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.

GREENWOOD INDUSTRIES, INC.

Respondent.

OSHRC Docket No. 12-0671

APPEARANCES:

Kevin E. Sullivan, Esquire
U.S. Department of Labor
Boston, Massachusetts
For the Secretary

Paul Katz, Esquire
Brookline, Massachusetts
For the Respondent

BEFORE: Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Health and Safety Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On August 17, 2011, the Occupational Safety and Health Administration ("OSHA") inspected a worksite of Greenwood Industries, Inc. ("Respondent" or "Greenwood") in Attleboro, Massachusetts. The inspection was in response to a reported accident at the worksite. After the inspection, OSHA cited Greenwood for a serious violation of the fall protection standard. Greenwood filed a timely notice of contest, bringing this matter before the Commission.

A hearing was held in Boston, Massachusetts on October 11 and 12, 2012. Both parties have submitted post-hearing briefs and reply briefs. Further, on January 2, 2013, the Secretary submitted a Motion to Amend Citation in the Alternative ("Motion"). Greenwood submitted its opposition to the Motion ("Opposition").[1] I deny the Motion for the following reasons.

The Motion to Amend the Citation

The Secretary submitted her Motion at the same time she filed her reply to Greenwood's post-hearing brief. She proposed amending the citation to add a violation of 29 C.F.R. § 1926.501(b)(10) in the alternative.

In accordance with Federal Rule of Civil Procedure 15(b), a citation can be amended, even after judgment, if "the parties' conduct demonstrates their express or implied consent to litigate the claim." *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 319 (1st Cir. 2012) (finding the unpleaded issue had been discussed, included in discovery and in a scheduling order, and briefed by the parties); *see also Rodney E. Fossett d/b/a Southern Lightweight Concrete Co.*, 7 BNA OSHC 1915, 1916-17 (No. 76-3944, 1979) (finding no prejudice because the respondent was on notice that issues in the unpleaded standard were being tried). Amendments are permissible where the amendment does not alter the essential factual allegations of the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993).

However, the Commission has also held that "unless the employer has had an opportunity to introduce evidence to rebut" the Secretary's unpleaded issue, the evidentiary record is not complete. *J. A. Jones Constr. Co.*, 16 BNA OSHC 1497, 1498 (No. 87-2059, 1993) (finding it proper to deny a motion to amend when the parties have not tried or elicited evidence to support the unpleaded issues).[2]

The standard cited in the Secretary's complaint requires an employer to choose one of two options (guardrail system or personal fall arrest system) when an employee is exposed to a

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[1] Greenwood's Opposition included an affidavit exhibit to support its position. The Secretary did not object to or comment on this affidavit in her Reply to Opposition. Nonetheless, because the content of the affidavit was not directly tried or responded to, I have not considered it in my decision.

[2] The facts in *J.A. Jones* are similar to those in the instant case. There, after the close of the hearing, the Secretary moved to amend the citation's characterization from willful to repeat. The Secretary asserted that the evidence for a repeat violation had been fully tried and no further evidence was needed. The Commission found that some evidence which had been presented to support the willful characterization could also be relevant to support a repeat characterization. However, the Commission held that mere presentation of evidence relevant to an unpleaded issue is not sufficient to show consent by the parties to try the unpleaded issue. The Commission concluded that the parties had not consented to try the unpleaded issue, that it was not appropriate to reopen the record, and that the Secretary had not previously made any attempt to raise the unpleaded issue. 16 BNA OSHC at 1498.

fall of 6 feet or more in a hoist area.[3] The standard proposed in the alternative requires an employer to protect an employee from a fall of 6 feet or more when engaged in roofing work on a low-slope roof.[4] Depending on the width of the roof, it requires an employer to choose from one of several fall protection options.

Greenwood asserts that because it had no notice of this proposed alternative violation, it did not have the opportunity to prepare a defense and would be significantly prejudiced by an amended complaint. I agree.

Greenwood had no opportunity to prepare a rebuttal to the proposed alternative violation because the Secretary did not allege a violation of 29 C.F.R. § 1926.501(b)(10) until after the hearing had concluded. For example, Greenwood points out that to defend against the proposed alternative violation, it is likely that it would have investigated and presented evidence about the width of the roof, the extent and positioning of the flag system, and whether an employee was acting as a safety monitor. (R. Opposition).

The Secretary asserts in her Reply to Opposition, for the first time, that uncontroverted evidence was adduced at the hearing to prove that Greenwood was not using an adequate warning line or safety monitoring system.[5] (S. Reply to Opposition). The Secretary argues that Mr. Langton-Hayward's testimony is proof that he could not have been an adequate safety monitor under the standard's requirements.[6] *Id.* However, a review of his testimony shows that he was responding to a question about what happened when Mr. Crane fell off the roof; I find no

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[3] 29 C.F.R. § 1926.501(b)(3). *See infra.*

[4] 29 C.F.R. § 1926.501(b)(10): "*Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50 feet (15.25 m) or less in width (see appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted."

[5] In her Motion, the Secretary stated that the "salient issue is why the employees were not tied off, which was fully addressed" by both parties. Later, in her Reply to Opposition, the Secretary set forth the argument that the record included all the necessary evidence in regard to a warning line system and safety monitoring system.

[6] The requirements for a safety monitoring system (SMS) are set out in 29 C.F.R. § 1926.502(h). Several requirements are listed, e.g., the designation of a competent monitor. The Secretary asserts that because Mr. Langton-Hayward could not have been a safety monitor, it is clear Greenwood was not using a compliant SMS. The Secretary, however, has the burden to prove her case, and she did not offer evidence about the required elements of a SMS and whether Greenwood had met those requirements.

indication that the Secretary was attempting to elicit testimony about his possible role as a safety monitor.[7] (Tr. 121).

The Secretary further asserts there is uncontroverted evidence of an inadequate warning line system. (S. Reply to Opposition). She urges that testimony from Mr. Crane and Mr. Langton-Hayward is adequate to support the alternative alleged violation. *Id.* The record shows that both Mr. Crane and Mr. Langton-Hayward referred to a flag line in their testimony.[8] A review of the testimony, however, shows that it was not provided in the context of whether the flag line was a compliant warning line system.[9] Instead, I find that the testimony was generally descriptive of the conditions on the roof that day and that it was not sufficient to support the allegation of an inadequate warning line system.

I conclude that the Secretary has not shown that the record was sufficiently developed to support the proposed alternative violation.[10] I find the testimony was not directed at whether the elements of a compliant warning line system or safety monitoring system were implemented at the worksite. Further, Greenwood offered no rebuttal evidence in this regard and at no time indicated that it was presenting evidence for the proposed alternative violation. Finally, I find nothing in the pleadings to indicate the Secretary intended to cite Greenwood for a violation of 29 C.F.R. § 1926.510(b)(10), prior to her Motion. Based on the record before me, I conclude that Greenwood had no notice that it would be necessary to prepare a defense with respect to the proposed alternative violation. The Secretary's Motion is DENIED.

Background and Relevant Facts

Greenwood operates a roofing business in Millbury, Massachusetts. On August 17, 2011, it had a roofing project at Studley Elementary School in Attleboro, Massachusetts. Greenwood had four of its employees on a sheet metal crew at the project – Scott Crane, Sean Langton-Hayward, Jay Andrews, and Bob Grigarauskas. At about 7:20 that morning Mr. Crane fell off

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[7] The Secretary cites two cases for support that Greenwood had an inadequate safety monitoring system in place. (S. Reply to Opposition) (*Upstate Roofing, Inc.,* No. 00-0336, 2002 WL 31246069 (O.S.H.R.C.A.L.J., Oct. 3, 2002); *Beta Constr. Co*, 16 BNA OSHC 1435 (No. 91-102, 1993)). These cases address the substantive issue of whether a cited employer's SMS was compliant; they are not helpful in determining whether the evidence in this case supports the Motion.

[8] Mr. Langton-Hayward testified that a flag line was a couple of feet from the roof's edge. (Tr.121). Mr. Crane testified that the line was either 1 or 2 feet from the roof's edge, that it was lying on the ground, and that he might have tripped on it. (Tr. 38-39, 60, 84-85).

[9] The requirements for a compliant warning line system are found at 29 C.F.R. § 1926.502(f). The Secretary did not reference this standard in her pleadings or arguments.

[10] The Secretary did not present evidence about the width of the roof or the requirements of either the safety monitoring system or warning line system as applied to the conditions on the worksite that day.

the roof and was then transported to the hospital. OSHA Compliance Officer ("CO") Robert Volinsky arrived at the worksite around noon on the day of the accident to conduct an inspection. The CO spoke with Glen Narrow, Greenwood's corporate safety director. He then interviewed the employees that were still onsite – Mr. Grigarauskas, Mr. Andrews, and Mr. Langton-Hayward. (Tr. 18-20, 163, 165-66, 177, 306).

There are several points of conflicting testimony about the events surrounding Mr. Crane's accident. The primary area of conflict is whether the foreman, Mr. Grigarauskas, told Mr. Crane to not bother with attaching his fall arrest equipment because they needed to unload the sheet metal quickly. There is also disagreement as to whether the foreman was able to see that the employees on the roof were not tied off. Further, there is a dispute regarding whether a "toolbox talk" about fall protection was held before work started that morning. Additionally, there is conflicting testimony about whether all four members of the sheet metal crew were on the roof at an earlier time that morning.[11]

Mr. Grigarauskas was the foreman for the sheet metal crew at the site.[12] Mr. Andrews testified all four of them were on the roof first thing that morning to take tools and fall protection supplies to the roof.[13] In contrast, Mr. Grigarauskas testified that neither he nor Mr. Andrews were on the roof earlier that morning. Both Mr. Crane and Mr. Langton-Hayward testified they worked on two areas of the roof that morning. (Tr. 17-19, 27, 118-19, 271, 290-91).

After receiving and stacking sheet metal in the first roof area, Mr. Crane and Mr. Langton-Hayward then went to the second roof area to receive more sheet metal. Everyone agreed that Mr. Grigarauskas told them to hurry up and unload the truck before the teachers arrived. Mr. Crane and Mr. Langton-Hayward were not tied off at this second work area.[14] At the time of the accident, Mr. Grigarauskas and Mr. Andrews were on the ground unloading sheet metal from a truck. Mr. Crane and Mr. Langton-Hayward were at the second area on the roof. Mr. Andrews and Mr. Grigarauskas handed the sheet metal pieces to Mr. Crane and Mr.

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[11] Because the citation is vacated due to the inapplicability of the cited standard, I have not made credibility findings. However, I note that the testimony of the employees who were onsite that day was not completely straightforward and that some of it is difficult to reconcile. For example, Mr. Andrews testified that all four employees were on the roof, while Mr. Grigarauskas testified that he had not been on the roof that morning.

[12] Mr. Grigarauskas is a journeyman and has worked for Greenwood for 20 years; Mr. Andrews and Mr. Crane are also journeymen and have worked for Greenwood for 8 and 4 years, respectively. Mr. Langton-Hayward was an apprentice and had worked for Greenwood for two weeks at the time of the accident. (Tr. 14-15, 262, 277).

[13] The roof was about 11 feet from the ground. (Tr. 268).

[14] Mr. Crane and Mr. Langton-Hayward were tied off in the first roof area. (Tr. 22-23, 118-20).

Langton-Hayward to stack on the roof. After about five minutes of this activity, Mr. Crane tripped as he walked back toward the roof's edge and fell off the roof. The police arrived soon after, and Mr. Crane was transported to the hospital. (Tr. 32-38, 54-60, 95, 120, 163, 268, 283).

Mr. Andrews and Mr. Grigarauskas testified that a "toolbox talk" about fall protection had been held before the crew started working that morning. Both Mr. Crane and Mr. Langton-Hayward testified there had not been a toolbox talk that day. However, Mr. Crane testified he had attended toolbox talks in the past, and he admitted he had signed an attendance sheet for a toolbox talk at a previous Greenwood worksite.[15] (Tr. 31-32, 107, 141, 264-66, 280).

Jurisdiction

In the parties' joint pre-hearing statement, Greenwood admitted that it is a corporation with an office in Massachusetts engaged in the roofing business. Greenwood also admits that it is engaged in interstate commerce and that it is an employer under the Act. Finally, Greenwood admits that the Commission has jurisdiction over this matter. (R. Br. 5). I find that at all relevant times, Greenwood was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 652(5). I also find that the Commission has jurisdiction over the parties and subject matter in this case.

The Alleged Violation

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.501(b)(3), which states, in pertinent part:

> (3) *Hoist areas.* Each employee in a hoist area shall be protected from falling 6 feet (1.8 m) or more to lower levels by guardrail systems or personal fall arrest systems.

The Secretary's Burden of Proof

To demonstrate that there has been a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

[15] No sign-in sheet was submitted into evidence for a toolbox talk held on the day of the accident.

Whether the Cited Standard Applies

Greenwood asserts that the cited standard is inapplicable because its employees were not working in a "hoist area." (R. Br. 9). Greenwood further asserts that the Secretary offered no evidence to prove its employees were in a "hoist area." *Id.*

"To determine the meaning of a standard, the Commission and the courts consider the language of the standard, the legislative history, and, if the drafter's intent remains unclear, the reasonableness of the agency's interpretation." *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1328-29 (No. 97-0469, 2003) (consolidated) (citations omitted). To determine if the Secretary's interpretation is reasonable, "such factors as the consistency with which the interpretation has been applied, adequacy of notice to regulated parties, and the quality of the Secretary's elaboration of pertinent policy considerations" will be taken into account. *Id.* at 1329 (citing *Martin v. OSHRC*, 499 U.S. 144, 157-58 (1991)).

Greenwood argues that a hoist area is one where materials are moved to or from the area by some type of mechanical device; simply handing materials from one employee to another does not constitute a hoist area. (R. Br. 10). Greenwood refers to a dictionary definition of the word hoist to demonstrate this point – "any apparatus or device for hoisting" or to "raise or lift up, especially by mechanical means." (R. Br. 11).

There is no definition of "hoist area" in subpart M of 29 C.F.R. § 1926, Fall Protection. *See* 29 C.F.R. § 1926.500-503. The preamble to the final rule provides some degree of insight:

> There were two comments on this provision. The WMACSA (Ex. 2-56) commented that the term "hoist areas" needed to be defined for the sake of clarity. In addition, the SSFI (Ex. 2-89) requested that OSHA interpret the "exception" in proposed paragraph (b)(3), because "the paragraph seems ambiguous." OSHA believes that it has responded to the concerns of both commenters by rewording the provision to state more clearly which type of fall protection may be used at hoist areas. The revised provision clearly differentiates between working in the area where hoisting activities will take place (***e.g., the area where materials are to be landed***) and taking part in the actual hoisting operation (***e.g., receiving materials hoisted by a crane).***"

Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40672, 40685 (Aug. 9, 1994) (emphasis added). While this preamble provides no definition, its general discussion of the standard's requirement includes both hoisting activities and hoisting operations. *See supra.* The inference is that a hoist area is one where the materials are being landed by a crane or some other lifting device. Further, the dictionary defines "hoist" as "an act of hoisting"

or “an apparatus (as a mechanical tackle or hydraulic lift) by which things are hoisted” or “to raise into position by means of a tackle.” Webster's Third New International Dictionary 1077 (1986) (unabridged).

The Secretary offers the explanation that a hoist area is “an area to which loads are being lifted, which is the plain meaning of the language used in the standard.” (S. Reply Br. 2). The Secretary does not present any letters of interpretation or other guidance documents to show OSHA’s history of interpreting of this term. The Secretary refers, without discussion, to two cases to support her position. *Orlowski Co., Inc.*, 22 BNA OSHC 1676 (No. 08-0785, 2009) (ALJ); *Atlantic Heydt Corp.*, No. 02-1936, 2004 WL 1056449 (O.S.H.R.C.A.L.J. Apr. 7, 2004) (remanded by Commission on unrelated issue).

I find neither of these cases helpful in deciding the issue at hand.[16] In *Orlowski*, the issue of whether the employees were in a hoist area was not at issue. In that case, both parties had stipulated that the employer was in violation of 29 C.F.R. 1926.501(b)(3). *Id.* at 1677. The penalty amount was the only contested issue. *Id.*

In *Atlantic*, the employer was charged with not having adequate fall protection in a hoist area. There, an employee was standing on a hoist tower 330 feet above the ground receiving planks hoisted by a winch. The Judge in that case found the work area was a hoist area based on the plain language of the cited standard. *Atlantic,* 2004 WL 1056449 at, *13. The Judge then stated that the “standard is designed to protect employees who are required to assist in landing the load, which is precisely the situation in the present case.” *Id.* I find that *Atlantic* does not support the Secretary’s position; rather, it is supportive of Greenwood’s position.

Finally, as Greenwood has pointed out, the Secretary offered no agency interpretation of this term.[17] 29 C.F.R. § 1926.501(b) lists fifteen different categories of walking/working surfaces and the type of fall protection that is required for each category. *See* 29 C.F.R.

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[16] The Commission has not issued a decision on the particular issue of the definition of “hoist area.” However, I find the following from Judge Cook’s decision to be instructive:

> [T]he CO’s definition of the term “hoisting area” [is] too broad. The Random House Dictionary of the English Language, Unabridged Edition, 1971, defines the verb “hoist” as “to raise or lift, especially by some mechanical appliance.” The standard’s use of the words “during landing of materials” and “to receive or guide equipment or materials” also indicates that hoisting is more than handing something down from one level to another.

Pete Miller, Inc., No. 99-0947, 2000 WL 675527, at *3 (O.S.H.R.C.A.L.J. May 22, 2000), *aff’d on other grounds,* 19 BNA OSHC 1257 (No. 99-0947, 2000).

[17] Further, a search of OSHA’s website revealed no interpretive letter or guidance document showing an interpretation for the meaning of “hoist area.”

§1926.501(b)(1)-(15). Because OSHA's standard sets out fifteen separate categories along with the required fall protection method for each, I find the standard's intent is to have an employer implement fall protection methods in accordance with the specifically described work area. It is the Secretary's burden to show that the standard she chose to cite is the properly applicable one. *See Southern Pan Serv. Co.*, 21 BNA OSHC 1274, 1281 n.11 (No. 99-0933, 2005) (Commissioner Rogers finding that the Secretary cited the wrong standard and instead should have cited the employer for a violation of 29 C.F.R. § 1926.501(b)(3)).

I find that OSHA's fall protection standard is designed in such a way that the Secretary must cite the standard related to the employer's particular work area. I accept Greenwood's position that the term "hoist area" is something more than one employee handing materials to another without any sort of mechanical device; the Secretary has not presented convincing evidence to the contrary. I find that the Secretary has not shown by a preponderance of the evidence that Greenwood's employees were working in a hoist area. Therefore, the Secretary has not shown that the cited standard is applicable. Citation 1, Item 1, is VACATED.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

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

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. § 1926.501(b)(3), is VACATED.

/s/

Covette Rooney
Chief Judge

Date: February 27, 2013
Washington, D.C.