



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

Secretary of Labor

Complainant,

v.

B&N&K Restoration Co., Inc.

Respondent.

Simplified Proceeding

OSHRC Docket No. 07-1373

Appearances:

Jeffery S. Rogoff, Esquire
Daniel Henefeld, Law Clerk
U.S. Department of Labor
New York, New York
For the Secretary.

Adam M. Schneider, Esquire
Law Office of Adam M. Schneider
Morganville, New Jersey
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On March 1, 2007, the Occupational Safety and Health Administration (“OSHA”) inspected a work site of Respondent, B&N&K Restoration Company, Inc. (“Respondent” or “BNK”), after an accident at the site on February 28, 2007, that injured an employee of another employer. As a result of the inspection, OSHA issued to BNK a two-item serious citation. The first item alleged that a cover over a skylight opening on the roof of a school addition was not adequately secured. The second item alleged that the cover over the opening was not painted or marked to warn of the hazard. BNK contested the citation. This case was designated for the Commission’s simplified proceedings pursuant to Commission Rule 203(a). The hearing in this matter was held in Newark, New Jersey, on December 5, 2007. Both parties have filed post-hearing briefs and reply briefs.

Background¹

The subject site was a construction project involving an addition to an elementary school building located in Verona, New Jersey. The work at the site took place during 2006 and 2007. BNK was the prime contractor for general construction through a contract with the Verona Board of Education (“the Board”), the school’s owner. Epic Management, Inc. (“Epic”) was the project management firm and the representative of the Board at the site. J.G. Schmidt Steel (“Schmidt”) was the prime contractor for steel erection on the project, also through a contract with the Board. Schmidt supplied the steel for the project, but subcontracted the actual steel erection work to Campbell Welding & Machinery, Inc. (“CWM”). BNK was contractually responsible for coordinating all the construction work of the separate prime contractors on the project. BNK was also responsible for performing some of the work, including masonry and the concrete pouring on the roof of the school building. During the project, BNK management personnel contacted Schmidt management personnel on a regular basis to discuss coordinating work and to inform Schmidt that particular tasks should proceed on the project.

On or about February 6, 2007, CWM employees installed metal sheet roof decking and also cut an opening for a skylight on the roof of the building.² The opening was approximately 4.5 feet by 4.5 feet and had curbing on all four sides that was about 1.5 inches high. On or about February 7, BNK project manager Vasko Curovic and an unidentified BNK laborer placed two steel sheets over the skylight opening to cover it. Each of the two steel sheets was about 3 feet by 10 feet. The two steel sheets were placed such that they overlapped over the middle of the opening. Sometime before February 28, BNK, or one of its subcontractors, constructed an elevator shaft that protruded up through the roof of the building and was located less than 2 feet from the skylight opening. Also before February 28, BNK informed the other contractors that the elevator shaft was completed and that BNK planned to have concrete poured on the roof. BNK also communicated a request to Schmidt to install steel sheets over the top of the elevator shaft that protruded through the roof.

¹The following background is primarily derived from the parties’ stipulated facts, which are set out in full in the attachment (“Attachment” or “Attach.”) that is appended to this decision and order and is incorporated herein by reference. JX-1 also contains the parties’ stipulated facts.

²Unless otherwise indicated, all dates hereinafter will refer to the year 2007.

Schmidt, in turn, directed CWM to perform additional steel erection work on the addition's roof, including installing steel sheets over the top of the elevator shaft that protruded through the roof, before the concrete was scheduled to be poured on the roof.

On February 28, shortly before 7 a.m., Gasper Pinto, a CWM foreman, and Louis Rodriguez, a CWM welder, went to the site to perform the work on the addition's roof that Schmidt had directed. Soon after Messrs. Pinto and Rodriguez arrived, Mr. Pinto discussed with BNK's project manager, Mr. Curovic, what CWM was to do. Mr. Rodriguez went up to the roof to prepare for his work. The two steel sheets that BNK had put over the skylight opening were the same type of steel sheets that CWM was to install over the elevator shaft. The sheets were not painted with high-visibility paint, or color coded, or marked with the word "hole" or "cover" to indicate the skylight opening. Mr. Rodriguez bent over and lifted one of the sheets that was over the opening. (Tr. 50-51). He then fell through the opening to the floor 14 feet below. (Tr. 25-27, 51, 60-61). Mr. Rodriguez's injuries from the fall included a broken wrist, a broken forearm, a dislocated elbow, and damage to tendons and nerves.³

The Cited Standards

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.754(e)(3)(ii), which states that:

All covers shall be secured when installed to prevent accidental displacement by the wind, equipment or employees.

In the alternative, Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.502(i)(3), which provides that:⁴

All covers shall be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees.

Citation 1, Item 2, alleges a serious violation of 29 C.F.R. § 1926.754(e)(3)(iii), which states that:

³Mr. Rodriguez testified that he missed about five months of work as a result of these injuries. (Tr. 34).

⁴The Secretary's motion to amend Citation 1, Items 1 and 2, to allege violations of 29 C.F.R. §§ 1926.502(i)(3) and (i)(4) in the alternative was granted by the Court on November 26, 2007.

All covers shall be painted with high-visibility paint or shall be marked with the word “HOLE” or “COVER” to provide warning of the hazard.

In the alternative, Citation 1, Item 2, alleges a serious violation of 29 C.F.R. § 1926.502(i)(4), which provides as follows:

All covers shall be color coded or they shall be marked with the word “HOLE” or “COVER” to provide warning of the hazard.

Jurisdiction

The parties have stipulated that the Commission has jurisdiction of this matter. They have also stipulated that, at all relevant times, BNK was engaged in a business affecting commerce and was an employer within the meaning of the Act. *See* JX-1, § E, nos. 1-2. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary’s Burden of Proof

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that: 1) the cited standard applies, 2) the terms of the standard were not met, 3) employees had access to the cited condition, and 4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). All these elements of proof are met here.

The Relevant Testimony

Louis Rodriguez

Mr. Rodriguez testified that when he and Mr. Pinto went to the site on February 28, Mr. Curovic met with Mr. Pinto and discussed the work to be done, *i.e.*, covering the elevator shaft.⁵ Mr. Rodriguez then began unloading the equipment that he needed from the truck he and his foreman had driven to the site, after which he accessed the roof of the building through an opening on the second floor ceiling that had a ladder going through it. He then began hauling up equipment, including welding equipment and a screw gun, to the roof with a rope. This was done by Mr. Pinto tying the items needed to the rope at the ground level and Mr. Rodriguez pulling the items up to the

⁵Mr. Rodriguez did not know the name of the general contractor’s project manager at the site. (Tr. 23). The record shows that individual was Mr. Curovic. *See* Attach., p. 1, no. 5.

roof. After completing this task, Mr. Rodriguez returned to the ground level to see if anything else needed to be done. He and Mr. Pinto then went up to the roof through the same opening Mr. Rodriguez had used before. Mr. Rodriguez identified CX-2A as a photograph of the skylight opening through which he fell. He marked the photograph with an “A” to indicate the elevator shaft, a “B” to indicate the parapet wall of the building, a “C” to indicate where he was standing when he lifted up the metal sheet, and a “D” to indicate the direction of the opening he had used to access the roof, which was about 12 feet away from the opening in CX-2A.⁶ Mr. Rodriguez said the metal sheeting he saw in the CX-2A area was going the same direction as the installed sheeting it sat on. He also said the equipment he had hauled up was on the other side of the elevator shaft and that he and Mr. Pinto were on that side for a few minutes before the accident. (Tr. 21-25, 28-32, 36-48, 56, 59).

Mr. Rodriguez further testified that Mr. Pinto stayed on the other side of the elevator shaft, looking at some drawings, while he himself went to the area shown in CX-2A. Mr. Rodriguez saw the metal sheeting, which he assumed he was to use to cover the elevator shaft, particularly since he had seen no uninstalled sheeting anywhere else on the roof. He bent over and picked up the edge of the sheeting with both hands, and, in doing so, he fell through the opening.⁷ After he fell, a worker came over to help him. Mr. Curovic also came to his assistance. (*See also* Attach., p. 3, no. 34). Mr. Rodriguez asked them to notify Mr. Pinto, who had not seen the accident, and they did so. Mr. Rodriguez was thereafter helped into a police car that had arrived. He waited there for the ambulance. While waiting, he heard Mr. Pinto, who Mr. Rodriguez described as “not being too happy,” talking loudly to Mr. Curovic about there not being any screws in the sheeting. (Tr. 25-26, 31-33, 47-51, 56-59).

Mr. Rodriguez noted he had not been at the site since he had done welding there several weeks before. No metal sheeting had been installed on the roof then. Mr. Rodriguez stated he did

⁶CX-2A, which shows the skylight opening uncovered, was taken by the Verona Police Department when it investigated the accident on February 28. OSHA obtained CX-2A, as well as CX-2B through CX-2G, other photographs the Verona Police Department took on February 28, during the course of the OSHA inspection. (Tr. 75-76).

⁷Mr. Rodriguez testified that he believed the metal decking that he picked up to be the material that he was to use to cover the elevator shaft. (Tr. 25-26, 47-48).

not know about the skylight opening on the roof and that Mr. Pinto did not mention the opening to him or tell him what sheeting to use to cover the elevator shaft. Mr. Rodriguez further stated he did not see the opening, or the curbing around the opening, because of the sheeting covering it and that there were no markings of any kind on that sheeting. Mr. Rodriguez said it was “simple” to lift up the sheeting and that it took him “only a second,” after which he fell “a bit over 14 feet” right into the opening. He also said he noticed no screws or fastenings in the sheeting and that he removed no screws or bolts before lifting the sheeting.⁸ Mr. Rodriguez noted that the metal decking that he picked up: 1) did not have any high-visibility paint on it, 2) was not color coded in any way, 3) was not marked with the word “hole,” and 4) was not marked with the word “cover.” Mr. Rodriguez further noted that the sheeting was covering the opening when he looked up at it after his fall. He did not realize then or before that the sheeting consisted of two overlapping sheets.⁹ He agreed that it was possible that when he fell he may have slipped on the snow or ice between the corrugations of the metal sheet roof decking shown in CX-2A. (Tr. 21, 26-28, 32-36, 44, 47-62).

OSHA Compliance Officer (“CO”) Gary Jensen

CO Jensen testified that he was assigned to go to the site after the Verona Police Department referred the matter to OSHA. He went to the site on March 1 and met with Mr. Curovic, who went with him to the roof where Mr. Rodriguez had fallen. The CO identified CX-1A through CX-1D as his photographs of the roof and the skylight opening that he took on March 1 and CX-2A through CX-2G as photographs received from Detective Harrington of the Verona Police Department.¹⁰ He noted that CX-2A depicted the opening through which Mr. Rodriguez had fallen. The dimensions of the skylight opening were 4 feet by 4 feet square. The CO identified CX-3 as a sketch he made at the site on March 1 and a smaller sketch that Mr. Curovic made the same day. CO Jensen said that Mr. Curovic told him that there were two sheets over the skylight opening that overlapped a foot and

⁸Mr. Rodriguez testified that he did not use any tools to pick up the metal decking. (Tr. 27-28).

⁹There were no screws in the center of the steel sheets to hold the sheets together, where they overlapped over the opening. (Attach., p. 3, no. 2).

¹⁰CO Jensen testified that photographs CX-2A through CX-2G were taken on February 28 by the Verona Police Department. (Tr. 75-76).

a half and that the two sheets were each 3 feet by 10 feet. The CO's sketch, at the top of CX-3, showed the roof, the elevator shaft, the skylight opening and his measurements. Mr. Curovic's sketch, at the bottom of CX-3, showed the skylight opening and how it had been covered as described by Mr. Curovic. The CO noted that, besides Mr. Curovic, he had also spoken to Mr. Rodriguez, Detective Harrington of the Verona Police Department, CWM President Thomas Campbell, and Mr. Pinto of CWM during the course of his inspection. The CO also noted that his conclusion that BNK had not properly secured the cover over the skylight opening was based on several things. First, Mr. Rodriguez stated that there were no screws in the sheeting because it came up so easily. Mr. Rodriguez also told CO Jensen that he had overheard Mr. Pinto state on February 28 that there were no screws at all in the sheeting over the skylight because Mr. Pinto had gone up to check the sheets after Mr. Rodriguez fell through the hole.¹¹ Second, Detective Harrington stated that there were only two small screws on one of the two narrow ends of the decking.¹² Third, Mr. Curovic stated that there were screws all along the narrow ends of the sheeting, as shown in CX-3. The CO said that this latter statement was inconsistent with what others told him and was also inconsistent with Mr. Curovic's earlier statement to him that there were screws just in the corners of the sheeting. In addition, Mr. Curovic told him he had gone up on the roof after the accident and had found no screwed or unscrewed screws there. CO Jensen did not believe the hole under the sheeting would have been obvious. The curbing was only 1.5 inches high. The sheeting could have appeared to have been stacked, and the sheeting was the same type that was installed on the roof. CO Jensen noted that Mr. Curovic told him on March 1 that he covered the skylight opening on February 8 to protect what was inside the building and for fall protection. (Tr. 32, 63-69, 75-82, 86, 89-97, 129-32, 137, 142-45; Attach., p. 1, no. 10).

CO Jensen further testified that when he saw the site on March 1, the skylight opening had been covered with sheeting cut to the size of the opening and the elevator shaft had also been covered with sheeting. CO Jensen identified RX-L as a photograph he took on March 1 that showed

¹¹However, on cross-examination, the CO agreed that when he interviewed Mr. Pinto on March 6, Mr. Pinto told him that while he was not sure of the number, Mr. Pinto believed that there had been more than two screws in the sheeting. (Tr. 116, 133).

¹²The CO said CX-2B showed one of the screws in the sheeting. (Tr. 79-80).

that corrugated steel decking had been placed on top of both the skylight and elevator shaft openings. He never saw the sheeting that had covered the skylight opening previously. He had not thought to ask Mr. Curovic what had happened to it. He assumed it was used to cover the elevator shaft, but he did not know that for a fact. The CO viewed RX-M1 through RX-M5, some of the photographs he had received from the Verona Police Department.¹³ He said that RX-M2 and RX-M4 showed a screw in the sheeting and that while the other photographs showed what he believed could have been screw holes in the sheeting, he could not say for sure that was the case. CO Jensen testified he measured the distance that Mr. Rodriguez fell at 14 feet. He also testified that both of the citation items were classified as serious because serious injuries or death could have occurred. The CO stated that Mr. Pinto told him on March 6 that, after CWM personnel cut open the skylight hole on February 7, CWM personnel were told by an unidentified BNK representative not to cover the skylight because the roof deck was getting ready to be poured. The CO agreed that the lifting of the sheeting by Mr. Rodriguez was a deliberate act. (Tr. 82-87, 98-110, 119,120, 134-36, 146-47).

Alexander Kuridza

Mr. Kuridza, the vice-president of BNK and an employee of the company for nearly 20 years, testified that BNK is a general contractor that usually performs some work on its contracts itself and subcontracts the rest. He said the contract at the Verona site was a multiple prime contract, that BNK was the prime contractor for general construction work, such as masonry, windows, and carpentry, and that other prime contractors at the site included the steel erection, electrical and plumbing contractors. Mr. Kuridza noted that the difference between a general contractor and a prime contractor for general construction is that the former hires and is responsible for all of the subcontractors, while the latter hires and is responsible only for certain subcontractors, like masonry and carpentry subcontractors. Each other prime contractor is likewise responsible for any subcontractors it hires. He also noted that while BNK was in charge of coordinating and scheduling work at the site, and for overseeing certain aspects of the work, BNK could not direct other prime

¹³With the exception of RX-M2, which is the same as CX-2B, RX-M1 through RX-M5 are different photographs from those the Secretary introduced that originated from the Verona Police Department. As noted *supra*, those photographs are CX-2A through CX-2G.

contractors to do any work or take any steps as to safety. Instead, BNK would have to go to the owner's representative, in this case Epic, to resolve such matters. (Tr. 153-55).

Mr. Kuridza's understanding of the contract documents involving the site was that they made each contractor responsible for its own safety measures, for following OSHA regulations, and for making the job site "[s]afe for other people." (Tr. 166). Mr. Kuridza said that an addendum to BNK's contract requirements called for each of the five prime contractors, including BNK, to be responsible for furnishing, installation, maintenance and removal of safety, fall and opening protection, etc., associated with their work on the building. (Tr. 181; RX-I § 1.5.3, 1e). He also said that the addendum required BNK to furnish, install, maintain and remove all initial safety protection work in full compliance with OSHA standards. This section applied to all holes everywhere. (Tr. 182, 200; RX-I, § 1.5.3, 1a). Mr. Kuridza agreed that the contract required BNK, as a prime contractor, to be responsible "for initiating, maintaining and supervising all safety precautions and programs in connection with the work." (Tr. 187-88, 191-92; RX-B § 1.44, 1, p. 1-21).

Mr. Kuridza stated that the contract required BNK, as a prime contractor, to:

[T]ake all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: a. Every employee on the work and all other persons who may be affected thereby.... (Tr. 192; RX-B § 1.44, 2, p. 1-21).

He also stated that the contract required BNK to:

Provide all necessary temporary enclosures, covers, guardrails, barricades, safety devices, etc., to adequately protect all workmen and the public ... from possible injury due to the various processes required to accomplish the work required. (Tr. 193; RX-B, § 1.5.2, p. 1-3).

Mr. Kuridza further testified that he was familiar with the site as he oversaw the work that Mr. Curovic did. He also attended many of the job progress meetings, along with Mr. Curovic. All the prime contractors, including Epic, which chaired the meetings, were required to attend. Subcontractors for the most part did not go to those meetings. CWM never attended them. Mr. Kuridza said that, according to what Mr. Curovic told him after Mr. Rodriguez fell through the hole in the roof, CWM finished its work on the roof late on February 6 and did no more work at the site until February 28. On February 7, Mr. Curovic went up to the roof to see what had been done and noticed two skylight openings that CWM had left uncovered. One was the opening through which Mr. Rodriguez fell, and the other was the opening that was used to access the roof. Mr. Curovic and

a BNK laborer proceeded to cover the two openings to protect the work down below because snow was forecast. As to the subject opening, Mr. Curovic told Mr. Kuridza that he and the laborer covered it with two sheets of metal decking, the same as that on the rest of the roof, and that the sheets were fastened to the roof deck with about a dozen screws along two edges. Mr. Curovic also told Mr. Kuridza that on February 28, when he got there at about 7:00 a.m., Mr. Pinto was already on the site and another individual was on the roof pulling up items. Mr. Kuridza said that Mr. Curovic spoke to Mr. Pinto to see “what [the] game plan [was]” and then went inside the building to do his own work. Mr. Kuridza stated that he went to the site on March 1 to see the roof and that CX-1B depicted how the subject opening looked then, with new decking fastened down on it. He also stated that he never saw the sheets that had been over the subject opening before and did not know what had happened to them and that everything he knew about the sheets covering the opening was based on what Mr. Curovic had told him after the accident. Mr. Kuridza noted that a BNK subcontractor, PMC Contracting, constructed the elevator shaft before February 28. He further noted that Mr. Curovic put the cover over the skylight opening after Mr. Rodriguez fell through the hole in the roof. Mr. Kuridza agreed that CWM was supposed to use the steel decking Schmidt supplied at the work site to cover the elevator shaft. (Tr. 155-73, 177, 194-96).

Mr. Kuridza admitted that the skylight opening should have been covered after the hole was made in the roof. He further admitted that the cover over the skylight opening should have been marked. He stated that BNK employees were scheduled to pour concrete on the entire roof, including the area near the skylight opening, commencing as early as February 26. He also stated that Mr. Curovic was currently employed as a project manager at BNK. (Tr. 173-175, 177; CX-7-8).

Discussion

The first element of the Secretary’s case is to show the applicability of the cited standard(s). The Secretary has cited the steel erection standards relating to the cited conditions and, in the alternative, the general construction standards relating to those conditions.¹⁴ I find that the Secretary

¹⁴The Secretary contends the steel erection standards apply because the definition of steel erection includes the installation of metal decking. *See* 29 C.F.R. § 1926.751(b). BNK contends the steel erection standards do not apply because it performed general construction at the site. I agree with BNK. Placing two steel sheets over an opening in a roof deck does not constitute performing steel erection at the site. I find that the Secretary failed to prove that 29 C.F.R. §

has shown the applicability of the general construction standards cited in the alternative, that is, 29 C.F.R. §§ 1926.502(i)(3) and 1926.502(i)(4).

The second element of the Secretary's case is to establish that the terms of the cited standard(s) were not met. As to Item 2, the parties have stipulated that the metal sheeting covering the opening was not painted or marked in any way to warn of the hazard.¹⁵ See Attach., p. 2, no. 22. As to Item 1, that standard requires covers to be secured so as to prevent accidental displacement by wind, equipment or employees. The Secretary contends the evidence shows that the metal sheets were not adequately secured, and that even if there were two screws in one end of the sheets, the screws did not prevent displacement. BNK contends the decking was secured sufficiently with screws and that, in any case, Mr. Rodriguez's act of lifting one of the sheets was intentional.

The record shows Mr. Rodriguez did in fact intentionally lift one of the sheets. (Tr. 110). However, it also shows that Mr. Rodriguez did not know the metal sheeting served as a cover for the skylight opening. (Tr. 25-27). Moreover, as the Secretary points out, the Fifth Circuit has construed the term "accidental displacement" used in 29 C.F.R. § 1926.500(f)(5)(ii), the predecessor to 29 C.F.R. § 1926.502(i)(3), to apply to the same type of displacement at issue here. See *Atlas Roofing Co.*, 518 F.2d 990, 1013 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977). In *Atlas Roofing*, the employer covered a hole with two bundles of insulation, which was the same kind of material employees were laying on the roof at the time. An employee picked up the cover, mistaking it for the roofing material he was supposed to use, and fell through the hole to his death. The Fifth Circuit affirmed the violation of 29 C.F.R. § 1926.500(f)(5)(ii), finding the "accidental displacement" standard applied whether there was an "advertent dislodging" or an "inadvertent removal" of a cover.¹⁶ 518 F.2d at

1926.754(e)(3)(ii) and 29 C.F.R. § 1926.754(e)(3)(iii) are applicable.

¹⁵BNK's suggestion that it was obvious the sheets covered an opening is rejected. The CO testified that he did not believe the opening under the sheets would have been obvious. Also, Mr. Rodriguez testified that he did not know there was an opening under the sheets. (Tr. 25-27, 86).

¹⁶The Secretary also points out that in *C&T Erectors, Inc.*, 9 BNA OSHC 1274, 1981 WL 19167 at *4 (No. 80-923, 1981), a Commission judge noted the Fifth Circuit in *Atlas Roofing* had "resolved" that 29 C.F.R. § 1926.500(f)(5)(ii) was violated if it was possible for an employee to remove a cover, even if the employee removed the cover intentionally.

1013. Based on *Atlas Roofing*, BNK's suggestion that the intentional displacement of the cover in this case is not a hazard contemplated by the standard is rejected.

As to the testimony in this case, it is clear from that set out above that there are significant differences between the statements of the Secretary's witnesses and those of Mr. Kuridza, BNK's witness. I observed the demeanor of all three witnesses on the stand, and I found all three credible. Mr. Rodriguez was the only one with personal knowledge of the events on the roof at the time of the accident on February 28. His testimony was direct, certain and consistent, and I found it particularly persuasive. Further, CO Jensen spoke not only to Mr. Rodriguez, but also to Mr. Curovic, Mr. Pinto and Detective Harrington. CO Jensen used the statements of all of these individuals to arrive at his conclusions about what had happened. I found his testimony convincing. Finally, while Mr. Kuridza testified about what Mr. Curovic told him after the accident took place, Mr. Kuridza had no personal knowledge of these matters. He also admitted that everything he knew about the cover over the subject opening and the accident was based on what Mr. Curovic said. (Tr. 168-71, 194-95). I find the testimony of both Mr. Rodriguez and CO Jensen to be more reliable than the hearsay evidence attributed to Mr. Curovic and relayed second hand by Mr. Kuridza. Consequently, I attach less weight to Mr. Kuridza's testimony about events pertaining to the subject opening that occurred on or before February 28.

As the Secretary notes, out-of-court statements reportedly made by an employee to his superior after an accident has occurred, when the declarant may have had an incentive to evade blame for the accident, lack reliability. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720,1993) (a supervisor's out-of-court statement to the plant manager is "inherently less reliable" than the in-court statement of the compliance officer). As the Secretary also notes, "when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party." *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1986, 2003), citing to *Graves v. United States*, 150 U.S. 118, 121 (1893). In *Capeway*, the Commission drew a negative or adverse inference from the employer's "failure to present testimony from either of the two supervisory employees who were present," concluding that this failure "suggests that neither of them would have been able to contradict" the Secretary's evidence. 20 BNA OSHC at

1343. Further, in *Regina Constr. Co.*, 15 BNA OSHC 1044, 1049 (No. 87-1309, 1991), the Commission noted that the employer had failed to “test the reliability” of the Secretary’s evidence, where the employer only offered hearsay testimony from its superintendent about the foreman’s out-of-court statement to him.¹⁷

Mr. Kuridza admitted that Mr. Curovic was still a project manager with BNK at the time of the hearing; yet, BNK did not call him as a witness. (Tr. 177). In light of the circumstances in this case, and my credibility findings above, I find the statements Mr. Curovic reportedly made to Mr. Kuridza about the cover over the subject opening and the accident to be unreliable to the extent they differ from the testimony of Mr. Rodriguez and the CO. I conclude that the metal sheeting placed over the subject opening by BNK was not secured so as to prevent accidental displacement by a worker. Even if the cover had two screws in one end, as possibly indicated by certain photographs in the record and what Detective Harrington told the CO, the screws were small and plainly insufficient to prevent displacement due to the ease with which Mr. Rodriguez lifted one of the sheets.¹⁸ Based on the credible evidence of record, I find that the terms of both of the cited standards, 29 C.F.R. §§ 1926.502(i)(3) and (4), were not met by Respondent.

The third element of the Secretary’s case is to demonstrate that employees had access to the cited condition. The Secretary contends that Mr. Rodriguez not only had access to the skylight opening, but was actually exposed to the opening in that he fell through it. She asserts that, although Mr. Rodriguez was not BNK’s employee, BNK was contractually responsible for the safety of all

¹⁷Respondent argues that since the Federal Rules of Evidence do not apply to simplified proceedings, *see* 29 C.F.R. § 2200.200(b), no adverse inference can be drawn by the absence of Mr. Curovic from the courtroom. Respondent, however, cites to no case law to support this position. Respondent is confusing the allowed admissibility of hearsay evidence in a simplified proceeding with the weight ultimately to be accorded to any such hearsay evidence. In this case, the Court gave little weight to Mr. Kuridza’s relayed account of what Mr. Curovic told him with regard to how the metal sheets were supposedly secured above the subject opening.

¹⁸I have considered the CO’s testimony, set out *supra*, that Mr. Pinto had told him that while he was unsure of the number, there had been more than two screws in the sheeting. (Tr. 116, 133). I do not consider Mr. Pinto’s remark significant, in view of the other evidence in this case. Even if there were more than two screws in the cover, they did not prevent Mr. Rodriguez from easily displacing it without the use of any tools.

employees at the work site. She further asserts that BNK was responsible here because, pursuant to the multi-employer work site doctrine, it created the condition: BNK's project manager, Mr. Curovic, and an unidentified BNK employee created the condition using two unmarked metal sheets to inadequately cover the hole in the roof. BNK, on the other hand, contends the Secretary cannot establish the employee access element as it had no employees exposed to the condition and neither controlled nor created the condition. BNK asserts that CWM created the condition by cutting the openings in the roof, that CWM took responsibility for the condition and the injury of its employee by settling with OSHA after it was cited, and that these factors preclude the Secretary from enforcing her multi-employer policy against BNK.

As the Secretary asserts, BNK was contractually responsible for the safety of all employees at the site. BNK was obligated to "take all reasonable precautions for the safety of ... Every employee on the work [site]" and to "erect and maintain, as required by existing conditions and progress of the work, all reasonable safeguards for safety and protection...." (Tr. 191-93; RX-B, p. 1-21). BNK was also obligated to "[p]rovide all necessary ... covers, guardrails, barricades, safety devices, etc., to adequately protect all workmen ... from possible injury...." (Tr. 193; RX-B, p. 1-3). In addition, as set out *supra*, Mr. Kuridza himself admitted that, as he understood the contract documents, BNK was responsible for making the job site safe for other people. (Tr. 166).

As the Secretary further asserts, BNK was also responsible for the cited conditions pursuant to the multi-employer work site doctrine. Under that doctrine, and long-standing Commission precedent, "the employer who creates a violative or hazardous condition is obligated to protect its own employees as well as employees of other contractors who are exposed to the hazard." *Smoot Constr.*, 21 BNA OSHC 1555, 1557 (No. 05-0652, 2006); citing *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). See also *Secretary of Labor v. Trinity Indus., Inc.*, 504 F.3d 397, 402 (3d Cir. 2007) ("*Trinity*") (citing Courts of Appeals cases upholding "creating employer" doctrine).¹⁹ Although BNK contends it did not create the hazard in this case, I find that it did. The

¹⁹The Secretary points out that in *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007), *on appeal* (8th Cir. 2008) ("*Summit*"), the Commission vacated the Secretary's citation of a non-creating, non-exposing employer but did not disturb the line of Commission cases affirming citations of employers whose own employees were not exposed but who created the hazard to which contractor's employees were exposed. The Secretary also points out that in

record plainly shows that Mr. Curovic and a BNK laborer placed the metal sheeting over the skylight opening on February 7, and that the sheeting was not marked or painted in any way to warn of the hazard. Also, the sheeting was not secured to prevent displacement. In fact, as the Secretary put it in her opening statement, BNK made the skylight opening, which was an obvious, recognizable hazard, into a dangerously hidden hazard. (Tr. 17). I further find that because BNK created the hazardous condition, it was properly cited for violating both of the cited standards pursuant to the multi-employer work site doctrine.²⁰ In making these findings, I have noted BNK's argument that the multi-employer work site doctrine cannot be enforced against it because OSHA also cited CWM for the condition and CWM took responsibility for the condition and settled its citation. It is clear that OSHA may cite more than one employer for the same condition. *See RMS Consulting, LLC*, 20 BNA OSHC 1994, 1997 (No. 03-0479, 2004) (on a multi-employer work site, OSHA may appropriately cite a subcontractor whose employees are exposed to a hazard, as well as the general contractor for the same condition, especially if the general contractor created or controlled the hazardous condition).

While the foregoing is sufficient to dispose of the employee access element, the Secretary points out that, but for the circumstances in this case, BNK's own employees would also have had access to the cited condition.²¹ Mr. Kuridza testified that in the week before the accident, BNK was attempting to schedule its employees to pour concrete on the roof at the site. The concrete pour was originally scheduled for February 26, two days before the accident, but was postponed due to the weather. BNK ended up pouring the concrete on the roof during the first week in March 2007, and its employees poured concrete over the entire roof, including the area around the skylight opening. (Tr. 174-76; CX-7-8). The Secretary may show employee access through either actual employee

Trinity, the Third Circuit confirmed that *Summit* did not eliminate the Secretary's authority under the Act "to impose duties on employers to persons other than their employees." 504 F.3d at 402.

²⁰I find that Respondent had both statutory and contractual obligations to provide for the safety of Mr. Rodriguez and to sufficiently mark and secure the cover BNK's employees placed over the subject opening.

²¹I also note that, when creating the hazard on February 7, BNK's project manager and unidentified employee had access and were exposed to the cited condition.

exposure, or by showing that “while in the course of their assigned working duties ... [employees] will be, are, or have been in a zone of danger.” *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test for whether an employee would have access to the “zone of danger” is “based on reasonable predictability.” *Id.*; *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citing *Capform, Inc.*, 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994)). In view of the evidence of record, I agree with the Secretary that, but for the inclement weather, and Mr. Rodriguez’s accident, BNK’s own employees would have been exposed to the cited condition.²² BNK’s arguments with respect to the employee access element are rejected, and I conclude that the Secretary has established that element.

The final element the Secretary must prove is that the employer either knew or should have known of the cited condition. As the Secretary asserts, she can establish a prima facie showing of knowledge by demonstrating that a supervisory employee knew of, or was responsible for, the violation. Such knowledge is imputable to the employer. *See, e.g., Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 92-862, 1993), and cases cited therein. Here, BNK had actual knowledge of the cited condition. BNK admitted that Mr. Curovic, the project manager, along with a BNK laborer, created the condition by covering the skylight opening with two metal sheets. (Tr. 158; Attach., p. 2, no. 19). Because Mr. Curovic was BNK’s supervisor at the site, his knowledge is imputable to BNK. I conclude that the Secretary has shown the knowledge element.

The Secretary has met all four elements in this case. Items 1 and 2 of Citation 1, alleging violations of 29 C.F.R. §§ 1926.502(i)(3) and (4), are affirmed. The items are affirmed as serious violations, especially in light of the serious injuries Mr. Rodriguez sustained as a result of his fall through the skylight opening.

Penalties

²²At the hearing, the Secretary also attempted to show BNK’s employees were exposed to the cited condition when they were building the elevator shaft. Contrary to the stipulations of the parties, Mr. Kuridza testified that a company named PMC built the elevator shaft. *See* Attach., p. 2, no. 24. However, even if BNK did build the shaft, Mr. Kuridza said that it was built from the inside by use of scaffolding, and there was no evidence to the contrary. (Tr. 169-70).

The Secretary has proposed a penalty of \$1,500.00 for each of the two items. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, prior history of violations and good faith. 29 U.S.C. § 666(j); *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 principal factor in penalty assessment. *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. CO Jensen testified that both items were classified as serious because serious injury or death could have occurred. He also testified that the severity of the items was high and the probability was greater, particularly in view of the serious accident that occurred. Finally, he testified that the gravity-based penalty for each item was \$5,000.00. Adjustments of 60 and 10 percent were made, respectively, for the small size of the employer and its lack of history of recent violations, resulting in a penalty of \$1,500.00 for each item. (Tr. 83-89). Based on the record, I find that the Secretary properly considered the statutory factors in her penalty proposals. I find the proposed penalty of \$1,500.00 for each item appropriate, and the proposed penalties are assessed.²³

Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Federal Rule of Civil Procedure 52(a).

²³Upon consideration of the penalty assessment criteria, I find as fact that for both items a serious classification is appropriate, within the meaning of section 17(k) of the Act. I further find that \$5,000.00 is appropriate as the gravity-based penalty for each item and that adjustments of 60 and 10 percent are appropriate, due to the small size of the company and its lack of history of recent violations, respectively.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of Serious Citation 1 is affirmed, as a violation of 29 C.F.R. § 1926.502(i)(3), and a penalty of \$1,500.00 is assessed.²⁴

2. Item 2 of Serious Citation 1 is affirmed, as a violation of 29 C.F.R. § 1926.502(i)(4), and a penalty of \$1,500.00 is assessed.²⁵

/s/ _____
Dennis L. Phillips
U.S. OSHRC Judge

Date: Mar 31, 2008
Washington, D.C.

²⁴The alternatively-alleged violation of 29 C.F.R. § 1926.754(e)(3)(ii) is vacated as inapplicable.

²⁵The alternatively-alleged violation of 29 C.F.R. § 1926.754(e)(3)(iii) is vacated as inapplicable.

ATTACHMENT TO DECISION IN B&N&K RESTORATION CO., INC., NO. 07-1373

The Parties' Stipulated Facts

Secretary's Statement of such facts that are undisputed by respondent:

1. The respondent, B&N&K Restoration Co., Inc. ("B&N&K" or "respondent"), a corporation organized under the laws of the State of New Jersey and doing business in the State of New Jersey, maintaining its principal office and place of business at 223 Randolph Avenue, Clifton, New Jersey 07011, is and at all times hereinafter mentioned was engaged in business as a general contractor in the construction industry.
2. In February 2007, Aleks Kuridza was Vice President of B&N&K, and is Vice President of B&N&K currently.
3. From 2006 to 2007, B&N&K was the Prime Contractor for General Construction on the construction of an addition ("the Addition") to the Brookdale Elementary School in Verona, New Jersey (this construction project is hereinafter referred to as "the Project").
4. B&N&K had a contract for the Project with the Verona Board of Education, which owned the Brookdale Elementary School.
5. Vasko Curovic was B&N&K's Project Manager for the Project, and is an employee of B&N&K currently.
6. Epic Management, Inc. ("Epic") was the Project Management Firm and the owner's representative for the Verona Board of Education on the Project.
7. J.G. Schmidt Steel ("Schmidt") was the Prime Contractor for steel erection on the Project, through a contract with the Verona Board of Education.
8. Andy Lukashuk was Schmidt's Project Manager for the Project, and is an employee of Schmidt currently.
9. Schmidt supplied the steel for the Project and subcontracted the steel erection work on the Project to Campbell Welding & Machinery, Inc. (CWM").
10. In February 2007, Thomas Campbell was President of CWM, and is President of CWM currently.
11. Gasper Pinto was CWM's foreman for the Project, and is an employee of CWM currently.
12. In February 2007, Louis Rodriguez was a welder employed by CWM, and is an employee of CWM currently.
13. B&N&K, as the Prime Contractor for General Construction, was contractually responsible for the coordination of, and oversaw (for coordination purposes) all construction activity on the Project by the separate prime contractors on the Project.

14. In addition, B&N&K was responsible for performing specific types of construction work for the Project, including masonry, and concrete pouring on the roof of the Addition.

15. Throughout the Project, management personnel of B&N&K regularly contacted management personnel of Schmidt to discuss coordination of work that needed to be performed on the Project and to inform Schmidt that particular tasks on the Project should proceed.

16. During the course of the Project, management personnel of B&N&K also regularly contacted management personnel of Epic and instructed them to direct Schmidt to proceed with particular tasks on the Project.

17. On or about February 6, 2007, CWM employees cut an opening for a skylight (“the skylight opening”) on the roof of the Addition.

18. The skylight opening measured approximately 4.5 feet by 4.5 feet, bounded on each of its four sides by curbing measuring approximately 1.5 inches in height.

19. On or about February 7, 2007, B&N&K Project Manager Vasko Curovic and a B&N&K laborer for respondent placed two steel sheets (“the two steel sheets”) over the skylight opening on the roof in order to cover it.

20. Each of the two steel sheets that were placed over the skylight opening measured approximately 3 feet by 10 feet.

21. The two steel sheets were placed over the skylight opening such that the sheets overlapped over the middle of the opening.

22. The steel sheets that B&N&K placed over the skylight opening were not painted with high-visibility paint, or color coded, or marked with the word “hole” or “cover.”

23. There were no screws in the center of the steel sheets, to hold the sheets together, where they overlapped over the opening.

24. Prior to February 28, 2007, B&N&K constructed an elevator shaft at the Addition.

25. The top of the elevator shaft protruded through the roof of the Addition, and was located less than 2 feet from the skylight opening.

26. Prior to February 28, 2007, B&N&K notified other contractors on the Project that construction of the elevator shaft at the Addition had been completed.

27. Prior to February 28, 2007, B&N&K notified other contractors on the Project of B&N&K’s plans to have concrete poured on the roof.

28. Prior to February 28, 2007, B&N&K communicated a request to Schmidt to install steel sheets over the top of the elevator shaft that protruded through the roof.

29. Prior to February 28, 2007, Schmidt directed CWM to perform additional steel erection work on the roof of the Addition, including installing steel sheets over the top of the elevator shaft that protruded through the roof, before the concrete was scheduled to be poured on the roof.

30. On the morning of February 28, 2007, shortly before 7:00 am, CWM foreman Gasper Pinto and CWM welder Louis Rodriguez went to the Addition in order to perform the additional steel erection work on the roof of the Addition as directed by Schmidt, including installing steel sheets over the top of the elevator shaft that protruded through the roof.

31. On February 28, 2007, shortly after Mr. Pinto and Mr. Rodriguez arrived at the Addition that morning, Mr. Pinto had a conversation with B&N&K Project Manager Vasko Curovic, during which the two discussed the work to be done by CWM on the roof that day.

32. The two steel sheets that B&N&K had placed over the skylight opening on the roof were the same type of steel sheets that were supposed to be installed over the elevator shaft by CWM.

33. Mr. Rodriguez sustained multiple injuries from the fall, including a broken wrist, a broken forearm, a dislocated elbow, and damage to tendons and nerves.

34. After Mr. Rodriguez fell, B&N&K Project Manager Vasko Curovic assisted him in going downstairs and exiting the Addition.

35. On July 30, 2007, the citation and notification of proposed penalty at issue herein (OSHA inspection number 310696026) was served on respondent, proposing a total penalty of \$3000.

36. On August 17, 2007, respondent filed with a representative of the Secretary of Labor, a notification of intent to contest the citation items at issue herein and the proposed assessment of the penalties therefor.

Respondent's Statement of such facts that are undisputed by the Secretary:

1. The instant project was a public multi-prime contract wherein B&N&K was the prime contractor for general construction.

2. On or about February 6, 2007 CWM employees performed the installation of the roof deck at the Addition and at the same time, cut one or more required openings for skylights to be installed on the roof of the addition.

3. CWM knowingly cut the openings well before the intended installation of the skylights.

4. CWM did not place any coverings over the skylight opening which it had made in the deck, either on February 6, 2007 or thereafter.

5. Following February 6, 2007, CWM did not perform any additional work on the roof deck at the jobsite until February 28, 2007.

6. Prior to February 7, 2007, B&N&K had installed work at the lower floors of the Addition including without limitation drywall that could not be exposed to the elements, and which required temporary protection to be in place to avoid weather related damage.

7. There were no employees of CWM on the jobsite on February 7, 2007.

8. On February 28, 2007, Luis Rodriguez and Gasper Pinto arrived at the worksite prior to 7:00 am.

9. Initially, Rodriguez alone went up and onto the roof deck.

10. At the time that Rodriguez went onto the roof there was snow, slush and/or ice on the deck.
11. Initially, Pinto remained on one of the floors below and coordinated his work for the day with B&N&K employee Curovic.
12. Rodriguez accessed the roof deck by climbing a ladder up to and through an opening in the roof.
13. No B&N&K employees performed work on the roof deck between February 7, 2007 and February 28, 2007 (other than on February 7, 2007 for the sole purpose of putting temporary protection in place over the openings cut by CWM on the prior day).
14. On August 22, 2007, CWM entered into an Informal settlement agreement with OSHA whereby it agreed not to contest the citation issued for the serious violation of 29 CFR 1926.754 (e)(2)(iii) cutting the opening well before its intended installation was to occur and CWM agreed to pay a penalty of \$1,500.00.
15. B&N&K did not cut the hole for the skylight.