

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

)) ,
Secretary of Labor, :
Complainant, :
 :
v. : OSHRC Docket No. **02-0463**
 :
Coastal Bridge Company, L.L.C., : **EZ**
Respondent. :
)) -

Appearances:

Christopher V. Grier, Esquire
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Mr. Van P. Bailey
Coastal Bridge Company, L.L.C.
Baton Rouge, Louisiana
For Respondent

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

DECISION AND ORDER

Coastal Bridge Company, L.L.C., is engaged in the business of bridge construction. On February 8, 2002, respondent was engaged in construction work at a jobsite in Slidell, Louisiana. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite on February 8, 2002. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the citation and proposed penalties.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.501(b)(1) as follows:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge, 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of a guardrail systems [*sic*], safety net systems [*sic*], or personal fall arrest systems [*sic*].

- a) Employees were observed working without fall protection on the edge and leaning over the edge while painting the concrete barrier on the U. S. Interstate 12 overpass of U. S. Interstate Highway 59

in Slidell, LA. This action did subject the employees to a potential fall (to the Interstate Highway below) in excess of 20 feet.

The standard at 29 C.F.R. § 1926.501(b)(1) provides:

(b)(1) *Unprotected sides and edges*. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, and personal fall arrest systems.

The standard at 29 C.F.R. §1926.501(b)(9)(i) provides:

(9) *Overhead bricklaying and related work*. (I) Except as otherwise provided in paragraph (b) of this section, each employee performing overhand bricklaying and related work 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 shall work in a controlled access zone.

29 C.F.R. § 1926.500 defines overhand bricklaying and related work, unprotected sides and edges, and walking/working surface as follows:

Overhand bricklaying and related work means the process of laying bricks and masonry units such that the surface of the wall to be jointed is on the opposite side of the wall from the mason, requiring the mason to lean over the wall to complete the work. Related work includes mason tending and electrical installation incorporated into the brick wall during the overhand bricklaying process.

Unprotected sides and edges means any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high.

Walking/working surface means any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties.

A hearing was held pursuant to the E-Z trial procedures in New Orleans, Louisiana, on July 15, 2002. At the conclusion of the hearing, a bench decision was issued affirming Citation No. 1, item 1. A penalty of \$800.00 was assessed for item 1.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is affirmed as a serious violation and a penalty of \$800.00 is assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: August 6, 2002

1 The case arose as a result of an inspection of
2 the Respondent's job site at the intersection of
3 Interstate Highways 12 and 59 in Slidell, Louisiana. The
4 inspection was conducted on February 8, 2002.
5 And the citation issued as a result of that, on
6 February 26, 2002, alleged violation of 29 CFR Section
7 1926.501(b) (1), alleging that each employee on a
8 walking/working surface, horizontal and vertical surfaces,
9 with an unprotected side or edge six feet or more above, a
10 lower level was not protected from falling by the use of
11 guardrail systems, safety net systems, or personal fall-
12 arrest systems.
13 Specifically, employees were observed working
14 without fall protection on the edge, and leaning over the
15 edge while painting the concrete barrier on U.S.
16 Interstate 12 overpass of U.S. Interstate 59 in Slidell,
17 Louisiana. This action did subject the employees to a
18 potential fall to the interstate highway below in excess
19 of 20 feet. A penalty was proposed by the Secretary of
20 \$1,375.
21 At the hearing, the parties stipulated to
22 coverage of this employer under the Act. The company
23 admitted that the employees in the photographs received
24 into evidence are photos of its employees. And there was
25 stipulation as to the height of the railing on this

1 interstate highway. It's a concrete railing 32 inches
2 high, as shown in the photos.

3 At the hearing, the Respondent admitted there
4 was no fall protection on the bridge. Let me clarify for
5 the record that evidence elicited at the hearing indicated
6 that this was not a painting operation. However, there
7 was a coat being added. A substance called ThoroCoat was
8 being added to the concrete barriers after the concrete
9 barriers had been worked on.

10 The work that had been done on the concrete
11 barriers was raising the concrete barrier from the height
12 of 27 inches to a height of 32 inches, which is standard
13 height for highway bridge work, as determined by the U.S.
14 Department of Transportation. The purpose of the concrete
15 barriers, or guardrails, is to prohibit vehicular traffic
16 from going off the side of the bridges. It was not
17 erected for the protection of individuals.

18 At the hearing, Mr. Bailey admitted that the
19 company's not contending that employees cannot fall off
20 the side of the bridge. It admits that there is a hazard
21 of falling.

22 The testimony elicited at the trial indicates
23 that the distance from the top of the railing on this
24 bridge to the ground level below is 24 feet six inches.

25 Also, there is a ledge that some employees were

1 standing on, which is about 3-3/4 inches high off the
2 roadbed level, which means that for those employees
3 standing on those ledges, the height of the concrete wall
4 was not 32 inches, but was about 28-1/4 inches.

5 Mr. Geistfeld was the compliance officer for
6 the complainant that made the inspection of this operation
7 on the bridge of Interstate 12 over Interstate 59,
8 Slidell. He saw employees working on the site of this
9 bridge and stopped to make his inspection. He contacted
10 the supervisor. This was an acting supervisor.

11 At the time of the inspection, employees had
12 finished or completed the elevation of this railing from
13 27 inches to 32 inches, but were adding a finish coat.

14 At the time of the inspection, there was no
15 safety net or fall-arrest system being used by the
16 company. The Government witness, Mr. Geistfeld, indicated
17 that there were alternative methods of protecting the
18 employees. One involved the use of a truck or machine,
19 that was counterweighted with a boom and an attached
20 scaffold, so employees could work on the outside of the
21 bridge below the working level and still remain protected
22 with a railing.

23 Another system that was recommended as being a
24 fall-arrest system involving a steel cable inside the
25 supports of the bridge. It could wrap around the supports

1 and the employee could be tied off to that cable.
2 Another method would be to have I-beams laying
3 horizontal along the bridge level with vertical members to
4 which cable could be attached.

5 A fourth method would be to raise the level of
6 the guardrails to 39 inches.

7 Employees were working on the shoulder of this
8 bridge, which was approximately six feet wide between the
9 edge of the lane of traffic and the edge of the bridge.

10 Mr. Bailey testified that the standard rails
11 were standard 32-inch Jersey barriers, designed by the
12 federal highway department and used throughout the United
13 States; and also admitted that these railings were seven
14 inches below the requirements of the standards at 501.

15 He testified that masons must reach over the
16 rail to apply the ThoroCoat to the surface; and testified
17 that in Exhibit C-2, a photograph -- that photograph shows
18 an employee leaning over the railing to do his work. But
19 he testified that, in his opinion, the center of gravity
20 of that employee was not over the railing.

21 Mr. Bailey posited the opinion that all those
22 alternative means would create a greater danger to
23 employees, due to the vehicular traffic. He specifically
24 focused on the method of abatement of tying off
25 individuals to a cable and lanyard, that they would be --

1 as I understand it, it would be the equivalent of having
2 the employee tethered to the cable, unable to move out of
3 the way of vehicular traffic. And that this would create
4 a greater hazard.

5 The company had alleged, basically, two
6 defenses. One is that the compliance with the standard
7 would create a greater~~hazard for the employees working in
8 the area. And, secondly, that that standard at 29 CFR
9 Section 1926.501(b) (9) is applicable as opposed to Section
10 501(b) (1) . Let me go into that aspect of it.

11 The Secretary of Labor has the burden of proof
12 in these cases. There are four major elements of that
13 burden -- the applicability of the standard; the issue of
14 whether the company complied with the terms of the
15 standard; whether employees were exposed to the hazard;
16 and whether the company knew, or should have known with
17 the exercise of reasonable diligence, of the existence of
18 the violative conditions.

19 Let me take these, basically, out of order.
20 There appears to be no dispute that the terms of the
21 standard were not complied with. The guardrails were 32
22 inches. The standard requires at least 39 inches, of a
23 guardrail -- or the employees be protected by other means.

24 And I'll get into the applicability of the
25 standard a little bit later, and discuss this in a little

1 more detail. But I find that the terms of the standard
2 were not complied with.

3 The employees, indisputably, were exposed to a
4 falling hazard. They were next to this 32-inch guardrail,
5 leaning over that guardrail. If they fell, they would
6 fall 24-plus-feet to-another interstate highway.

7 There is no dispute that the Respondent knew
8 employees were working under these conditions, that they
9 were working next to the guardrails. That they were doing
10 this work -- they had to lean over those guardrails. And
11 that the distance to the next interstate below, where
12 traffic was traveling right directly below the employees,
13 was approximately 24 feet. If these individuals fell to
14 that level, there would be serious injury or death.

15 The main issue that I see -- two main issues --
16 one is the greater hazard and the other is the
17 applicability of the standards.

18 Let me address the greater hazard first. Well,
19 let me give you the -- first of all, on the greater hazard
20 defense. Respondent has the burden to prove that this
21 would create a greater hazard to comply with the standard
22 than to not comply with the standard.

23 The standard at 29 CFR Section 1926.501(b) (1)
24 reads, "Each employee on a walking/working surface,
25 horizontal and vertical surface, with an unprotected side

1 or edge which is six feet or more above the lower level,
2 shall be protected from falling by use of guardrail
3 systems, safety net systems, or personal fall-arrest
4 systems.”

5 Mr. Bailey’s testimony primarily focused on the
6 personal fall-arrest’ system. Without changing the flow of
7 traffic, the personal”fall-arrest system may pose a
8 greater hazard to these employees, if they are tied in
9 place when traffic is moving around them -- unable to --
10 unless there is some quick release system that could be
11 implemented. But I am not ready to say that this is a
12 system that should go into place next week.

13 I believe that it would be necessary to change
14 the flow of traffic -- maybe close a lane -- to do this
15 thing. Right now, while I don’t believe the company has
16 presented sufficient evidence to prove that it’s going to
17 create a greater hazard, I think there is that possibility
18 and would not suggest that as a method of abatement here.
19 It’s not my job to suggest methods of abatement -- just to
20 determine who has proved their case and who has not.

21 However, I believe that that needs further
22 study. I would not want to suggest in my decision that I
23 am in any way sanctioning tying individuals to one spot
24 while traffic is moving at a high rate of speed within six
25 feet of them. So I do find that there was insufficient

1 evidence to prove that. But I would also advise caution
2 in this area.

3 The other areas of using a guardrail system
4 of -- there was no evidence produced, except for the
5 opinion of Mr. Bailey that safety nets would not be a good
6 thing over an interstate highway. There was no evidence
7 to show that it would create a greater hazard to have a
8 higher guardrail than what is currently there. So given
9 that evidence that was produced, I have to reject the
10 defense that this would create a greater hazard, with my
11 footnote explanation as to my concerns about tying off.

12 Next, we would go to the applicability of the
13 standards. The question of whether 1926.501(b) (1) applies
14 or, as the Respondent argues, 1926.501(b) (9) applies. Let
15 me address the issue of (b) (9) first.

16 We have to look at the -- the company claims
17 that this is the equivalent or related work to overhand
18 bricklaying. And, therefore, that standard applies to the
19 work. 1926.501(b) (9) reads "Except as otherwise" -- this
20 applies to bricklaying and related work.

21 "Except as otherwise provided in paragraph b of
22 this section, each employee performing overhand
23 bricklaying and related work, six feet or more above lower
24 levels, shall be protected from falling by guardrail
25 systems, safety net systems, personal fall-arrest systems

1 or shall work in a controlled access zone.”

2 Respondent admitted - - or Mr. Bailey testified,
3 that is, that in his opinion, these individuals were
4 working in a controlled access zone and also performing
5 overhand bricklaying or related work; and, therefore, met
6 the requirements of the standard. Overhand bricklaying is
7 defined in 29 CFR Section 1926.501 as follows:

8 “Overhand bricklaying and related work means
9 the process of laying bricks and masonry units, such that
10 the surface of the wall to be jointed is on the opposite
11 side of the wall from the mason, requiring the mason to
12 lean over the wall to complete the work. Related work
13 includes mason tending, electrical installation
14 incorporated into the brick wall during overhand
15 bricklaying process.”

16 The first issue that has to be determined is
17 whether this is overhand bricklaying or related work. Mr.
18 Bailey admitted in his testimony that they were not laying
19 bricks in this matters, and that they were not laying
20 concrete block, but alleged that this was related work
21 similar to the work done in that kind of work. The
22 threshold question is, you know, was this overhand
23 bricklaying.

24 I have to -- this is an exception to the
25 general applicability of standards. An exception is

1 narrowly construed and the burden is on the Respondent to
2 prove that he meets that exception. There are very few
3 cases in this area.

4 However, if concrete block were being laid,
5 this would be a concrete masonry unit which would be
6 covered by overhand bricklaying -- if all other elements
7 were met. This was not a concrete block unit, or a
8 concrete masonry unit. It was a concrete pour with
9 reinforcing rods, and just a normal concrete pour.

10 So this does not meet the definition of
11 overhand bricklaying and related work. It may be similar
12 to that kind of work, but not related to it. There is no
13 brick, or block, or masonry unit that's being laid. And,
14 so, any work, when they refer to related work -- the
15 standard refers to related work -- I'm interpreting that
16 as being related to the basic work of bricklaying or
17 concrete masonry unit laying.

18 So, therefore, I would find that that does not
19 apply. That standard is not applicable. And we have to
20 determine whether 1926.501(b) (1) is applicable.

21 We have to look at the language of the
22 standard. The rhetoric of what 501(b) (1) says -- we have
23 to look at the definitions of unprotected sides and edges,
24 and walking/working surfaces, in 1926.501, to have a clear
25 understanding of what the requirements of the standard