SECRETARY OF LABOR, Complainant, v. DOUGLAS E. BARNHART, INC., Respondent.	OSHRC DOCKET NO. 03-0352

APPEARANCES:

For the Complainant:
Susan Seletsky, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California

For the Respondent:
Robert P. Stricker, Esq., Stricker & Ball, San Diego, California

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Douglas E. Barnhart, Inc. (Barnhart), at all times relevant to this action maintained a place of business at the Casino Project on the San Manuel Reservation, Highland, California, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 3, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Barnhart's work site at the casino project. As a result of that inspection, Barnhart was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Barnhart brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 6, 2003 an E-Z hearing was held in San Diego, California. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1926.501(b)(1)

Serious citation 1, item 1 alleges:

CFR 1926.501(b)(1): Each employee on a walking/working surface with unprotected sides or edges which is 6 feet or more above a lower level was not protected from falling by the use of a guardrail system, safety net systems or fall arrest systems.

(a) San Manuel Casino Project Roof: Employer did not insure that an adequate guard rail system was installed to ensure that employees were protected from a 30 foot fall to the ground. Guardrails were not attached to the building negating any fall protection the guardrails could provide for the employees.

The cited standard provides:

> *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Facts

On January 3, 2003 OSHA Compliance Officer (CO) Marion Moore arrived on the site of the San Manuel Casino Project to conduct a planned inspection (Tr. 18-21). As Moore approached the back side of the casino, he saw two workmen, later identified as Johnny Nuno and Louis Torres of Nolex Construction, standing at the edge of the roof, approximately 30 feet above the ground (Tr. 21, 35, 39-40, 91-92). Moore proceeded to the construction trailer, where he identified himself to Keith Wyatt, superintendent for the general contractor on the site, Douglas E. Barnhart (Tr. 21-22, 100). Moore then continued on to the roof of the building with Mr. Wyatt, accessing the roof by way of a scaffold stair ladder (Tr. 26-27). When he reached the roof, Moore found that a wooden guardrail had been erected on top of a 28-30 inch[1] parapet located around the edge of the roof (Tr. 31, 80; Exh. C-5, C-9). It is undisputed that at one corner of the building, near where a ladder and scaffold accessed the roof, a vertical post supporting the guardrail was not attached to the building (Tr. 30-35, 75-76, 114; Exh. C-9, C-10).

At the hearing Nuno testified that "a bunch of people" accessed the roof. According to Nuno people were working up there at some point (Tr. 92). Nuno and Torres were not working at the time

[1] Superintendent Wyatt calculated that the parapet was between 32 and 35-1/2 inches high (Tr. 106-07). In any event it is clear from Complainant's exhibits that the parapet was between thigh and hip height (Exh. C-7, C-8, C-9).

of the alleged violation, but had climbed up the scaffold stairs to the rooftop in order to use Nuno's cell phone (Tr. 92). According to Nuno, it was common for employees to go up onto the roof to get better reception on their phones (Tr. 92). He had no idea, however, whether Mr. Wyatt was aware of the practice (Tr. 92).

Wyatt told CO Moore that Barnhart was responsible for safety at the casino project site (Tr. 22-24). Moore testified that Wyatt told him that he made daily inspections of the entire site, but admitted he had not personally checked the guardrail system in the last month (Tr. 69, 79). At the hearing, Wyatt testified that he inspected the guardrail after it was initially installed on or around December 1, 2002 (Tr. 105). At that time, the vertical support was attached to the roof (Tr. 106, 120). Wyatt believed that the scaffolding subcontractor, Eleven Western Builders, may have dislodged the vertical support post when they installed the scaffold stairs on December 31, 2002 (Tr. 103-04, 119). Wyatt did not inspect the area after the stairs were installed because there was no work being done on the roof (Tr. 104, 121). Wyatt testified that subcontractors were instructed to stay off the roof, and he was unaware of anyone going up there (Tr. 107, 113, 127). Although Wyatt knew that the cell phone reception in the area was limited, he did not know that employees would go up onto the roof to get a signal (Tr. 126-27). Wyatt told the subcontractors that he had a land line, which employees were free to use (Tr. 127-27).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). Barnhart does not dispute the applicability of the cited standard, and admits that the terms of the standard were not met on January 3, 2003. Barnhart argues that it did not know or have reason to know of the violative condition. Barnhart further maintains that the Secretary failed to prove that employees had access to the cited condition.

In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). The Secretary maintains that Barnhart could have known that the cited guardrail was no longer fastened to the roof, had superintendent Wyatt re-inspected the roof. Though no work was being done on the roof, Complainant maintains that Barnhart should have known that its employees were accessing the roof to improve their

cell phone reception, and so had a duty to inspect the roof for unsafe conditions to which employees using the area would be exposed.

In order to show employee exposure, the Secretary must prove that employees have been, or that it is reasonably predictable that they will be in a zone of danger during either their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶30,303, p. 38,886, (No. 86-0274, 1993). There is no evidence in the record establishing that superintendent Wyatt knew that the employees of Barnhart's subcontractors would climb up onto the roof to improve their cell phone reception. Though Complainant argues that the practice was "reasonably predictable," this judge cannot find that a reasonable employer would have anticipated either that employees would need to use their cell phones where a land line was available, or that they would climb up onto the roof to find a signal. I cannot find, therefore, that Barnhart had a duty to ensure the safety of the rooftop guardrailing to protect such employees.[2]

Moreover, there is no evidence in the record establishing that employees using the rooftop to make phone calls were ever actually in the zone of danger created by the faulty guardrail. The Commission has held that the zone of danger is determined by the hazard presented by the violative condition, and is normally the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction Co. (RGM)*, 17 BNA OSHC 1229, 1234, 1995 CCH OSHD ¶30,754 (No. 91-2107, 1995). In *RGM*, the Commission found there was no exposure to the edge of an unguarded bridge where employees "had ample room to walk along the bridge surface without being in danger of falling off the edge." The Commission went on to find that the Secretary failed to establish that exposure was reasonably predictable "[i]n the absence of evidence that the employees walked close to the edge, ran along the surface, engaged in horseplay, or otherwise engaged in an activity that might endanger them." *Id.* In this case, the guardrail surrounding the majority of the roof was adequately secured. The zone of danger consisted solely of a short run of guardrail located in a corner of the roof behind a ramp providing access to the scaffold stairs. To access the corner, an employee must go around a hand rail protecting the edge of the ramp, avoiding two vent covers projecting from the flat roof in that area. *See*, Complainant's exhibits C-8 through C-10. CO Moore's testimony does not establish that the two

[2] Complainant contends that Barnhart should have inspected the rooftop guardrail prior to Eleven Western Builders' commencement of work in the area. However, there is no evidence that the guardrail was loose prior to the OSHA inspection. A citation cannot be upheld solely on the employer's failure to inspect, without evidence of the existence of a violative condition.

employees he saw on the roof were standing in the crowded corner near the defective length of guardrail. Nor does the record establish that employees talking on cell phones are likely to place themselves in the zone of danger posed by the cited guardrail.

Because the record establishes neither employee exposure to the cited condition, nor employer knowledge of said condition, the citation is vacated.

Alleged Violation of §1926.34(c)

Serious citation 2, item 1 alleges:

29 C.F.R. 1926.34(c): Means of egress shall be continually maintained free of all obstructions or impediment to full instant use in the case of [f]ire or other emergency.

(a) San Manuel Casino Project, Kitchen: The employer did not maintain a clear means of egress in case of fire or other emergency.

The cited standard provides:

> *Maintenance and workmanship.* Means of egress shall be continually maintained free of all obstructions or impediments to full instant use in the case of fire or other emergency.

Facts

CO Moore further testified that in the kitchen area of the casino itself, he noted and photographed debris piled on the floor of the kitchen (Tr. 63; Exh. C-14, C-15, C-16). Moore did not see any employees working in the kitchen during his inspection; however, Wyatt showed him where employees had been working in the back aisle, tearing out the old kitchen (Tr. 64, 85, 134-36; Exh. C-15,). The back aisle was piled with trash, blocking clear access to the exits (Tr. 65, 136; Exh. C-15). Wyatt told Moore he knew the aisles were supposed to be kept clear, and promised to move the debris out immediately (Tr. 67).

At the hearing, Wyatt testified that he could not remember where the employees were working (Tr. 138). Nonetheless, Wyatt believed there was a path over the torn out steel through which employees could have safely exited the area (Tr. 138).

Discussion

The record establishes that the cited kitchen aisles were not clear of debris. In the event of an emergency, the evacuation of employees working in the back aisle would have been delayed by their need to avoid the tripping hazard posed by the drywall and pieces of steel in their path. The standard requires that means of egress be free of *all* impediments to *full and instant* use. The Secretary has established the cited violation.

Penalty

This item was originally cited as "other than serious." In the Complaint, the Secretary amended the citation to "serious," stating that the cited condition could lead to death or other serious harm. A penalty of $975.00 was proposed. At the hearing, the CO testified merely that he believed the hazard was "minimal" (Tr. 66). In the absence of any evidence on the record establishing that the violation gives rise to a "substantial probability" of death or serious physical harm, as is required under §17 of the Act, the Secretary's motion to amend is DENIED, and the citation is affirmed as "other than serious," without penalty.

ORDER

1. Citation 1, item 1, alleging violation of 29 C.F.R. §1926.501(b)(1) is VACATED.

2. Citation 1, item 2, alleging violation of 29 C.F.R. §1926.34(c) is AFFIRMED as an "other than serious" violation, without penalty.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: December 23, 2003