

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 00-0602
	:	
	:	
SAUGUS CONSTRUCTION CORP.,	:	
Respondent.	:	
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APPEARANCES:

David L. Baskin, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Barrett A. Metzler
Northeast Safety Management, Inc.
Columbia, Connecticut
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) (“the Act”), to review a one-item serious citation issued by the Occupational Safety and Health Administration (“OSHA”). On February 8, 2000, Alexander Steel, an OSHA compliance officer (“CO”), conducted an inspection of a portion of the Central Artery Tunnel Project (“CAT Project”) in Boston, Massachusetts.¹ At the site, CO Steel observed Mark French, an employee of Saugus Construction Corporation (“Saugus”) performing welding in a position that the CO concluded exposed the employee to a serious fall hazard. Following the inspection, OSHA cited Saugus for a serious violation of 29 C.F.R. § 1926.501(b)(1).

Stipulations

¹The CAT Project is an ongoing construction project that involves creating an underground tunnel system that will connect Boston proper with the surrounding outlying areas. (Tr. 9-10).

At the trial, the parties agreed to the following stipulations:

1. The Commission has jurisdiction in this matter.
2. The Respondent is a corporation engaged in steel erection.
3. The Respondent is an employer engaged in a business affecting commerce.

The Relevant Testimony

CO Steel testified that the area of the CAT Project he inspected was designated as “C15A2” and that the referral OSHA had received about the site had to do with materials from an existing roadway or bridge falling down on workers in an excavation below. He further testified that the area involving Saugus was the ground-level “Bent 13” section of the site. (Tr. 11-13). When asked what he saw relating to Saugus, the CO responded as follows:

A: Well, as I was walking through the site looking at the conditions for the general contractor, I observed an employee ... doing some welding, some cutting, who was laying with his body over [a] steel beam with his head over this excavation, which was somewhere between 18 and 20 feet in depth. I looked at him; he was not that far away. The point that I asked, Was he tied off? Does he have any fall protection there? I do not want to see him fall 18 to 20 feet. (Tr. 15).

After asking the general contractor’s representatives to get the employee’s foreman, the CO photographed and videoed the welder. When the Saugus foreman, Mr. Pedicini, arrived, the CO told him what he had seen, and Mr. Pedicini stated the employee should have been tied off. The CO also spoke to Mark French, the employee, who said he had been doing some welding on a soldier beam; Mr. French also said he had a harness but was not using it because he did not think he needed it. CO Steel noted there was no safety net in the excavation and that the 16 to 18-inch-wide steel horizontal beam Mr. French was laying or leaning across to work was not a guardrail because it was 30 to 32 inches high and guardrails should be 42 inches in height. CO Steel also noted that there was a wooden work platform 4 to 5 feet below the area where Mr. French had been welding but that the platform did not protect him as he had been working to the left of it.² (Tr.15-24, 34, 41-46).

²The CO said that C-1-2, his photos showing Mr. French standing over the platform, were taken after Mr. French had moved from the steel beam he had been laying on; C-3, the CO’s video, likewise does not show the violation but only the working conditions at the site. (Tr. 21-25, 31).

CO Steel said that the cited standard requires employees on walking/working surfaces with unprotected edges 6 feet or more above lower levels to be protected from falling, and he defined a walking/working surface as “any surface upon which an employee may walk or work.” (Tr.36-37).

When asked about the walking/working surface in this case, the CO stated as follows:

A: It was two planks, which he was standing on.

Q: Now, did you actually, in fact, see him standing on those planks?

A: No, I did not.

Q: So, you do not know where he was standing at the times you observed the violation.

A: I know where he was standing because when I went over to him after I observed him I saw where he was standing.

Q: How could that be? You were not there.

A: He told me where he was standing.

Q: He pointed out exactly where he was standing?

A: No, we talked about the planks. That is what he was standing on when he was performing his work.

Q: Where were those planks in relation to the soldier beam?

A: Adjacent to it.

Q: Perfectly adjacent or at some distance?

A: I have no idea.

Q: So, you do not actually know where he was standing in relation to the beam.

A: No. (Tr. 37-38).

The CO further explained why he believed the standard was violated, as follows:

Q: If he is standing on the ground and he has a beam between him and the fall area, why was this citation issued?

A: Because he was leaning over that beam to perform his work.

Q: But he had his feet on the ground.

A: He can still fall.

Q: I am asking you why this standard applies in this case. If he has his feet on a walking/working surface and he has a beam between him and the fall why [was] this standard violated?

A: Because the fall was greater than 6 feet.

Q: What fall?

A: Over the edge of the beam and to the bottom of the excavation.

Q: The standard says any walking/working surface without a protected edge. The beam is not the walking/working surface. You have admitted that.

A: The beam is not the protective edge either.

Q: Why?

A: Because it is not high enough to be used as a guardrail.

Q: How did you determine that?

A: Because I observed the employee, where that beam was in relationship to his body. (Tr. 38-39).

Q: If the standard says an unprotected edge and there is a beam in that location that meets the requirements of a protected edge, what difference does it make under the standard?

A: Because it was not a protected edge.

Q: Why not?

A: Because it was not high enough.

Q: How did you determine that?

A: By the employee and by the height of the steel beam above the planks.

Q: How did you determine that?

A: By the superintendent telling me approximately what the height of that beam was above grade.

Q: So you have no idea what that beam's height was.

A: No. (Tr. 39-40).

In an exchange with the undersigned as to where Mr. French was standing while welding the soldier beam, CO Steel responded as follows:

Q: He was on the truck side. That is where his feet were, on the truck side.

A: Yes, sir.

Q: He was leaning over.

A: Yes, sir. (Tr. 50).

Q: Okay. Now, from 40 feet away you do not know what he was standing on though.

A: My initial observation, no.

Q: Okay. It is your testimony that from that distance and actually you said that it could have been 60 or 80, but let us stay with 40.

A: Correct.

Q: You say the fact that he was leaning over here did not provide him with fall protection.

A: Absolutely.

Q: The reason being....

A: There was no harness on and that really was, well, whether you want to look at that acted as a guardrail or did not act as a guardrail, the ... fact ... is that he was definitely exposed to a fall to the ground. He had a harness in his truck. It was not used. He was actually laying on top of that beam. Now, when he stood up, Your Honor ... that

beam came approximately to here on him. So when he went to lay on the steel beam and do the work, he was laying like this doing his welding and my picture of him was going off that edge. (Tr. 50-51).

Mark French testified that when the CO saw him he had been “burning a run-off tab off a weld he had put on” the soldier beam. He further testified that R-2 was a “posed photo” of him in the position he had been in when the CO had observed him and that Kerry Fears, the safety director for Saugus, had taken R-2 a day or two after the inspection.³ (Tr. 58-63). Mr. French answered the following questions about what R-2 showed:

Q: Is that the position you were in at the time of the inspection when you believe the compliance officer found you in violation?

A: Yes, pretty much, except I was just laying down, my belly was down, I just put my hand on the outside to get rid of, get rid of the molten [metal] that was on caught on some wood and it was smoking. So, I just wiped [it off with] my hand so it would not fall in the hole. (Tr. 59-60).

Q: Does this photo correctly depict the scene as you remember it at the time of the inspection?

A: Yes. (Tr. 62).

Q: Is that where your feet were on the day of the inspection or were they closer into the beam?

A: I would say that is where they are.... (Tr. 64).

Q: Now you stated that this depicts the work you were doing on the day of the inspection, is that correct?

A: Right.

Q: That work was taking place directly in front of you?

A: Yes.

Q: Was that work taking place inside the beam or on the street side of the beam?

A: It would be on the inside of the beam. I guess, a run-off tab is on the edge. See where my head is. That is where I was burning. See that weld is parallel to that right there. Just follow where my hands are.

Q: Would you mark the legal copy with an x as to those points?

²Mr. Fears agreed he had taken R-2 a day or two after the inspection and that, based on what Mr. French told him, it showed Mr. French where he had been when the CO saw him. (Tr. 54-57).

A: You see it has run-off tabs on all four corners. There would be one there, one there, one on the inside, and one right there, parallel with that one.

Q: Would you put an x right there?

A: I will put it where my head is. If you are going level with that, it is right above there on the beam. It would be on the inside. (Tr. 65).

DISCUSSION AND CONCLUSION

Item 1 of Citation 1 alleges a serious violation of 29 C.F.R. 1926.501(b)(1) and proposes a penalty of \$3,000.00. The cited standard provides as follows:

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, or personal fall arrest systems.

The citation alleges a violation of the standard in that:

Employee was exposed to serious fall hazards while burning and welding an extension section of steel soldier beam, where employee was not wearing and using a fall arrest system, to prevent a possible fall in excess of 18 feet to the bottom of the future road way.

In order to establish a violation of a specific standard, the Secretary must show: (a) the standard is applicable to the cited condition; (b) the employer's noncompliance with the terms of the standard; (c) the employees had access to the violative condition; and (d) the employer had actual or constructive knowledge of the conditions (i.e., the employer either knew or could have known of the conditions with the exercise of reasonable diligence. *Armstrong Steel Erectors Inc.*, 19 BNA OSHC 1630, 1632 (No. 97-0250, 1999); *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The first issue to resolve is whether the Secretary has demonstrated the applicability of the cited standard. Specifically, the question is whether the two planks the employee was standing on and the 16 to 18-inch-wide horizontal beam he was laying or leaning across to work, as shown in R-2, were "walking/working surfaces" within the meaning of the standard. A further question is whether there was an "unprotected side or edge" within the meaning of the standard. The Commission has set out the test in regard to standard applicability as follows:

It is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation.

Unarco Commercial Prod., 16 BNA OSHC 1499, 1502-03 (1502-03, 1993); Kiewit Western Co. 16 BNA OSHC 1689, 1693 (No. 91-2578, 1994). The Commission has also held that standards should be given reasonable and common-sense interpretations. Globe Indus., Inc. 10 BNA OSHC 1596, 1598 (No. 77-4313, 1982).

Subpart M defines the term “walking/working surface” as “any surface ... on which an employee walks or works ... on which employees must be located in order to perform their job duties.” See 29 C.F.R. 1926.500(b). OSHA has further explained this term as follows:

OSHA has used the term “walking and working surfaces” instead of the existing term “floor” to indicate clearly that subpart M addresses all surfaces where employees perform construction work. The Agency has always maintained that the OSHA construction fall protection standards cover all walking and working surfaces.

59 Fed. Reg. 40672, 40681 (August 9, 1994).

In her brief, the Secretary asserts that the planks and the horizontal beam were both walking/working surfaces because the scope of the term “includes all areas upon which employees put their bodies and upon which they perform work.”⁴ Based on the foregoing, it is the opinion of the undersigned that, under the circumstances of this case, a reasonable and common-sense interpretation of the standard is to conclude that the planks and the horizontal beam both constituted walking/working surfaces within the scope of the cited standard. Regardless, for the reasons set out below, I find that the Secretary has not shown that there was an unprotected side or edge within the meaning of the standard.

⁴In support of her position, the Secretary refers to Davy Songer, Inc., No. 95-648, a judge’s decision issued on November 24, 1995. This decision was not reviewed by the Commission and thus has no precedential value. Leone Constr. Co., 3 BNA OSHC 1979, 1981 (No. 4090, 1976).

The plain language of 29 C.F.R. 1926.501(b)(1) states that employees on walking/working surfaces with unprotected sides or edges 6 feet or more above a lower level must be protected by guardrails, safety nets or personal fall protection. CO Steel specifically testified that the horizontal beam on which Mr. French was laying or leaning to work was not a guardrail because guardrails should be 42 inches high. (Tr. 24). However, Subpart M defines “unprotected sides and edges” as those “where there is no wall or guardrail system at least 39 inches (2.0 m) high.” See 29 C.F.R. 1926.500(b). Moreover, in my view, the Secretary has failed to establish that the horizontal beam in this case was not 39 inches high.

CO Steel initially said that the beam was “at least ... 30 inches” above the planks Mr. French stood on. (Tr. 23). CO Steel also said that the beam was “not high enough to serve as a guardrail,” based on his observing where it was in relation to Mr. French’s body, but he then admitted he had “no idea” what the beam’s height was. (Tr. 39-40). When asked how he determined the beam’s height, the CO stated that “the superintendent ... said [it was] probably 30 to 32 inches, somewhere in that ballpark.” (Tr. 46). However, the CO did not clarify whether “the superintendent” he referred to was the general contractor’s superintendent, who was with him when he observed the condition, or Mr. Pedicini, the Saugus foreman; thus, the statement of the superintendent cannot be found to be an admission of Saugus. (Tr. 15-17, 46). Mr. Pedicini’s statement to the CO that Mr. French should have been tied off is likewise not probative in this matter; Mr. Pedicini did not see the employee when the CO did, he may simply have agreed with the CO in an effort to be conciliatory, and, in any case, Mr. French told the CO that he did not think he needed to be tied off. (Tr. 16-17, 20). Additionally, the CO viewed the cited condition from 40 to 80 feet away, and C-1-3, his photos and video, do not show the alleged violation.⁵ (Tr. 21-25, 31, 42, 50-51). Finally, R-2, the “posed photo” taken a day or two after the inspection, shows Mr. French with his feet on the planks, his trunk across the beam, and his head just barely over the outside edge of the beam. Mr. French testified that R-2 correctly depicted the scene as he remembered it on the day of the inspection. (Tr. 62). I observed Mr.

⁵Although the CO went over to where Mr. French was working to talk to him, his testimony about what he saw there was equivocal. (Tr. 37-40, 46). Further, while the Secretary put on a staged demonstration of what allegedly transpired at the site, using a table and chair at the hearing, I found this demonstration less persuasive than R-2 and Mr. French’s testimony about R-2. (Tr. 33-35).-

French's demeanor on the witness stand, and I found his testimony to be convincing and credible. On the basis of his testimony, and given his position in R-2, I conclude that it would have been very unlikely that Mr. French could have fallen over the beam as the CO described. I further conclude that the horizontal beam could in fact have been 39 inches high.

Under the circumstances of this case, I find that the CO's failure to obtain more conclusive evidence of the height of the horizontal beam, such as actually measuring it, constitutes a failure of the Secretary's burden of proof with respect to the applicability of the standard; to hold otherwise would render the phrase "at least 39 inches ... high" meaningless. Since the Secretary has not met her burden in this regard, this citation item is VACATED.

ORDER

Based on the foregoing decision, the disposition of the citation item in this case is as follows:

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

/s/

G. MARVIN BOBER
Administrative Law Judge

Dated: 16 FEB 2001
Washington, D.C.

