United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,
v.
DAVY SONGER, INC.
Respondent.

OSHRC DOCKET
NO. 95-0648

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 7, 1995. The decision of the Judge will become a final order of the Commission on January 8, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 27, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 7, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0648

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. DAVY SONGER, INC., Respondent.	OSHRC Docket No.: 95-0648

Appearances:

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Cleveland, Ohio
For Complainant

Richard R. Nelson, II
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Davy Songer, Inc. (Songer) contested a 6-item serious citation issued to it by the Occupational Safety and Health Administration on March 16, 1995. Prior to a scheduled hearing, the parties submitted a Partial Settlement Agreement resolving all but one of the items. The remaining item (item 4) was submitted for a decision on the record without a hearing pursuant to 29 C.F.R. § 2200.61.

Songer is a corporation maintaining a workplace at 3707 Georgetown Road, N.E., Canton, Ohio, where it was engaged in construction activities. It is an employer within the meaning of the Occupational Safety and Health Act of 1970 (Act). Songer employed approximately 290 employees at its Canton, Ohio workplace (Stipulation ¶¶ 1 - 4). The following are the parties numbered stipulations:

5. In item 4, respondent is alleged to have violated 29 C.F.R. § 1926.501(b)(1) on February 28, 1995, by failing to protect two employees from falling from the top of a crate by the use of guardrail systems, safety net systems, or personal fall arrest systems. The alleged violation is depicted in the photographs attached hereto as Joint Exhibits 1 and 2.

6. The crate was 10' high and approximately 5-6' wide and 8-10' long. The top of the crate was not reinforced.

7. The crate was made of wood and it enclosed a piece of machinery to protect it during shipping.

8. Respondent attempted to dismantle the crate to attach rigging to the machinery to remove the machinery from the crate in order to install the machinery in the industrial facility at which respondent was working.

9. Two of respondent's employees used ladders to climb to the top of the crate.

10. While on top of the crate, respondent's two employees dismantled and cut a hole in the top to attach the rigging to the machinery.

11. The two employees did not use the top of the crate for any other purpose.

12. The two employees did not use any guardrails systems, safety net systems, or personal fall arrest systems while they were on top of the crate.

13. The two employees were on top of the crate for approximately thirty minutes to perform the dismantling and rigging work described above. During this period, the two employees moved about on top of the crate several times.

14. The crate was dismantled and the piece of machinery was removed.

15. Respondent knew that its employees were on top of the crate to dismantle it and that they did not use any guardrails systems, safety net systems, or personal fall arrest systems.

16. Complainant noted the alleged violation as moderate severity and low probability for a $2,000.00 adjusted penalty. However, respondent was given a 25% reduction for good faith, and a 10% reduction for history for a total assessed penalty of $1,300.00.

In addition to these stipulations, the parties submitted two photographs (J-Exh. 1, 2). These show the large wooden shipping crate at issue here. Three sides of the container are intact; one side

has been dismantled. The shipping container is resting on skids, and has been placed near a wall. A ladder stands along each of the container's three closed sides. One person is shown in a bent position at the top of the container.

Discussion

Section 1926.501 is contained within Subpart M, "Fall Protection." Section 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, or personal fall arrest systems.

The Secretary has the burden of proving that Songer violated §1926.501(b)(1).

> To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. See, e.g., *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD 29,239, p. 39,157 (No. 87-1359, 1991).

Seibel Manufacturing & Welding Corporation, 15 BNA OSHC 1218, 1222 (No. 88-821, 1991).

If the first element is proven, the parties' stipulated facts establish that the Secretary has met the last three elements of proof. The terms of § 1926.501(b)(1) were not met: The employees atop the crate were not using fall protection (¶ 12). The employees had access to the violative condition: They were exposed to a fall of 10 feet (¶ 6). Songer knew of the violative condition: Songer was aware that the employees atop the crate were not using fall protection (¶ 15).

Thus, if § 1926.501(b)(1) applies to Songer's employees atop the crate for 30 minutes while attaching the rigging to the machinery and dismantling a portion of the container top, the violation is shown. The sole issue in this case is whether the top part of the crate constituted a walking/working surface within the meaning of the cited standard. Section 1926.500(b)(1)(2) defines walking/working surface as:

> 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.

Section 1926.501(b)(1) is part of the revised fall protection standards that became effective on February 6, 1995. The preamble to the final rule ("Safety Standards for Fall Protection in the Construction Industry") states (59 Fed. Reg. 40672 (1994)):

> 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.

Songer argues that it is not reasonable to interpret § 1926.501(b)(1) as applying to the employees working from the top part of the crate.[1] Indeed, the case presents facts which initially appear sympathetic to Songer. As stipulation 10 clarifies, however, a primary purpose for having the employees work from the crate top was to gain access to attach rigging to the machinery inside, so that the machinery could be lifted into place. The top portion of the crate was partially dismantled to afford access for the rigging. Given this work activity, the container top had become a working surface even if the surface would soon be demolished.

Songer cites several cases in support of its position which interpret the term "platform" as used in previous OSHA construction fall protection standards, including *General Electric Co. v. OSHRC*, 583 F.2d 61 (2d Cir. 1978); *Unarco Commercial Prods.*, 16 BNA OSHC 1499 (No. 89-1555, 1993); and *Globe Industries, Inc.*, 10 BNA OSHC 1596 (No. 77-4313, 1982). "Platform" was previously defined at § 1926.502(e) as:

> A working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery or equipment.

Songer attempts to analogize the definitions of "platform" and "walking/working surface" in order to argue that the cases holding that certain surfaces were not platforms preclude a finding that the top of the crate is a walking/working surface. There is a significant difference, however, between the definitions of the terms.

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[1]Songer argues the Secretary's interpretation of the standard is unreasonable if it applies to its work activities. Where application of a standard in a particular case appears unreasonable, assertion of a defense may more properly present the argument.

The definition for platform gives as examples "a balcony or platform for the operation of machinery or equipment." These examples characterize the salient feature of the platform by its intended purpose. The definition focuses on the purpose for which the platform was built. Thus, in *Unarco Commercial Products*, 16 BNA OSHC at 1502, the Review Commission rejected the Secretary's argument that anode rails and pvc pipes on which employees sometimes stood constitute platforms: "These objects clearly cannot be considered platforms. They were neither built nor rigged for that purpose. They merely served on occasion as convenient footholds from which Unarco's employees were able to retrieve objects from the tanks." In *Globe Industries, Inc.*, 10 BNA OSHC at 1598, the Review Commission declined to find that the tops of conveyor belts on which employees walked or stood during weekly cleaning were platforms. The conveyor belts "were designed and used primarily to transport and cool acoustical material." *Id.*

By contrast, the definition of a walking/working surface shifts the focus from the purpose for which the surface was designed to the purpose for which it is actually being used by the employees. A walking/working surface is "any surface. . . on which an employee walks or works. . . on which employees must be located in order to perform their job duties." In the present case, the top of the container is a surface on which two employees worked in order to perform their job duties, *i.e*, cutting access holes and attaching the rigging to the machinery. This is the reasonable interpretation of the cited standard.

Songer contends that it has been deprived of fair notice that § 1926.501(b)(1) required it to provide fall protection for its employees working on top of the crate. The definition of a walking/working surface encompasses just such a situation as presented in the instant case. A reasonable employer reading the cited standard would realize that the top of the container became a walking/working surface when its employees were required to go on top of it in order to complete their work assignment.

While Songer has not pled the affirmative defenses of greater hazard or infeasibility, it argues that the installation of guardrails or the use of some other means of fall protection would not have alleviated the hazardous condition. This is essentially an infeasibility argument. The unreasonableness Songer perceives in applying the standard to these facts may have been alleviated by pleading and proving affirmative defenses. Since defenses were not properly raised, they cannot be considered in

this case.[2] The clear language of the standard gave notice to Songer that the top of the crate was a walking/working surface as used by its employees. Section 1926.501(b)(1) applies to the cited condition. Songer was in serious violation of the standard.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Songer had approximately 290 employees at the time of the inspection (¶ 1). In calculating his proposed penalty, the Secretary gave Songer reductions for history and good faith, indicating that Songer had no prior history of OSHA violations and that it had demonstrated good faith (¶16). The nature of the activity the Secretary cited is weighed as a gravity consideration and reduces the total penalty. Further, only two employees were exposed for relatively short periods to the 10-foot fall hazard. Employees did not walk or move much while concentrating on cutting the access hole and attaching rigging to the top of the machine. A fall from 10 feet onto concrete, however, could result in serious injuries or possibly in death. Upon consideration of these factors, it is determined that a penalty of $700.00 is appropriate.

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 hereby ORDERED that:

1. As stipulated in the parties' partial settlement agreements, which are approved and incorporated as part of this decision: item 1 (§ 1926.451(a)(10)); item 2 (§ 1926.451(d)(3)); and

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[2]It is a misreading of this decision to imply that it approves use of guardrails or nets on a shipping container which is to be simultaneously destroyed. Such a result is counter intuitive, at best. The standard discusses three options for fall protection, guardrails and nets are two of the three. Because of the posture of this case, it is mere speculation as to whether some type of tie off point was accessible for personal fall protection, the third option. Had affirmative defenses been pled, even though employees were exposed to a hazard while on the working surface, the outcome of this case may have been different.

item 5 (§ 1926.1053(b)(1)) and item 6 (§ 1926.103(b)(6)) are affirmed as amended. Item 3 (§ 1926.451(d(10)) is vacated. The agreed combined penalty of $2,925.00 for items 1, 2, and 5 is assessed.

2. Item 4 (§ 1926.501(b)(1)) is affirmed and a penalty of $700.00 is assessed.

NANCY J. SPIES
Judge

Dated: November 24, 1995
Atlanta, Georgia