had a valid certificate in first-aid training was not available at the worksite to render first aid.

The Secretary argues the First Aid Standard clarifies that "provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury." (Sec'y's Br. at 5-6) (*citing* 29 C.F.R. § 1926.50(b)). It is undisputed PM did not make direct contact with any fire department or emergency services to have them on standby in case of an accident. (Tr. 27). Thus, the Secretary argues "[t]he failure to have medical services pre-arranged exposed all three employees to [the cited] hazard[.]" (*Id.*) The Court does not agree with the premise of the

Secretary's argument since PM was not cited for a violation of 29 C.F.R. § 1926.50(b). The issue is not whether PM made provisions prior to commencement of the project for prompt medical attention in case of serious injury, but whether the Secretary has proven there "was no infirmary, clinic, hospital or physician reasonably accessible in terms of time and distance to the worksite that was available for the treatment of injured employees." 29 C.F.R. § 1926.50(c)

Fermin Flores, PM's Safety Manger, testified employees had company cell phones with which they could use to call 911. (Tr. 141). Flores also testified that for purposes of litigation, after the accident he drove to the South Post Oak Medical Clinic in "just under two minutes." (Tr. 142). His testimony was not rebutted by the Secretary. No evidence was introduced by the Secretary to establish the clinic was not "readily accessible in terms of time and distance to the worksite" or was not "available for the treatment of injured employees." Thus, the Secretary failed to prove a violation of the first-aid construction standard. Therefore, amended Item 2 of the citation must be vacated.

C. Amended Citation 1, Item 3

In amended Item 3 of the citation, the Secretary asserts PM committed a serious violation of section 1926.302(b)(10), the Power-Operated Hand Tools Standard relating to abrasive blast cleaning nozzles, since "the tube nozzle was not equipped with an operating valve that had to be held open manually." (Order Grant'g Sec'y's Mot. to Am. Compl. at 1). That Standard mandates in relevant part that "blast cleaning nozzles shall be equipped with an operating valve which must be held open manually." 29 C.F.R §1926. 302(b)(10).

In the construction industry standards, "abrasive blasting" is defined as the "forcible application of an abrasive to a surface by pneumatic pressure, hydraulic pressure, or centrifugal force." 29 C.F.R §1926.57(f)(1)(xii). However, the abrasive blasting definition "does not apply to steam blasting, or steam cleaning, or hydraulic cleaning methods where work is done *without the aid of abrasives*." 29 C.F.R §1926.57(f)(8) (emphasis added). An "abrasive" is defined as a "solid substance used in an abrasive blasting operation." 29 C.F.R §1926.57(f)(1)(i).

There is no dispute PM's crew was using water to clean the manhole. A "solid" substance means "having relative firmness, coherence of particles, or persistence of form, *as matter that is not liquid or gaseous*." (Dictionary.com Unabridged. Random House, Inc. http://www.dictionary.com/browse/solid (accessed: July 7, 2016)) (emphasis added). Therefore, water is not an "abrasive" since it is not a "solid" substance. The Secretary seems to

acknowledge as much in an OSHA Fact Sheet, which indicates high pressure water is a "blasting material," but not an "abrasive material." (Gov. Ex. 16).

The Fact Sheet specifically states abrasive blasting "uses compressed air or *water* to direct a high velocity stream of *an abrasive material* to clean an object or surface . . . ."[9] (*Id.* at 1). Although the Fact Sheet also indicates alternative, less toxic blasting materials include "high pressure water," the Secretary expressly left out the word "abrasive" as a descriptor in that alternative, again recognizing that water alone is not an "abrasive material." (*Id.*) There is no evidence in the record that the water was mixed with any "abrasive materials" when it was used to clean the manhole. Thus, the Secretary failed to prove the applicability of the cited standard. Therefore, amended Item 3 of the citation must also be vacated. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED** and no penalty is assessed.

SO ORDERED THIS 22nd day of **July, 2016**.

/s/
JOHN B. GATTO, Judge

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[9] The Fact Sheet indicates commonly used abrasive materials include Silica sand (crystalline), Coal slag, Garnet sand, Nickel slag, Copper slag, Glass (beads or crushed), Steel shot, Steel grit, and Specular hematite (iron ore). (*Id.*)