United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Everclear Enterprises, Inc., Respondent.	OSHRC Docket No. **12-2212** Simplified Proceedings

Appearances:

Brian D. Mauk, Esquire, U. S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For Complainant

Chris Heinss, Esquire, Balch & Bingham, LLP, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Everclear Enterprises, Inc. is engaged in window washing including work on high-rise buildings. As a result of an incident on April 11, 2012, where an employee fell while washing windows on Everclear's jobsite, Occupational Safety and Health Administration (OSHA) Compliance Officer Jennifer McWilliams conducted an inspection of Respondent's worksite at Children's Hospital in Birmingham, Alabama, on April 13, 2012. The Secretary subsequently issued a citation to Respondent on September 24, 2012, alleging two violations of Section 5(a)(1) of the Act, and proposing total penalties of $3,400.00.

Everclear contested the Citation and Notification of Proposed Penalty. A hearing was held on March 21, 2013, in Birmingham, Alabama, under Commission Rules governing Simplified Proceedings. Respondent agrees to jurisdiction and coverage. For the reasons that follow, both alleged violations of Section 5(a)(1) of the Act are vacated, and no penalties are assessed.

Discussion

This case involves one citation with two separate items. Item 1 and Item 2 of the Citation each allege a violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the Act), and the basis for each item is that Everclear allegedly exposed its employees to a specific fall hazard.

Section 5(a)(1) provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

> To prove a violation of the general duty clause, "the Secretary must show that a condition or activity in the workplace presented a hazard, that the employer or its industry recognized the hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard." *Arcadian Corp.*, 20 BNA OSHC 2201, 2007… (No. 93-0628, 2004).

ACME Energy Services d/b/a Big Dog Drilling, 2012 WL 4358852 at *2 (No. 88-0088, 2012).

It is undisputed that a fall hazard existed for Respondent's employees washing windows 215 feet above the ground, and that it was likely to cause death or serious physical harm. The Secretary must also establish the hazard was recognized, and that a feasible and effective means existed to eliminate or materially reduce the hazard. Hazard recognition can be established by showing either that the individual employer was aware of the hazard or that its industry as a whole was aware of the hazard.

Both Respondent and its industry recognize high access window work exposes employees to a fall hazard by the nature of the work. Respondent, however, argues that where an employee is using the fall restraint system or the fall arrest system the hazard of falling has been abated.

Item 1, Alleged Serious Violation of § 5(a)(1) of the Act

In Citation No. 1, Item I, the Secretary alleges:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish to each of his employees a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that employees were exposed to fall hazards:

a) On or about April 11, 2012 – at 412 18th Street, South, Birmingham, Alabama, an employee was not secured within the seatboard prior to being suspended.

Among other methods, one feasible and acceptable method to correct this hazard would be to comply with the requirements in the ANSI IWCA I-14.1-2002 Window Cleaning Safety standard section 5.7.8 that states "The worker shall be secured within the seatboard and fall arrest equipment prior to being suspended."

At the hearing and in his brief, the Secretary conceded that while a fall occurred on April 11, 2012, resulting in injuries to an Everclear employee, the cause of the fall is not an issue with regard to this citation. It is undisputed that on April 11, 2012, Respondent's employees entered the seatboard after it had been suspended over the wall. Respondent refers to this as the step and sit method. The Secretary contends that employees must first be strapped into and sitting on the seatboard before going over the wall.

Three employees told the compliance officer during the inspection that on April 11, 2012, they were attached to the fall restraint system as they approached the edge of the roof. They then attached to the independent fall arrest system (safety line). They placed the seat over the wall and stood on the seat. At this point, the employees would be connected to both the fall restraint system and the fall arrest system. The employees then disconnected from the fall restraint system while still connected to the fall arrest system. They then sat on the seatboard. These employees remained connected by a 3 foot lanyard to the independent fall arrest system (safety line) while performing their window washing activities. The seatboard was connected to the descending line which is a line independent of the safety line.

The fall restraint system prevents employees from going into the fall hazard zone. The fall arrest system is an independent safety line used by the employee when he is in the fall hazard zone.

The Secretary does not dispute that Everclear employees are attached to the independent fall arrest system, the fall restraint system, or both while they approach the roof edge, when they go over the wall or when they are suspended while cleaning high-rise windows. The Secretary claims employees must also be secured within the seatboard prior to being suspended to prevent

exposure to a fall hazard.

Respondent argues that at all times its employees are protected from fall hazards by use of the fall arrest system, the fall restraint system, or both. It asserts the straps securing the employees to the seatboard are used to allow the employees to position themselves in relation to the window surface they are cleaning. Securing to the seatboard is not a method of fall protection.

To establish a violation of § 5(a)(1) of the Act, the Secretary must specify the particular steps the employer should have taken and demonstrate the likely utility of these measures. *See National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). He must show that his proposed abatement will materially reduce the hazard. In *U.S. Postal Service*, 21 BNA OSHC 1767, (No. 04-0316, 2006), the Commission held:

> To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate. Where the Secretary fails to show any such inadequacy, a violation of the general duty clause has not been established. *See Alabama Power Co.*, 13 BNA OSHC 1240, 1987 CCH OSHD ¶ 27,892 (No. 84-357, 1987) (citation alleging insufficient safety rules vacated where employer's safety program was not inadequate): *Jones & Laughlin*, 10 BNA OSHC 1778, 1981 CCH OSHD ¶ 26,128 (No. 76-2636, 1982).

In accordance with that decision, a determination must be made as to the adequacy of the methods undertaken by Everclear to address the alleged fall hazard for its employees while performing high access window washing on its jobsite.

In Citation No. 1, Item 1, discussed above, the Secretary alleges that Respondent's employees were exposed to a fall hazard when they were not secured within the seatboard prior to being suspended in the descent control system.

Respondent agrees that its employees used the step and sit method where the seatboard is first placed over the wall and then employees step on it, remove the slack in the line and then sit on the seatboard. The employees do not first secure themselves to the seatboard before going over the wall. Respondent, however, argues that its method protected employees from any fall hazard in that they are always attached to the fall arrest system, the fall restraint system, or both at all times that they approach the edge of the wall, when they enter the seatboard using the stand and sit method, and when they are performing window washing activities while suspended.

In 1991, the Director of Compliance Programs for OSHA sent a memorandum to all OSHA Regional Administrators detailing the requirements for use of descent control equipment by employees performing building exterior cleaning, inspection, and maintenance. The memorandum (Exh. R-4) states in part:

> OSHA allows the employees to use descent control equipment, provided that the equipment is used in accordance with the instructions, warnings and design limitations set by manufacturers or distributors. In addition, the Agency expects employers whose employees use descent control devices to implement procedures and precautions as follows:
>
> 1. Training of employees in the use of equipment before it is used;
>
> 2. Inspection of equipment each day before use;
>
> 3. Proper rigging, including sound anchorages and tiebacks, in all cases, with particular emphasis on providing tiebacks when counterweights, cornice hooks, or similar non permanent anchorage systems are used;
>
> 4. Use of a separate fall arrest system (including bodybelt, sit harness, or full body harness; rope grab or similar device; lifeline; and anchorage (all of which are completely independent of the friction device and its support system), so that any failure in a friction device, support seat (or harness), support line, or anchorage system will not affect the ability of the fall arrest system to operate and quickly stop the employees fall;
>
> 5. All lines installed (such as by using knots, swages or eye splices) when rigging descent control devices shall be capable of sustaining a minimal tensile load of 5,000 pounds;
>
> 6. Provisions are made for rescue;
>
> 7. Ropes are effectively padded where they contact edges of the building, anchorage, obstructions, or other surfaces which might cut or weaken the rope;
>
> 8. Provisions are made for intermittent stabilization for descent in excess of 130 feet.

Procedure 4 of the memorandum clearly indicates that OSHA does not consider the descent control system or the support seat to be part of the fall arrest system. It emphatically states that the separate fall arrest system is completely independent of the friction device and support seat.

This independent system is necessary to prevent employee falls should the control descent equipment fail.

Respondent's expert, Stefan Bright, is a member of an alliance team which includes OSHA and the International Window Cleaning Association (IWCA). Mr. Bright is the Safety Director of the IWCA with over 33 years experience in the exterior building and construction maintenance industry including 20 years in training and 18 years designing systems and installations. He has also chaired the I-14 Window Cleaning Safety Standards Committee since 2001. That committee is responsible for the ANSI Standard IWCA I-14.1-2001 (Exh. C-10).

Mr. Bright echoed the requirements of OSHA's memorandum paragraph No. 4 (Exh. R-4) that the fall arrest system must be separate and completely independent of the control descent equipment and the support seat. He emphasized that the control descent system and the seatboard are not part of the fall arrest system, but are used for positioning of the employee to perform his work. He clarified this when questioned by the Court about what constitutes a fall arrest system and what constitutes the primary descent system:

> THE WITNESS: The primary descent system is the work positioning part of the system. It's the one that's under load, the weight of the work. They attach the rope to an anchor on the roof, put the descent device on the rope and attach the seatboard to the descent device.
>
> Once they're in the seatboard, now they can operate the descent device to descend to a level floor work area on the façade. If any of that system fails, any of it, that's the purpose of the secondary fall arrest system. That prevents them from falling.
>
> The fall arrest system consists of another rope anchored to an - - independently anchored - - anchored to - -
>
> JUDGE SIMKO: A separate anchor from the primary anchor.
>
> THE WITNESS: Right. The operator or user wears a harness and a lanyard and a rope grab device attached to that rope, and for window cleaning purposes and generally in all cases, they are attached to that, once they approach the end, while they're assembling their primary system.

JUDGE SIMKO: So the harness is the portion that's on the employee that's attached to that fall arrest system?

THE WITNESS: Correct.

JUDGE SIMKO: All right. Now, is the harness also attached to the primary descent rope?

THE WITNESS: No.

JUDGE SIMKO: So the seat and the other mechanism is attached to that?

THE WITNESS: Yes.

(Tr. 226-227).

Mr. Bright further testified that the seatboard is a single point suspended platform and that employees are usually connected to the platform by sitting on it. They are not secured to the seatboard. He stated that the straps on the seat are used for positioning and are not part of a life support or fall arrest system. While he did not consider securing of the employee to the seatboard to be unsafe, Mr. Bright's opinion was that the employee was not subject to a fall hazard if he uses the fall restraint or fall arrest system. He further testified an employee attached to the safety line is not exposed to a fall hazard even where he is not in his seat or when he is using the stand and sit method of entering the seat.

Mr. Bright found nothing to indicate Respondent's stand and sit method to be unsafe. He testified that in his opinion employees are not exposed to a fall hazard when they are not secured to the seatboard prior to suspension when they are connected to a fall arrest system or fall restraint system. This is the method and procedure used by Respondent.

The Secretary has failed to prove Respondent's fall protection methods are inadequate.

The Secretary relied exclusively on one sentence in the ANSI IWCA I-124.1-2001 Window Cleaning Safety Standard, Section 5.7.8. Mr. Bright was the chairman of the IWCA Committee that developed that ANSI standard. He testified that in 2003, two years after the publication of the standard, the committee that developed it struck out the sentence by a vote of 15 members. Only three members abstained. No member opposed. Mr. Bright testified that this ANSI standard is a guideline for the industry and not a requirement. I find this provision of the

ANSI Standard not controlling in a determination of whether the industry considers failure to secure the employee within the seatboard prior to suspension to be a recognized hazard in the industry causing or likely to cause death or serious physical harm.

Respondent's methods are consistent with industry practice. The Secretary has failed to show that Everclear or its industry recognizes a fall hazard to employees that are not secured to a seatboard prior to suspension where, as here, the employee is attached to a fall arrest system or a fall restraint system. The Secretary has failed to establish a recognized hazard.

The alleged violation of Section 5(a)(1) of the Act set forth in Citation No. 1, Item 1 is vacated.

Item 2, Alleged Serious Violation of § 5(a)(1) of the Act

In Citation No. 1, item 2, the Secretary alleges:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish to each of his employees a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that employees were exposed to fall hazards:
>
> a) On or about April 13, 2012 – at 412 18th Street, South, Birmingham, Alabama, ropes used by employees were not permanently marked or tagged with: length and diameter, date of manufacture and date placed in service.
>
> Among other methods, one feasible and acceptable method to correct this hazard would be to comply with the requirements in the ANSI IWCA I-14.1-2001 Window Cleaning Safety standard section 14.5.4 that states "Ropes shall be permanently marked or tagged with: length and diameter, date of manufacture and date placed in service."

The Secretary relies on one sentence of an ANSI guideline and asks this Court to presume a fall hazard to employees. Complainant produced no evidence to prove that non-compliance with specific provisions of one section of an ANSI standard created a fall hazard. Unlike specific OSHA standards, ANSI standards do not create a presumption of a hazard without other evidence. This ANSI standard has not been adopted as an OSHA standard.

Mr. Stefan Bright, Respondent's expert witness, chaired the ANSI committee that developed the ANSI standard which is the basis of the alleged violation. He testified that Part A of the ANSI guideline was developed for users of the equipment like Everclear and that part B was

developed for designers, manufacturers and installers of the equipment (See Exh. C-10, Section 1.2.2). The Secretary relies on provisions in Section 14.5.4 which are in Part B, applicable to designers, manufacturers and installers. These provisions are not applicable to users like Everclear. Arguably the provision relating to the date equipment is placed in service can be known only to the user and not the manufacturer. Mr. Bright conceded this provision may have been misplaced in Part B of the ANSI guideline.

Mr. Allen Burton, Respondent's president, testified that the manufacturer marks the diameter and length of the ropes at the rope ends. The date of manufacture is an internal tag in the middle of the rope which can be determined visually by the user. The Secretary does not dispute this testimony. The company color codes the ends of ropes showing lengths for shared ropes stored at the shop. It does not color code ropes given to individual employees. The Secretary produced no evidence to show failure to mark the ends of ropes of individual employees created a fall hazard.

The testimony of the Secretary's compliance officer focused on her concern for assuring ropes were not used beyond their replacement dates. She testified that a feasible means of abatement would be marking or tagging ropes with the dates they were placed in service.

Mr. Burton testified Everclear issues only new ropes to individual employees and that each rope has tags on and in the rope. The company also maintains information on each rope in its office. This includes the date ropes assigned to specific employees are put in service. Employees are trained how to inspect ropes for defects and irregularities and to remove defective ropes from service. Employees inspect all ropes used for descent prior to each use. Everclear continuously monitors and inspects all equipment every six months. Respondent has established that it knows when ropes are put in service and monitors the service life of the ropes in the field.

In response to questions by the Court, Mr. Bright testified as follows:

> JUDGE SIMKO: Now, is there - - going to the alleged violation for not having a permanent marking or tagging for the date of in service, is there another way that an employer generally does the in-service equipment in your industry?
>
> THE WITNESS: Yeah. Yes, most of them seem to do it administratively within the office parameters of someone logging it in the logbook.

> The particular rope may be identified in some fashion, maybe using the manufacturer's marking and serial number, and then the date placed into service is usually logged in a book, because these things are operated. They're functional pieces of equipment. It's like climbing up and down a ladder. The users are descending and moving them and dragging them up and down the side of a building. It's hard to keep tags on a rope that's used in such a fashion, so they're generally kept - - the recordkeeping is kept clerically.
>
> JUDGE SIMKO: Okay, and that's done in conjunction with daily inspections of the rope by the employees?
>
> THE WITNESS: Yes.

(Tr. 231-232).

Respondent's methods of recording and monitoring in-service dates of ropes along with daily inspections are consistent with industry practice as described by Mr. Bright.

The Secretary has failed to prove that the methods undertaken by Everclear to address the alleged hazard were inadequate. The Secretary has also failed to establish that Respondent's procedures created any fall hazards for its employees.

The alleged violation of § 5(a)(1) of the Act set forth in Citation No. 1, Item 2 is vacated.

FINDINGS OF FACT AND CONCLUSION OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1) of the Act is vacated, and no penalty is assessed; and

2. Item 2 of Citation No. 1, alleging a serious violation of § 5(a)(1) of the Act is vacated, and no penalty is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: May 8, 2013
Atlanta, Georgia