United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
MINELLI CONSRUCTION CO., INC.
Respondent.

OSHRC DOCKET
NO. 94-3374

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 May 30, 1996. The decision of the Judge will become a final order of the Commission on July 1, 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 June 19, 1996 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: May 30, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-3374

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

vs.

MINELLI CONSTRUCTION COMPANY, INC.,
Respondent.

OSHRC
Docket No. 94-3374

Appearances:

Alan L. Kammerman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Melvin J. Kalish, Esq.
Mineola, New York
For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act") to review citations issued by the Secretary of Labor pursuant to § 9(a) of the Act and proposed penalties assessed thereon issued pursuant to § 10(a) of the Act.

On October 14, 1994, the Secretary issued citations to Respondent Minelli Construction Company, Inc. (Minelli), alleging that serious and other than serious violations occurred at Respondent's worksite during an inspection conducted by the Occupational Safety and Health Administration during the period June 28, 1994 to August 17, 1994. The serious citation alleges eleven (11) violations with a total proposed penalty of $20,650 and the other citation alleges one violation with a zero proposed penalty. A timely notice of contest was filed by Respondent. The Secretary has filed a complaint incorporating the citation and Respondent answered by admitting the

jurisdictional allegations in the complaint and denying the alleged violations. The parties have submitted their post-hearing memoranda and the matter is now ready for decision.

Respondent is a construction firm specializing in rigging, scaffolding and restoration work and has been in business since 1975. During the inspection period, Respondent was engaged as a subcontractor to perform bridge rehabilitation work under a contract between the State of New York and the prime contractor, Sealand Contractors Corp. Respondent participated in the repair of a bridge on interstate highway 90 (New York Thruway) located between Silver Creek and Dunkirk, New York (Tr. 256). A safety compliance officer for the Occupational Safety and Health Administration visited the worksite on June 28, 1994 pursuant to a safety complaint. The compliance officer revisited the worksite on July 6, 1994 and August 16, 17, 1994. As a result of that inspection the aforesaid citations were issued to Respondent. The compliance officer, Michael Willis, was the only witness called by the Secretary at the hearing. The alleged violations are discussed *seriatim*.

Serious citation No. 1 Item No. 1

29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

> a) On or about 7/6/94 at the N Y State Thruway (I-90) project beneath the bridge deck over Silver Creek employee was observed cutting pieces of plywood and 2x4's and was not protected with safety glasses in accordance with 29 CFR 1926.102(a)(1).

During his walk around of the worksite on July 6, 1994, the compliance officer observed a carpenter employed by Respondent using a circular saw to cut a 2"x4" without wearing eye protection (Exh.C-1, Tr. 18, 22). Through interviews and personal observation, the compliance officer determined that two carpenters employed by Respondent periodically used the saw to cut lumber without wearing appropriate eye protection (Tr. 21, 22). The compliance officer testified that the employees were exposed to flying wood chips which could become embedded in their eyes causing serious injury. The Respondent knew or could have known of the violation, according to the compliance officer, because the work activity was conducted in plain view of the supervisors on the worksite (Tr. 18). In this instance, the carpenter foreman was observed and photographed while operating a circular saw without eye protection (Tr. 390).

Respondent acknowledges that its employees, including supervisors, should wear eye protection while operating a circular saw (Tr. 389). Indeed, Respondent's superintendent testified that each employee was supplied with eye protection and instructed to wear safety glasses at all times (Tr. 391). Moreover, employees who are "caught more than one or two times not abiding by Minelli's rules of not wearing safety glasses or if he gets caught, for some reason, not being hooked up with a safety belt, he's immediately fired or he's warned once and fired" (Tr. 389). Accordingly, Respondent asserts that this item should be vacated because (1) it made safety glasses available to all employees and (2) a safety rule requiring employees to wear safety glasses at all times was in effect. Respondent argues that it should not be held responsible for an employees' failure to comply with company safe work practices.

The affirmative defense of employee misconduct is well established. *See Nooter Construction Co.* 16 BNA OSHC 1572; *Jensen Construction Company* 1979 CCH OSHD ¶ 23,664. In *Nooter* the Review Commission stated:

> In order to establish the affirmative defense of unpreventable employee misconduct under Commission case law, an employer bears the burden of proving: (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

16 BNA OSHC at 1578 *see* also *Centrex-Romey Construction Co.*, 16 BNA OSHC 2127, 2130 (1994). When the misconduct of a supervisory employee is established, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of the employees under his supervision" *L.E. Myers Co.* 16 BNA OSHC 1037, 1041 (1993).

Although Respondent's superintendent testified that the company had a safety rule that employees were required to wear eye protection at all times there is no evidence that the rule was part of a written safety program or, if not a written safety rule, that it was communicated to the employees. Moreover there is no evidence that the rule was enforced by an effective disciplinary program other than the superintendent's self serving statements. *See Asplunth Tree Expert Co.* 7 BNA OSHC 2074, (1979). The employer must present evidence of having actually administrated

discipline in order to establish that a disciplinary system was in effect. No evidence of that nature was offered by Respondent. For these reasons, Respondent has failed to establish the unpreventable employee misconduct defense. Moreover the evidence establishes that Minelli "could have known, with the exercise of reasonable diligence, that its safety program was inadequate, and that a violation such as [this] would occur." *CF&T Available Concrete Pumping, Inc.* 15 BNA OSHC 2195, 2199 (1993).

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death of serious physical harm could result" from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that in the event of an accident, it is probable that death or serious physical harm could occur. *Flintco Inc.*, 16 BNA OSHC 1404, 1405, 1993 CCH OSHD ¶ 30,227 (No. 92-1396, 1993). Here, the evidence establishes employees regularly used a circular saw without wearing eye protection. Respondent conceded that eye protection is absolutely required to be worn by employees engaged in this activity. The compliance officer testified without contradiction that flying wood chips could have become embedded in an employees' eye resulting in serious injury. Accordingly, this violation was properly characterized as serious.

Pursuant to § 17(j) of the Act, the Commission is authorized to assess each violation an appropriate penalty, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006-07, 1995 CCH OSHD ¶ 30,635 (No. 92-424, 1994). The most significant of these factors is the gravity of the violation, which includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.* The Secretary proposes a penalty in the amount of $1,400 for the violation on the grounds that there was a low probability of an injury as well as a "medium" severity of an injury. Only two employees were exposed to the hazard during a two month period. In consideration of all the factors set forth at § 17(j) of the Act, the proposed penalty is reasonable and appropriate.

Citation 1 Item 2

29 CFR 1026.59(e)(1): The employer did not develop, implement, and maintain at the workplace

a written hazard communication program which described how the criteria specified in 29 CFR 1926.59(f), (g) and (h) would be met:

> a) On or about 8/17/94 at the NY State Thruway (I-90) project between the Dunkirk and Silver Creek exits, no program was developed or implemented for employees who were potentially exposed to material such as but not limited to oxygen, acetylene, gasoline, Black Beauty, air tool oil, and Seeks Top gel mortar polymer cement parts A+B.

Citation 1 Item 3

29 CFR 1926.59(g)(8): The employer did not maintain copies of the required safety data sheets for each hazardous chemical in the workplace:

> a) On or about 8/18/94 at the NY State Thruway (I-90) project between the Dunkirk and Silver Creek exits, no material safety data sheets were available or provided for materials such as but not limited to oxygen, acetylene, gasoline, Black Beauty, air tool oil, and Seeks Top gel mortar polymer cement parts A+B.

Citation 1 Item 4

29 CFR 1926.59(h): Employees were not provided information and training as specified in 29 CFR 1926.59(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

> a) On or about 8/17/94 at the NY State Thruway (I-90) project between Dunkirk and Silver Creek exits, no training was provided for employees exposed to but not limited to oxygen, acetylene, gasoline, Black Beauty, air tool oil, and Seeks Top gel mortar polymer cement parts A+B.

These items are grouped together for discussion because all three constitute the same violation as set forth at item 2 above. The alleged violation of 29 CFR 1926.59(e)(1) (item 2) asserts that Respondent failed to maintain a written hazardous communication program at the worksite and, in particular, a program which "described how the criteria specified in 29 CFR 1926.59(f), (g) and (h) would be met." Items 3 and 4 allege that Respondent failed to comply with subsections (g)(8) and (h) of the standard. Moreover, the descriptive language of all three alleged violations are identifical with the exception that item 3, refers to material data sheets (subsection g) and item 4 refers to the training requirements (subsection h). Both requirements must be met to be in compliance with the

standard set forth at item 2. In addition, the Secretary proposes a separate penalty in the amount of $1,050 for *each* violation. Since it is clear that by abating item 2 of the citation, Respondent will also comply with the standards set forth at items 3 and 4, the separate citations for those items are duplicative of item 2 *see Capfor Inc.* 13 BNA OSHC 2219; *Southwest Road and Paving Co.* 14 BNA OSHC 1263; *Morrisen-Knudsen Co/Yonkers Contracting Co.* 16 BNA OSHC 1105. Accordingly, items 3 and 4 and the proposed penalties for those items are vacated.

With respect to item 2, there is disputed testimony as to whether Respondent developed, implemented and maintained an appropriate hazard communication program at the worksite as required by the standard. The compliance officer testified that when he asked Respondent's superintendent, Mr. Gertonson, to produce the firm's hazard communication program, Mr. Gertonson replied that "they didn't have one"(Tr. 23). The compliance officer also testified that Respondent's foremen, Bob Swan, when asked the same question, replied that "he was clueless as to where it may be. He said, as far as he knew, he had never been given one and the company didn't have one" (Tr. 23).

Respondent's witnesses dispute the testimony of the compliance officer. Mr. Joseph Spano, Respondent's Vice President, testified that he developed a safety and health program and a hazard communication employee training program and submitted it to the prime contractor, Sealand (Tr. 399-400). Foreman Swan also testified that Respondent's written safety program was maintained at the prime contractor's trailer located at the worksite. This trailer, according to Swan was the only trailer on site and was used by all contractors at the jobsite. Moreover, Respondent's witnesses testified that they did not use any of the alleged hazardous materials listed in the citation at the jobsite except the substance known as "black beauty." That material is used for sand blasting purposes and does not contain silica; the hazardous material complained of by the compliance officer (Tr. 25).

The record reveals a clear contradiction between the testimony of the compliance officer who testified that Respondent did not have a written hazard communication program on site and Respondents' witnesses who testified that there was a written program on site and maintained at the prime contractor's trailer. Moreover, according to Respondent, the hazardous materials listed in the citation were not at the worksite during the inspection and, in any event, were never used by

Respondents' employees. Although the issue of whether a hazardous communication program existed at the worksite cannot be resolved based upon the record in this matter, it is undisputed that the compliance officer requested to see the hazard communications program and was not provided with the program as required by 29 CFR 1926.59(e)(4). The compliance officer testified on direct examination that he requested Respondent's superintendent Gertonson and foreman Swan to produce the written hazard communication program. The requested document was not provided to the compliance officer. Neither Gertonson nor Swan disputed that testimony during their respective appearances at the hearing. Respondent had fair notice that production of the written hazard communication program was an issue in the case and was in a position to dispute the compliance officers' assertion. Accordingly, pursuant to Rule 15(b), Federal Rule of Civil Procedure, item 2 of citation No. 1 is amended to allege a violation 29 CFR 1926.59(e)(4) to conform to the evidence and, based upon the evidence, it is concluded that Respondent failed to present its written hazard communication program upon request as required by the aforesaid standard. The alleged violation of 29 CFR 1926.59(e)(3) is vacated on the ground that the Secretary has failed to establish by a preponderance of the evidence that no hazard communication program was maintained at the worksite by Respondent as required by that standard.

It is further concluded that Respondents' failure to present the hazard communication program upon the compliance officer's request did not expose Respondents' employees to serious harm or death. Accordingly, in the absence of evidence that employees were exposed to serious physical harm or death, it is concluded that the violation must be designated as an other than serious violation. Moreover, in consideration of the factors set forth at section 17(j) of the Act, a penalty in the amount of $50 is assessed for the violation.

Citation 1 Item 5

29 CFR 1926.95(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

> a) On or about 8/16/94 on the NY State Thruway project, West end of the bridge deck over Silver Creek, employee sandblasting on reinforcing steel with "Black Beauty" was exposed to rebound from the blast medium and was not provided the proper personal protective equipment for his face, head, and hands. The only form of protection

that was provided was a pair of safety glasses.

During his inspection walkaround on August 16, 1994, the compliance officer observed a Minelli employee sandblasting metal "rebars" with a material known as ebony grit. The material safety data sheet (MSDS) for ebony grit (Exh. C-2) states that "[l]ong term inhalations may cause lung disorder due to nuisance dusts. Irritating to eyes as any foreign material." Under "Preventative Measures" the MSDS for ebony grit states: [i]f airborne concentrations of nuisance dusts are present, optional use of a dust [mask] may be desired.... There are no [special] handling procedures required. Use gloves and safety glasses as normal procedures [to] protect from abrasive products...." The compliance officer observed the employee wearing a long sleeve hooded sweatshirt and a hard hat and a cloth over his nose and mouth. (Exhibits C-3 and C-4) The complaince officer testified that the employee should have been wearing a face shield or a hood to protect his face and gloves to protect his hands from the blast residue (ebony grit).

Respondents' foreman acknowledges that the employee should have been wearing a hood to protect his face from the grit (Tr.. 299). In fact, another employee observed by the compliance officer (Exh. C-13) was wearing an air supplied hood while sandblasting below the bridge (Tr.. 297). Respondent asserts that proper protective equipment was provided to employees and, in this instance, the violation observed by the compliance officer was the result of unpreventable employee misconduct. For the reasons stated *supra* at pages 3 and 4, the Respondent has failed to provide sufficient support for the affirmative defense of unpreventable employee misconduct. Accordingly, the violation is affirmed.

In consideration of the penalty factors set forth at section 17(j) of the statute it is concluded that the gravity factor is not as high as calculated by the Secretary. For that reason, a penalty in the amount of $1,000 is assessed for this violation.

Citation 1 Item 6

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffold, catch platforms, temporary floors, safety lines, or safety belts was impractical:

> a) On or about 6/28/94, NY State Thruway project, beneath the surface of the roadway at the bridge over Silver Creek. Employees

were observed working on the concrete arch supports of the bridge, exposed to falls ranging from approximately eight five (85) feet up to one hundred thirty (130) feet to the creek bed below, and no fall protection was being utilized to prevent them from falling.

During his walkaround of the worksite on June 28, 1994, the compliance officer observed two of Respondent's employees, Pete Smith (Exh. C-9) and Patrick Donovan (Exh. C-10) working on the concrete support structure of the bridge without wearing any fall protection and without any safety nets (Tr.. 63-65).[1] Both employees were working approximately 85 feet above the ground (Tr.64). These employees were observed by the compliance officer for approximately one and a half to two hours that day working while standing on the support structure of the bridge without any fall protection (Tr. 65). This testimony was not rebutted by any of the Respondents' witnesses. Based upon the uncontroverted evidence of the compliance officer, this item is affirmed.

Respondent appears to argue that the use of safety nets was not practical under the circumstances of this job because concrete chipped away from the bridge would fall into the net creating a greater hazard to any employee who may have fallen into the net. Therefore, according to Respondent, safety belts, lanyards and safety lines were the more appropriate fall protection under the circumstances. While this may be true, the unrebutted testimony is that employees Pete Smith and Patrick Donovan were observed without any fall protection of any kind. *See Southern Colorado Prestree Co.* 586 F.2d 1342, 1350 (10th Cir. 1978); *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974); *L.E. Myers Company* 12 BNA OSHC 1609, 1614, 1411 (1986); *Pace Construction Corp.* 14 BNA 2217. Moreover, the fact that safety lines had been strung and employees had been issued safety belts does not relieve the Respondent of its obligation to ensure that the aforesaid safety equipment was used by its employees.

With respect to the penalty for this violation, it is well established that Respondent had strung safety lines wherever employees were exposed to falling hazards and required the wearing of safety belts and lanyards. Although it is apparent that the employees observed by the compliance officer

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[1]Exhibits C-6 and C-7 are photographs of superintendent Gertonson standing on a concrete support beam below the bridge without wearing any fall protection. Mr. Gertonson testified that he walked onto the beam at the direction of the compliance officer to call another employee down from a higher level under the bridge(Tr. 381). Moreover, he was only eight feet off the ground when the photographs were taken (Tr. 383, 393). For these reasons, Mr. Gertonson was not an exposed employee for the violation alleged by the Secretary.

were not utilizing the safety devices available to them the employer has failed to establish the affirmative defense of unpreventable employee misconduct *see supra* pages 3 and 4. However, only two employees were seen by the compliance officer without fall protection during his multi day inspection. Moreover, the company had a safety policy requiring the wearing of fall protection. Accordingly, because of the good faith exhibited by the Respondent as well as the limited extent of the violation, a penalty in the amount of $1,000 is assessed.

Citation 1 Item 7

29 CFR 1926.404(b)(1)(ii): When an assured equipment grounding program was not utilized, receptacles were not protected with ground-fault circuit interrupters when on a two-wire, single-phase portable or vehicle mounted generator rated more than 5kW or where the circuit conductors of the generator were not insulated from the generator frame and all other grounded surfaces:

> a) On or about 7/6/94 beneath the bridge deck over Silver Creek on the NY State Thruway, employees using a Skilsaw Professional Circular Saw attached to a Homelite generator and no ground-fault circuit interrupter was in use to protect the employees.

With respect to this item the compliance officer testified that he observed employees using hand held electrical tools which were powered by a Homelite 5200 kW generator. The generator had a two wire system without a ground fault circuit interrupter (Tr. 69). The compliance officer stated that employees using hand held electrical tools powered by the generator were exposed to electrical shock (Tr.. 69, 70). No other evidence was presented by the Secretary in support of this alleged violation.

Respondent's witness, Mr. Robert Swan, was a foreman at the worksite who accompanied the compliance officer at the time that this alleged violation was observed by the compliance officer. Mr. Swan testified that the generator was a 4200 kW generator, not a 5200 kW generator. Moreover, the generator had a built in ground fault interrupter which could be seen "plain as day. It's got a test and a reset button right on the front of the generator"(Tr. 309). Moreover, Mr. Swan observed the compliance officer test the generator to "see if my ground fault interrupter worked" (Tr. 309). According to Swan, the compliance officer determined that the ground fault interrupter "worked" *id.* This evidence was unrebutted by the Secretary. Since there is a clear conflict in the testimony of the compliance officer and Respondent's foreman regarding the essential elements necessary to

establish this violation and the Secretary failed to present any evidence in support of the compliance officer, this item is vacated for a failure of proof.

Citation 1 Item 8

29 CFR 1926.404(f)(6): The path to ground from circuits, equipment, or enclosures was not permanent and continuous:

> a) On or about 7/6/94 and 8/16/94 at the bridge over Silver Creek on the NY State Thruway (I-90), the grounding pin was broken off the attachment cord on the Skilsaw Professional Circular Saw thereby eliminating the ground from being continuous.

On July 6, 1994 and again on August 16, 1994 the compliance officer observed a circular saw without a grounding pin (Tr. 73, Exh. C-12). The absence of a grounding pin exposes an employee using the saw to the hazard of electrical shock. This condition was acknowledged by Respondent's foreman Swan (Tr. 309, 310). According to the compliance officer, the absence of a grounding pin constitutes a serious violation because an employee exposed to the electrical shock hazard could sustain burns or electrocution (Tr. 75). *See* also *Guardian Roofing Systems, Inc.* 14 BNA OSHC 1359; *Dover Elevator Co.* 14 BNA OSHC 1631; *Wilson Builders* 15 BNA OSHC 1363. The compliance officer testified that the likliehod of an injury was "medium" (Tr. 76) and did not credit the Respondent with any "good faith". It is concluded, however, that credit should be granted to the Respondent for good faith. Accordingly, a penalty in the amount of $700 is assessed. *See National Engineering and Contracting* 16 BNA OSHC 1317.

Citation 1 Item 9

29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platforms more than 10 feet above the ground or floor:

> a) On or about 6/28/94 at the NY State Thruway (I-90) project between Silver Creek and Dunkirk exits, beneath the roadway and bridge deck over Silver Creek, employee was working on the scaffold while being exposed to falls of approximately fifty (50) feet to the ground below and no guardrails were provided on the ends of the platform, nor were there any toeboards on any portion of the scaffold. The scaffold was hanging from the second arch from the South side of the bridge.
>
> b) On or about 6/28/94 at the NY State Thruway (I-90) project

between Silver Creek and Dunkirk exits, beneath the roadway and bridge deck over Silver Creek, employee was working on the scaffold while being exposed to falls of approximately fifty (50) feet to the ground below and no guardrails were provided on both ends and approximately one half of the front side of the scaffold, which was facing the arch of the bridge, and no guardrails including toeboards were in place on any portion. The scaffold was hanging from the first arch from the South side of the bridge.

c) On or about 6/28/94 and 7/6/94 at the NY State Thruway (I-90) project between Silver Creek and Dunkirk exits, beneath the roadway and bridge deck over Silver Creek, employees observed working on a four-point suspended scaffold without any guardrails being in place on the inside of the scaffold platform which normally faces the structure. The top rail was missing and exposed employees to falls of approximately fifty (50) feet to the ground below. The scaffold was hanging below the third arch. from the South side of the bridge.

With respect to subitem (a), the compliance officer testified that he observed a scaffold approximately fifty feet off the ground with guardrails missing from "both ends, including the toeboard and the toeboard...also missing off the back side of the scaffold" (Tr. 84). In support of this allegation, the Secretary offered Exhibit C-16 which depicts a scaffold without guardrails as described by the compliance officer. No other witness was offered by the Secretary. The photograph was taken by the compliance officer on June 25, 1994, the date that he saw a Minelli employee standing on the scaffold (Tr.85, 86). Although the photograph does not show anyone standing on the scaffold, the compliance officer testified that he observed "an employee" on the scaffold working on the form work depicted in the photograph (Tr. 86). The employee left the scaffold as the compliance officer approached the area (Tr. 228).

Mr. Swan, Respondent's foreman, acknowledged that employees worked off the scaffold as it is depicted in Exhibit C-16 (Tr. 317). The employees were required to construct "form work" on the side of the bridge support. In order to place the form work on the support, it was necessary to remove the rails from the scaffold (Tr. 317). According to Swan, the employees were tied off while on the scaffold with a safety belt and lanyard secured to a safety line (Tr. 317, 318). See Exhibit C-16 at "A". He also testified that the job could not be done safely with the guardrails on the scaffold (Tr. 318).

There was no mention of safety belts and safety line during the compliance officer's testimony nor was Mr. Swan cross-examined regarding his testimony that the employees working on the scaffold depicted in Exhibit C-16 were tied off with safety belts and lanyards. Thus, the only evidence in support of this violation is a photograph of a scaffold without any employees exposed to the hazard. The compliance officer's testimony that an employee left the scaffold as he approached the work area does not establish that the employee was working on the scaffold without appropriate personal protective equipment; *i.e.* a safety belt, lanyard and safety line. (*See 29 CFR 1926.28(a) and 105(a)).* Thus, I am constrained to vacate this item on the ground that the Secretary has failed to provide any evidence that an employee was exposed to a falling hazard as alleged.

With respect to subitem (b) the compliance officer testified that he observed employee Bob Smith standing on the scaffold depicted in the photograph designated as Exhibit C-26 on June 28, 1994. That photograph contains a suspended scaffold without anyone standing on it. The compliance officer stated that the scaffold did not have guardrails on the ends nor toeboards and was suspended about 50 feet above the ground (Tr. 88-89). Although he observed the employee on the scaffold for about one and one half hours (Tr. 89), there is no explanation as to why he did not take a photograph while the employee was on the scaffold(Tr. 89).

Respondent's foreman Swan testified that the scaffold depicted in Exhibit C-26 was in the process of being assembled at the time that the photograph was taken (Tr. 313). Swan stated that no employee worked on the scaffold while it was in that condition (Tr. 313). The following questions were asked of Mr. Swan during direct examination:

"Q There was testimony from Mr. Willis that he observed men standing on this scaffold and working on the structure. It that an accurate statement?

A No Sir.

Q Did that even occur?

A No." (Tr. 313)

Once again the Secretary has failed to present that quantum of evidence necessary to establish employee exposure to the alleged hazard. It is difficult to understand why a compliance officer would observe an employee standing on a scaffold for one and one half hours knowing that the

scaffold was not equipped with proper guardrails and then take a photograph of the scaffold after the employee had left the work area.[2] In view of the clear contradiction in the testimony of the compliance officer and Respondent's foreman regarding employee exposure to the hazard, additional evidence of employee exposure is required to corroborate the compliance officer's testimony regarding his observations. In the absence of that evidence, this subitem must be vacated.

Subitem (c) of this item alleges that employees were working on a suspended scaffold on June 28 and July 6, 1994 without the scaffold being equipped with appropriate guardrails. The compliance officer testified on direct examination that he observed an employee on the scaffold for about one and one half hours on June 28 and approximately one half hour on July 6, 1994 (Tr.89). In support of this testimony the Secretary submitted three photographs into evidence; Exhibits C-13, 14, and 15. Only Exhibit C-13 depicts a worker on the scaffold. The compliance officer described the violation as follows:

> "As the employee is facing me in this picture, the guardrails are missing in front of the employee. To the front side of the employee, there is no mid rail nor top rail (Tr. 83)."

Although Exhibit C-13 leaves much to be desired in terms of clarity, it appears to support the compliance officer's testimony that the guardrails immediately in front of the employee are missing. Moreover, there is no testimony indicating that the employee utilized other types of fall protection such as a safety belt and lanyard. Accordingly, based upon the compliance officers' testimony and Exhibit C-13, as well as the unrefuted testimony that the scaffolds were rigged fifty to eighty feet above the ground (Tr. 90) this subitem is affirmed as a serious violation.

With respect to the penalty, it is noted that the Secretary established that only one employee was exposed to the hazard. Moreover, there was testimony establishing that Respondent had an extensive fall protection program in place at this worksite which included the use of safety belts, lanyards and safety lines. It is concluded that Respondent had made a good faith effort to provide and ensure the use of appropriate personal protection equipment to its employees. Accordingly, a

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[2]On direct examination the compliance officer testified that he observed employees working on all three scaffolds for about one and one half hours (Tr. 78, 89). On cross-examination the compliance officer testified that the employees left the scaffolds "when they found out OSHA was on the jobsite" (Tr. 228) when he initially approached the work area.

penalty in the amount of $500 is assessed for this violation.

Citation 1 Item 10

29 CFR 1926.500(b)(7): Temporary floor opening(s) did not have standard railings:

> a) On or about 8/16/94 on the bridge deck over Silver Creek on the NY State Thruway (I-90), employees working on the bridge deck were exposed to temporary floor openings and no standard guardrails were provided. The openings all measured approximately 3'4 x 2'6".

During his inspection the compliance officer observed twenty-eight holes in the road surface of the bridge (Tr. 91). Each hole was approximately one and one half feet by three feet in dimension with a grid composed of steel reinforcing bars approximately six inches below the road surface. The largest opening between the steel rebars was approximately 6 inches by 6 inches. These holes resulted from the removal of "scuppers" (drain holes) which fit into the 6x6 inch opening. Respondent was required under its contract to remove the scuppers (Tr. 320). The compliance officer acknowledged that an individual could not fall through the hole because of the presence of the rebar (Tr. 91, *see* Exhibits C-18 to C-23).

Throughout this proceeding, including post hearing memorandum of law, the Secretary has taken the position that the holes in the bridge roadway were "floor openings" that should have been guarded by standard guardrails notwithstanding the fact that the government's only witness acknowledged that an individual could not fall through the openings. The definitional section at 29 CFR 1926.502(b) defines a "floor opening" as follows:

> *Floor opening*–An opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall.

Thus, the Secretary has failed to present any evidence that the openings observed by the compliance officer were of a sufficient size that would allow a person to fall through. However, a "floor hole" is defined at 29 CFR 1926.502(a) as follows:

> *Floor hole*–An opening measuring less than 12 inches but more than 1 inch in its least dimension in any floor, roof, or platform through which materials but not persons may fall, such as a belt hold, pipe opening, or slot opening.

Accordingly, assuming that the Secretary has met his burden of proof for every other element of this

alleged violation, the standard seemingly applicable to this situation is set forth at 29 CFR 1926.500(b)(8); that is, the proper guarding of floor *holes.*

A fundamental question, however, is whether a road bed constitutes a "floor" for purposes of the standards set forth at 29 CFR 1926.500(Subpart M). The Commission considered this issue in *Daniel Construction Company of Alabama* 1981 CCH OSHD 25, 553, at p 31,864 and stated:

> "The important distinguishing feature...is that section 1926.500(b)(5) [pits and trap door floor openings] is limited in applicability to interior cavities....we conclude that section 1926.500(b)(5) is inapplicable to the cavity at issue in this case because it was located ten feet outside the building and this was not a 'floor opening' or 'floor hole'". *See* also *CBI NA-CON INC.* 13 BNA OSHC 1641 (1988).

Inasmuch as the road bed of a bridge is not a "floor" within the meaning of the standard cited, this item must be vacated.

Citation 1 Item 11

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

> a) On or about 6/28/94 and 7/6/94 at the NY State Thruway (I-90) project between Silver Creek and Dunkirk exits, beneath the roadway and bridge deck over Silver Creek, employees were required to climb up and down an embankment to gain access to and from the roadway to the work area at the base of the piers where the employees were performing the majority of their work at this time.
>
> b) On or about 6/28/94 and 7/6/94 at the NY State Thruway (I-90) project between Silver Creek and Dunkirk exits, employees were required to gain access to their scaffolds and from busting out on piers by climbing up and down on the arch of the piers. No safe access was provided for the employees. The slope on the pier arch was approximately at a fifty (50) degree angle.

With respect to item 11(a), the compliance officer testified that on June 28, 1994[3] he observed

[3]There is no evidence that the compliance officer observed this violation on July 6, 1994 as alleged in the citation.

employees walking up and down a sloped embankment below the bridge "that went from the road surface down to the base of the piers that carried the arches...." The compliance officer estimated that the drop in elevation from the top of the embankment to the bottom was 39 feet. There is no evidence, however, regarding the length of the slope or the drop in elevation per foot along the length of the embankment. The embankment was composed of clay and rocks and, in the view of the compliance officer, created a "very slippery situation for the employees" (Tr. 95). In support of this item, the Secretary submitted a photograph (Exhibit C-24) which, according to the compliance officer, depicts the area of violation. Although no employees are shown in the photograph, Exhibit C-24 does depict the underside of the bridge, its supporting structures, a pipe scaffold and an embankment sloping up to the area where the scaffold is located. The compliance officer testified that he observed employees walking up and down the embankment depicted in Exhibit C-24.

Respondents' foreman, Swan, testified that Exhibit C-24 is not a photograph of the employee access area to the worksite. According to Swan, the section of the bridge depicted in Exhibit C-24 "...has nothing to do with my access" (Tr. 265). However, Swan did admit that his employees walked up and down the embankment shown in the photograph (Tr. 261, 265) to perform work.[4]

The issue to be resolved is whether Respondent was required to provide a stairway or ladder under the conditions depicted in Exhibit C-24. Although the compliance officer stated that there was a drop in elevation of 39 feet from top to bottom, the slope of the embankment does not appear to be of such an angle that employees could not safely walk up or down the embankment. Moreover, the standard allows a sloped embankment to be utilized in place of a stairway or ladder. Based upon the limited testimony of the compliance officer, as well as the photograph of the work area, there is no hazard to employees using the sloped embankment to walk to and from the work area. Accordingly, this subitem is vacated.

Subitem 11(b) alleges that on two dates, June 28 and July 6, 1994, Respondent's employees were required to walk up and down the arched piers supporting the bridge. According to the allegation, the arch of the supports was approximately fifty degrees. In support of this allegation,

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[4]In response to three other questions, Swan stated that employee's did *not* walk on the embankment depicted in Exhibit C-24 (Tr. 271, 272, 273). It is clear however, that employees were required to be on the embankment to perform their work activity relating to the pipe scaffold.

the Secretary presented two photographs (Exhibit C-9 and C-10). The photographs depict the concrete piers which support the bridge, as well as the arched support which underpin the cement piers. Employees Pete Smith and Patrick Donovan are shown in the photographs (Tr. 63-65). Both employees were exposed to a falling hazard without wearing appropriate personal protection equipment (*See* item 6 *supra* at 9). It is clear from the photographic evidence submitted by the Secretary, that the angle of the arch was of such an angle that it presented a slipping hazard to the employees who were seen walking up and down the arch. The installation of a ladder or stairs would have provided additional protection to employees. This was particularly important in this instance because of the employer's failure to ensure that its employees wore appropriate fall protection while walking on the archways. On this basis, subitem 11(b) is affirmed. For the reasons set forth at pg. 9 and 10 regarding the penalty assessed for item 6, a penalty in the amount of $1,000 is assessed for this violation.

Citation 2 Item 1

29 CFR 1926.152(a)(1): Containers other than approved metal safety cans were used for the handling and use of flammable liquids in quantities greater than one gallon:

> a) On or about 8/16/94 at the NY State Thruway project (I-90), bridge deck over Silver Creek, one (1) two and one half (2½) gallon plastic container of gasoline was not approved, the container did not have a spring closing lid.

The compliance officer testified that he observed an unapproved container (Exhibit C-25) containing gasoline and did not have a spring closing lid. See 29 CFR 1926.155(a) and 29 CFR 1926.155(l). *See* also *Vaughn Roofing Co.*1974-1975 CCH OSHD 19, 441. This evidence was unrebutted by Respondent. Accordingly, this item is affirmed as other than serious violation with no penalty assessed thereto.

FINDINGS OF FACT

Finding of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed finding of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious citation No. 1, item 1 alleging a violation of 29 CFR 1926.28(a) is **Affirmed** and

a penalty of $1,400 is assessed.

2. Serious citation No. 1, item 2 alleging a violation of 29 CFR 1926.59 (e)(4) vice 29 CFR 1926.59(e)(1) is **Affirmed** as an other than serious violation and a penalty in the amount of $50 is assessed.

3. Serious citation No. 1, item 3 alleging a violation of 29 CFR 1926.59(g)(8) is **Vacated**.

4. Serious citation No. 1, item 4 alleging a violation of 29 CFR 1926.59(h) is **Vacated**.

5. Serious citation No. 1, item 5 alleging a violation of 29 CFR 1926.95(a) is **Affirmed** and a penalty in the amount of $1,000 is assessed.

6. Serious citation No. 1, item 6 alleging a violation of 29 CFR 1926.105(a) is **Affirmed** and a penalty in the amount of $1,000 is assessed.

7. Serious citation No.1, item 7 alleging a violation of 29 CFR 1926.404(b)(1)(ii) is **Vacated**.

8. Serious citation No. 1, item 8 alleging a violation of 29 CFR 1926.404(f)(6) is **Affirmed** and a penalty in the amount of $700 is assessed.

9. Serious citation No. 1, item 9 alleging three instances of violations of 29 CFR 1926.451(a)(4) is **Vacated** as to subitems (a) and (b). Subitem (c) is **Affirmed** and a penalty of $500 is assessed.

10. Serious citation No. 1, item 10 alleging a violation of 29 CFR 1916.500(b)(7) is **Vacated**.

11. Serious citation NO. 1, item 11 alleging two instances of 29 CFR 1926.1051(a) is **Vacated** as to subitem (a) and **Affirmed** as to subitem (b) and a penalty of $1,000 is assessed.

12. Other than Serious citation No. 2, item No. 1 alleging a violation of 29 CFR 1926.152(a)(1) is **Affirmed** with no penalty assessed.

It Is So Ordered.

ROBERT A. YETMAN
Judge, OSHRC

Dated: May 10, 1996
Boston, Massachusetts