APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 26, 2019
Lyle W. Cayce
Clerk

No. 19-60067

OSHRC Docket No. 17-0679

EXCEL MODULAR SCAFFOLD & LEASING COMPANY, doing business as Excel Scaffold & Leasing,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; EUGENE SCALIA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents

Petition for Review of an Order of the
Occupational Safety and Health Review Commission

Before WIENER, HIGGINSON, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the petition of petitioner for review of an order of the Occupational Safety and Health Review Commission and was argued by counsel.

It is ordered and adjudged that the petition for review is denied.

IT IS FURTHER ORDERED that petitioner pay to respondents the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Feb 07, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; EUGENE SCALIA, SECRETARY, U.S. DEPARTMENT OF LABOR,

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Petition for Review of an Order of the
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Before WIENER, HIGGINSON, and HO, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

On September 12, 2016, an employee of Excel Modular Scaffold & Leasing Company ("Excel") was killed when a scaffold he was constructing collapsed into Galveston Bay in Texas City, Texas. In the aftermath of this tragedy, the Occupational Safety and Health Administration ("OSHA") conducted an investigation into the incident and issued Excel a number of safety citations. One of those citations charged Excel with a "serious" violation of 29 C.F.R. § 1926.106(d), a regulation which required Excel to ensure the presence of a "lifesaving skiff" at all jobsites where employees were required to work over water. Excel contested the issuance of the citation and the resulting

penalty, but it was upheld by an Administrative Law Judge ("ALJ"). The ALJ's decision became a final order when the Occupational Safety and Health Review Commission ("the Commission") declined to conduct further review. For the reasons explained below, we deny Excel's petition for review.

I.

Excel manufactures scaffolds and provides scaffold construction and dismantling services to companies in the refining industry. In 2015, Marathon Refinery hired Excel to build a series of scaffolds beneath three docks on Galveston Bay. The scaffolding system was comprised of "hanging scaffolds," which were constructed by attaching a horizontal bar to hanging vertical legs that were connected to I-beams under the docks. The project required Excel's employees to work both above and below the docks, and the water surrounding the docks was approximately eighteen feet deep.

On September 12, 2016, Luis Gonzalez was a member of an Excel crew working on the construction of a scaffold bay beneath one of Marathon's three docks. At the time, all crew members, including Gonzalez, were wearing safety harnesses with lanyards and personal flotation devices. While he worked, Gonzalez connected his lanyard to the vertical leg of one of the scaffold systems. As he attempted to attach the vertical leg to the existing scaffold bay, the leg became detached and fell into the water, dragging Gonzalez along with it. Two other members of the crew jumped into the water in an attempt to save Gonzalez, but they were unable to retrieve him. Tragically, by the time rescue personnel arrived, it was too late to save him, and Coast Guard divers recovered his body later that day.

After the incident, OSHA commenced an investigation into the fatality and the conditions at the jobsite. The Secretary of Labor ("the Secretary") issued Excel four safety citations. Only one of the citations is at issue in this

appeal.[1] That citation charged Excel with a "serious" violation of 29 C.F.R. § 1926.106(d), which requires employers to ensure that "[a]t least one lifesaving skiff" is made "immediately available at locations where employees are working over or adjacent to water." *Id.* A lifesaving skiff is a small boat located close enough to a jobsite that it can attempt to rescue someone who falls into the water within three or four minutes. The Secretary classified Excel's violation of the regulation as "serious," and proposed that Excel pay a penalty of $12,675.

Excel contested the citation by submitting a Notice of Contest form along with an answer containing twenty-five affirmative defenses, including "impossibility/infeasibility of compliance." A two-day hearing was scheduled to begin on March 19, 2018 before an ALJ. A month before the hearing, the parties filed a joint Prehearing Statement with the ALJ. The Prehearing Statement stipulated that Excel violated the regulation requiring a skiff and informed the ALJ that the following two "issues of fact" were the only ones that "remain[ed] to be litigated" with respect to that citation:

> 1. Whether failing to have a lifesaving skiff immediately available exposed [Excel's] employees to a substantial probability of death or serious injury under the facts and circumstances of this case; and
>
> 2. Whether the proposed penalty is appropriate.

The Prehearing Statement made no reference to Excel's earlier contention that compliance with the regulation was either impossible or infeasible.

At the beginning of the hearing, the ALJ sought to further clarify the issues in dispute. She asked counsel for Excel to explain the nature of the company's stipulation regarding the lifesaving skiff citation. Excel's lawyer

[1] The other three citations were subsequently dismissed. The Secretary voluntarily withdrew two of the citations before the ALJ issued her decision, and one was dismissed by the ALJ in her order, which was affirmed by the Commission.

explained that the company stipulated that it "did not comply with the standard," but continued to "challenge the serious type of the violation classification." The ALJ asked once again whether Excel was "only challenging the classification," and Excel responded that it was challenging "[t]he classification and, of course, that goes along with that, the penalty amount." Throughout this exchange, Excel omitted any reference to the infeasibility or impossibility defense.

During the hearing, Excel introduced testimony from employees who explained that, given the layout of the docks at the Marathon Refinery, it would have been difficult for a boat to navigate under the dock where Gonzalez fell. The Secretary did not object to the introduction of this testimony.

After the hearing, the parties submitted post-hearing briefs. In Excel's brief, the company argued that the testimony introduced during the hearing established that compliance with the lifesaving skiff regulation "was infeasible because a skiff could not have been deployed and successfully navigated underneath Dock 34 to rescue Luis Gonzalez." Excel further argued that, in the event the ALJ disagreed with the company's defense, the citation's classification of the violation should be reduced to "other than serious."

The ALJ issued a decision and order on October 26, 2018. The order held that Excel had abandoned the defense of infeasibility by failing to preserve the defense in the parties' joint Prehearing Statement. As a result, the ALJ disregarded the section of Excel's post-hearing brief pertaining to the infeasibility defense. In the alternative, the ALJ held that the evidence submitted during the hearing failed to establish by a preponderance of the evidence that it would have been infeasible for Excel to comply with the lifesaving skiff regulation, in part because the evidence established that partial compliance with the regulation was possible. After reviewing the evidence

presented at the hearing, the ALJ concluded that Excel's violation of the citation was "serious," and imposed the Secretary's proposed penalty.

Excel filed a petition for discretionary review with the Commission on October 19, 2018. When the Commission declined to direct the case for review, the ALJ's order became the final order of the Commission on November 27, 2018. *See* 29 U.S.C. § 661(j); 29 C.F.R. § 220.90(d).

II.

We have jurisdiction over this appeal under 29 U.S.C. § 660(a). Though the ALJ's order became final only when the Commission declined to conduct discretionary review, we apply the same standard of review to the final decision here as we would if the Commission had directly issued its own decision. *See MICA Corp. v. OSHRC*, 295 F.3d 447, 449 (5th Cir. 2002) (applying the same standard of review in such a situation). We review the ALJ's findings of fact under the substantial evidence standard. *Id.* We will affirm the ALJ's findings of fact as long as they are "supported by substantial evidence [in] the record considered as a whole even if this court could justifiably reach a different result de novo." *Id.* "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Chao v. OSHRC*, 401 F.3d 355, 362 (5th Cir. 2005) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

We will overturn the ALJ's legal conclusions only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(a); *Chao*, 401 F.3d at 367. The ALJ's determination that Excel waived its affirmative defense of infeasibility is a legal conclusion that we review for an abuse of discretion. *See Davis v. Fort Bend Cty.*, 765 F.3d 480, 487 n.1 (5th Cir. 2014).

III.

First, Excel argues that it was error for the ALJ to conclude that Excel waived the affirmative defense of infeasibility. Excel insists that it provided the Secretary with ample notice of the defense in its answer to the complaint, and argues that the testimony elicited during the hearing clearly established the company's intent to pursue the defense to contest the Secretary's issuance of the lifesaving skiff citation.

When presiding over a hearing involving a violation of a safety regulation, an ALJ is permitted to first conduct a prehearing conference with the parties to discuss "settlement, stipulation of facts, or any other matter that may expedite the hearing." 29 C.F.R. § 2200.51(b). The same regulation provides that the ALJ may utilize the "prehearing procedures set forth in Federal Rule of Civil Procedure 16," *id.*, which in turn permits a judge to schedule a pretrial conference to "formulate[] and simplify[] the issues, . . . eliminat[e] frivolous claims or defenses," and issue a pretrial order.[2] Fed. R. Civ. P. 16(c)–(d). A pretrial or prehearing order "controls the course of the trial." *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 n.13 (5th Cir. 1985). "Because of the importance of the pre-trial order in achieving efficacy and expeditiousness upon trial in the district court, appellate courts are hesitant to interfere with the court's discretion in creating, enforcing, and modifying such orders." *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982) (citations omitted).

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[2] Though Federal Rule of Civil Procedure 16 uses the term "trial" instead of "hearing," the Commission has noted that "[t]he purpose of Rule 16 appears to be identical with that of Commission Rule 51." *Duquesne Light Co.*, 8 BNA OSHC 1218, at *3 (No. 78-5034 1980). As such, the Commission refers to "trials" and "hearings" interchangeably, observing that "[p]rehearing procedures that aid in the early formulation of issues benefit all parties during trial preparation and result in the more efficient use of Commission resources at both the hearing and review stages." *Id.*

We have previously held that a party's failure to include an affirmative defense in a pretrial order constitutes a waiver of that defense—even if the defense was included in other pleadings. *See Flannery*, 676 F.2d at 129 ("If a claim or issue is omitted from the [pre-trial] order, it is waived." (citing cases)); *Pacific Indem. Co. v. Broward County*, 465 F.2d 99, 103–04 (5th Cir. 1972) ("The failure to indicate in the pre-trial order that an issue remains to be resolved at trial usually precludes the offer of proof on the issue at trial—to the detriment of the party who has the burden to prove the issue.") (citing *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945)). In this case, the joint Prehearing Statement that Excel and the Secretary submitted to the ALJ omitted any reference to Excel's affirmative defense of infeasibility. Though it is undisputed that Excel previously included this defense in its answer to the citation, "[i]t is a well-settled rule that a joint pretrial order signed by both parties supersedes all pleadings and governs the issue and evidence to be presented at trial." *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998) (quoting *McGehee v. Certainteed Corp.*, 101 F.3d 1078, 1080 (5th Cir. 1996)).

On the first day of the hearing, the ALJ spoke with Excel's counsel in an effort to clarify the meaning of the parties' stipulations and the Prehearing Statement. This exchange provided Excel with an additional chance to explain that the company continued to pursue the affirmative defense of infeasibility, notwithstanding its failure to include the defense in the Prehearing Statement. Despite this opportunity, however, Excel failed to mention the infeasibility defense during the conversation, reporting to the ALJ that the *only* issues that remained to be litigated were the classification of the citation and the resulting penalty. "Each party has an affirmative duty to allege at the pretrial conference all factual and legal bases upon which the party wishes to litigate the case." *Trinity Carton*, 767 F.2d at 192 n.13. In light of Excel's repeated failure to preserve the affirmative defense of infeasibility, it was not an abuse

of discretion for the ALJ to conclude that Excel waived the defense. *See, e.g.*, *Flannery*, 676 F.2d at 129–30 ("Unless the court has abused its discretion, its rulings concerning the [pretrial] order will not be disturbed on appeal." (citation omitted)); *Hodges v. United States*, 597 F.2d 1014, 1017 (5th Cir. 1979).[3]

Excel acknowledges that it did not include the defense of infeasibility in its Prehearing Statement, but it argues that the Secretary implicitly consented to the defense by failing to object at the hearing to the introduction of testimony that was relevant to that defense. As a result, Excel argues that the Secretary could not have been prejudiced or surprised by Excel's attempt to pursue the infeasibility defense in its post-hearing brief. While it is true that parties may consent to trial of an issue that was not preserved, consent occurs "only when the parties squarely recognized that they were trying an issue not raised in the pleadings." *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, at *2 (No. 92-262 1995) (citation omitted). More importantly, "[f]ailure to object to evidence relevant to the unpleaded issue" does *not* indicate consent "if the evidence is also relevant to a pleaded issue." *Id.* (citation omitted); *see also Int'l Harvester Credit Corp. v. E. Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977) ("[T]he introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the

[3] In its reply brief, Excel cites *Rathborne Land Co. v. Ascent Energy, Inc.*, 610 F.3d 249 (5th Cir. 2010), where we held that a trial court "not only has the right but the duty to relieve a party from a pretrial stipulation where necessary to avoid manifest injustice . . . or where there is substantial evidence contrary to the stipulation." *Id.* at 262–63 (quoting *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1369 (5th Cir. 1983)). The ALJ's decision to hold Excel to its Prehearing Statement did not lead to manifest injustice. Above all, even if Excel had not waived the infeasibility defense, the evidence presented at the hearing would not have been sufficient to establish the company's entitlement to the defense. *See also Coastal States*, 649 F.3d at 1369–70 (declining to find an abuse of discretion where the court was unable to find "substantial evidence contradicting the stipulations").

party who introduced the evidence was attempting to raise a new issue." (citations omitted)).

Here, Excel points to testimony from the hearing suggesting that it would have been difficult to navigate a skiff beneath Marathon's docks. This same testimony, however, was also relied upon by Excel to support its argument that the citation's classification should be reduced to "other than serious." Because the proffered testimony was used by Excel to support its other claims, it was not an abuse of discretion for the ALJ to conclude that it would have been prejudicial to the Secretary to allow Excel to pursue the infeasibility defense.[4] *See Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987) ("A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." (quoting *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92 (5th Cir. 1973))).

IV.

We also agree with the ALJ's alternative basis for dismissing Excel's infeasibility defense. In a footnote, the ALJ held that Excel had failed to establish by a preponderance of the evidence that it was infeasible for the company to comply with § 1926.106(d). Thus, even if Excel had not abandoned

[4] Excel also argues that the Secretary's failure to file a motion to strike Excel's affirmative defense of infeasibility demonstrated that the Secretary implicitly consented to Excel's reliance on the defense. Excel notes, by contrast, that the Secretary *did* move to strike the affirmative defense Excel advanced with respect to a different citation. This argument is misplaced, however. As the Secretary notes, the decision to "address a *different* affirmative defense as to a *separate* citation item is simply irrelevant to the question whether the Secretary knew that the infeasibility defense was at issue." Put differently, the fact that the ALJ chose not to infer from these arguments that the Secretary consented to the infeasibility defense was not an abuse of discretion. *Cf. Johnson v. Mississippi*, 606 F.2d 635, 638 (5th Cir. 1979) ("The 'abuse of discretion' standard of review contemplates an area in which the district court can act either way, exercising its own discretion, without reversal.").

the infeasibility defense, the ALJ held that Excel had not met its burden of proving that it was entitled to the defense on the merits.

To prove infeasibility, an employer must show by a preponderance of the evidence that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure." *Westvaco Corp.*, 16 BNA OSHC 1374, at *6 (No. 90-1341 1993). Because infeasibility is an affirmative defense, Excel bore the burden of producing sufficient evidence to meet each prong of the test. *See Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 441 (5th Cir. 1977); *A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 334 (D.C. Cir. 2002) (holding that an employer must prove each prong of the test to establish the infeasibility defense).

An employer is not entitled to an infeasibility defense if it would have been possible to partially comply with the standard. *See Cleveland Consol. Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981) (observing that OSHA "requires limited compliance where it furnishes some protection, even if exact compliance is not possible"); *Walker Towning Corp.*,14 BNA OSHC 2072, at *4 (No. 87-1359 1991) ("[E]ven when an employer cannot fully comply with the literal terms of a standard, it must nevertheless comply to the extent that compliance is feasible."). Excel presented evidence during the hearing to suggest it would have been difficult for a lifesaving skiff to navigate beneath Dock 34, but the evidence also suggested that a lifesaving skiff could have navigated around *other* areas of the same jobsite.[5] Even if this evidence

[5] Indeed, Excel itself acknowledges that "a skiff rescue might have been feasible at another location under different circumstances," but argues that that fact "does not defeat the defense's applicability." To the contrary, however, we endorsed the ALJ's view in *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573 (5th Cir. 1994), where we held that it was not an abuse of discretion for the Commission to conclude that an employer was not entitled to

demonstrates that Excel could have only partially complied with the lifesaving-skiff regulation, the evidence established that limited compliance with the regulation could have provided protections to other members of the crew.[6] Therefore, the ALJ did not err in concluding that Excel's infeasibility defense failed on the merits.

V.

Finally, Excel argues that the ALJ improperly affirmed the Secretary's classification of Excel's violation of the lifesaving skiff regulation as "serious." Under the Occupational Safety and Health Act, violations of a safety regulation are considered "serious" if "there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "A violation may be determined to be serious where, although the accident itself is merely possible . . . there is a substantial probability of serious injury if it does occur." *E. Tex. Motor Freight, Inc. v. OSHRC*, 671 F.2d 845, 849 (5th Cir. 1982) (internal quotation marks omitted).

Excel's arguments for alteration of the classification rest on its insistence that the absence of a skiff was not a substantial cause of Gonzalez's death. This focus is misplaced. As the ALJ held, the purpose of OSHA's safety regulations is "preventative, not reactionary." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 737 (5th Cir. 2016). Therefore, the question is not whether compliance with the standard would have prevented the *particular* tragedy here, but, instead, whether failure to comply with the regulation exposed employees to

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an impossibility defense when the evidence established that it would have been feasible for the employer to partially comply with a regulation. *Id.* at 579.

[6] It is not immediately clear that Excel's proffered evidence demonstrates that complete compliance with the regulation was impossible. If anything, this evidence established that the lack of a skiff did not cause Gonzalez's death, not that Excel was unable to place a skiff near the jobsite.

accidents where there was "a substantial probability of death or serious injury." *See, e.g.*, *Boh Bros. Constr. Co.*, 24 BNA OSHC 1067, at *9 (No. 09-1072, 2013) (affirming issuance of a "serious" citation for violation of the lifesaving skiff standard where the absence of a skiff exposed employees "to water-related hazards such as hypothermia and drowning"). *Cf. Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 642 (5th Cir. 1979) ("Because OSHA is designed to encourage abatement of hazardous conditions themselves . . . rather than to fix blame after the fact for a particular injury, a citation is supported by evidence which shows the preventability of the Generic hazard, if not this particular instance." (citation omitted)). Indeed, *Brennan v. OSHRC*, 494 F.2d 460 (8th Cir. 1974), a case upon which Excel relies, perfectly encapsulates this point, holding that the requisite inquiry focuses on "the general hazard" at issue, not the "foreseeability of the incident as it actually occurred." *Id.* at 463.

The ALJ's conclusion that the absence of a skiff exposed Excel's employees to a substantial probability of death or serious injury is amply supported by the record. For at least a year, Excel crew members worked at the Galveston Bay jobsite without a skiff. Excel crew members worked above and below the dock, using ladders to move between the areas of the scaffolding system. The top of the dock was thirty feet from the water, and the water around the docks was eighteen feet deep, with conditions ranging from calm to choppy. The ALJ also found that there was no evidence that it would have been difficult to navigate a skiff "if an employee fell from the dock or the ladder into an area of the water that was not underneath the dock"—a proposition Excel does not refute. Given these circumstances, there was substantial evidence to support the ALJ's conclusion that the absence of a skiff exposed Excel's employees to a substantial probability of death or serious injury.

VI.

For the foregoing reasons, the petition for review is DENIED.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Excel Modular Scaffold & Leasing Company dba Excel Scaffold & Leasing, Respondent.	OSHRC Docket No.: 17-0679

Appearances:

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For Complainant

Steven O. Grubbs, Esq.
Grant Dorfman, Esq.
Sheehy, Ware & Pappas, P.C., Houston, Texas
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Excel Modular Scaffold & Leasing Company dba Excel Scaffolding and Leasing (Excel) contests a Citation and Notification of Penalty (Citation) issued by the Secretary. The Secretary issued the Citation upon the recommendation of Compliance Safety and Health Officer (CSHO) Joshua Mandrell following a fatality investigation he conducted at the dock area of the Marathon Galveston Bay Refinery in Texas City, Texas. An Excel employee drowned when a scaffolding component to which he had attached his personal fall arrest system collapsed and dragged him into Galveston Bay.

Excel timely contested the Citation. The Court held a hearing in this matter on March 19 and 20, 2018, in Houston, Texas. The Court held the record open for admission of a post-hearing witness deposition. The Court closed the record by order issued May 9, 2018. The parties filed briefs on June 25, 2018.

The Secretary cited Excel for four serious violations of the construction standards of the Occupational Safety and Health Act of 1970, 29 C.F.R. §§ 651-678 (Act). The Secretary withdrew Item 2 (alleging a violation of 29 C.F.R § 1926.451(a)(6) for failing to ensure scaffolds were constructed in accordance with the design by a qualified person) during the April 5, 2018, post-hearing deposition of David Doucet (*Doucet Deposition,* Tr. 85-86). The Secretary withdrew Item 3 (alleging a violation of 29 C.F.R § 1926.451(g)(2) for failing to have a competent person determine the feasibility and safety of providing fall protection for employees erecting supported scaffolds) at the beginning of the hearing on March 19, 2018 (Tr. 7).

Item 1 alleges Excel violated 29 C.F.R § 1926.106(d). The parties stipulated Excel "violated 29 C.F.R § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3) Item 4 alleges Excel violated 29 C.F.R § 1926.502(d)(15) by failing to ensure the anchorage points used by employees for attachment of personal fall arrest equipment were capable of supporting at least 5,000 pounds per employee. The Secretary proposes a penalty of $12,675.00 for each item.

For the reasons discussed below, the Court **AFFIRMS** Item 1 as serious and assesses a penalty of $12,675.00. The Court **VACATES** Item 4 and assesses no penalty.

JURISDICTION AND COVERAGE

Excel timely contested the Citation and Notification of Penalty on April 3, 2017. The parties stipulate the Commission has jurisdiction over this action and Excel is a covered business under the Act (*Agreed Prehearing Statement,* ¶ D.1, D.2; Tr. 8). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Excel is a covered employer under § 3(5) of the Act.

BACKGROUND

The Marathon Refinery (Marathon) hired Excel to construct scaffolds underneath its three docks in Galveston Bay. Marathon planned to use the scaffolds when repairing and repainting the underside of the docks (Tr. 40). The scaffolds were a series of connected bays, measuring 10 feet by 10 feet, spanning the area underneath the docks (Tr. 81-82). The scaffolds were "hanging scaffolds" because the support legs of the scaffold were attached to the I-beams located underneath the dock

(Tr. 41-42). The scaffold platform was approximately 6 or 7 inches above the surface of the water (Tr. 210).

To construct the hanging scaffolds, Excel secured a horizontal bar, called a set-up bar, to the bottom flange of the I-beam using two beam clamps (Tr. 53-55). Right angle clamps secured the hanging vertical legs of the scaffold to the set-up bar (Tr. 60). Each of the vertical legs of the hanging scaffold consisted of a 4-foot long pipe attached to a 10-foot long cupped scaffold leg (Tr. 53-57-59). Horizontal runners snapped to the cups of the scaffold leg to create horizontal bracing for the scaffold. Upon completion of the scaffold frame, Excel planked it to create a working surface (Tr. 58-59, 82).

Crews of six workers erected the scaffold bays, three on each side of the bay. The chain of command for the crew ran from the foreman to the leadmen, then to the carpenters, and then to the helpers. On September 12, 2016, an Excel crew including leadman Charles Donnelly Jr., leadman L.G. (the decedent), and carpenter Adrian Guajardo constructed one side of a scaffold bay underneath an area known as Dock 34. Pedro Ventura was the crew's supervisor (Tr. 40-46, 63, 226-27). All crew members were equipped with personal fall arrest systems and were wearing flotation devices (Tr. 91). After finishing the first bay, the crew began constructing one side of a second bay underneath the dock, to be connected to the first bay. L.G. crawled on pipes underneath the dock to get to the location to attach the set-up bar to the I-beam (Tr. 73-77, 81-82). After L.G. had secured the set-up bar, Guajardo handed L.G. the vertical leg, which L.G. attached using a right clamp (Tr. 63, 83, 87-88, 174-75).

The crew members then secured two horizontal runners to connect the vertical leg to the existing scaffold bay but were unsuccessful in connecting the bottom runner. Donnelly crawled from the bay to the dangling vertical leg using the pipes underneath the dock and climbed down the vertical leg of the scaffold in an attempt to connect the bottom runner. He was unable to do so. Donnelly climbed up the vertical leg and L.G. crawled over to the vertical leg and climbed down it to attempt the connection. L.G. attached his lanyard to the vertical leg. As he attempted the connection, the vertical leg fell into the water, dragging L.G. with it. No lifesaving skiff was available at the site. Two Excel employees jumped into the water in an attempt to rescue L.G. The weight of the vertical leg, however, dragged L.G. to the bottom of Galveston Bay, which was

approximately 18 feet deep at that point. Coast Guard divers recovered L.G.'s body later that day (Exh. R-5, p. 53; Tr. 83-92, 184-187).

THE CITATION

The Secretary's Burden of Proof

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

ITEM 1: ALLEGED SERIOUS VIOLATION OF § 1926.106(d)

Item 1 of the Citation alleges:

> At Dock 34, on September 12, 2016, a lifesaving skiff was not immediately available where employees were erecting a tube and clamp scaffold over water.

Section 1926.106(d) provides:

> At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

Excel Violated § 1926.106(d)

Section 1926.106 ("*Working over or near water*") is found in *Subpart E—Personal Protective and Life Saving Equipment* of the construction standards, which sets forth the requirements for employees engaged in construction work. OSHA defines construction work as "construction, alteration, and/or repair, including painting and decorating." §1926.32(g). An employer engages in construction work when "its employees erect, configure, dismantle, and repair the scaffolds that were necessary for" other employees to perform construction work. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, n. 7 (No. 95-1449, 1999). Excel was in the process of erecting scaffolds so Marathon could "repair and repaint the underside of the dock and for them to go back and sandblast and paint, do any modification as far as welding or refabricating." (Tr. 40) "Excel does not dispute the applicability of the standard." (Excel's brief, p. 2)

The Court finds § 1926.106(d) applies to the cited conditions.

The parties stipulate Excel "violated 29 C.F.R. § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3)

There is, therefore, no dispute that the cited standard applies, Excel failed to comply with the standard, Excel's employees had access to the violative condition, and Excel knew of the condition.

The Court finds Excel's violation of § 1926.106(d) is established.

Excel Abandoned Infeasibility Defense

Excel asserted thirty defenses in its Answer, including the affirmative defense of infeasibility (*Answer*, p. 3, ¶ 11). Excel devotes four pages of its brief arguing this defense, under the heading "Excel Met Its Burden to Demonstrate the Infeasibility of Complying with 29 CFR 1926.106(d) Underneath Dock 34." (Excel's Brief, p. 2) In the *Agreed Prehearing Statement*, however, the parties do not identify infeasibility as an issue of fact or law with regard to Item 1:

> **F. Concise statement of issues of fact that remain to be litigated:**
>
> *Citation 1, Item 1:*
>
> 1. Whether failing to have a lifesaving skiff immediately available exposed Respondent's employees to a substantial probability of death or serious injury under the facts and circumstances of this case; and
> 2. Whether the proposed penalty is appropriate.

(*Agreed Prehearing Statement*, p. 15)

> **G. Concise statement of issues of law that remain to be litigated:**
>
> 1. Whether Citation 1, Item 1 is a serious violation of the Act[.]

(*Agreed Prehearing Statement*, p. 17)

As noted, the parties stipulated Excel "violated 29 C.F.R. § 1926.106(d) by failing to have a skiff immediately available at Dock 34. Employees were exposed to the cited condition and Respondent reasonably could have known of the violative condition[.]" (*Agreed Prehearing Statement*, ¶ D.3) The Court sought to clarify the specific issues remaining with respect to Item 1. When directly questioned on this matter, counsel for Excel omitted any mention of the infeasibility defense.

> The Court: [T]he stipulations on that particular violation, does that indicate that -- let's see -- Citation 1 is not an issue. You are saying here that the Respondent -- there is an agreement that Respondent violated that by not having the skiff immediately available; that the employees were exposed to the cited condition; and that Respondent reasonably could have known of the violative condition. It looks like applicability of the standard may be the only thing that you are not agreeing to? Does the Court not understand what that stipulation is?

> Counsel for Excel: Basically the stipulation is, Judge, we stipulate we did not comply with the standard. However, we challenge the serious type of the violation classification.
>
> The Court: *So you are only challenging the classification?*
>
> Counsel for Excel: *The classification and, of course, that goes along with that, the penalty amount.*
>
> The Court: Okay. All right. I just wanted to be sure that I understood what was remaining at issue in this item. All right. So we are talking about the serious classification and the corresponding penalty, which is $12,675.

(Tr. 8-10) (emphasis added)

Having declared at the beginning of the hearing that only the characterization and penalty of Item 1 were at issue, Excel cannot now rely on the infeasibility defense. "Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense. *Bettes v. Stonewall Insurance Co.,* 480 F.2d 92 (5th Cir.1973); *see also Bull's Corner Restaurant, Inc. v. Director, Federal Emergency Management Agency,* 759 F.2d 500 (5th Cir.1985)." *Ingraham v. United States,* 808 F.2d 1075, 1079 (5th Cir. 1987). Excel's prehearing stipulations rendered its post-hearing defense unexpected. The Secretary does not address infeasibility in his brief. It would be prejudicial to the Secretary to consider the defense. The Court determines Excel abandoned the infeasibility defense when it stipulated only the characterization and penalty of Item 1 remained at issue.[1]

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[1] To prove infeasibility, an employer must show by a preponderance of the evidence that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure."' *Westvaco Corp.*, 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993).

Excel argues the area underneath Dock 34 where L.G. fell was cramped and not navigable by a skiff. The record establishes, however, Excel's employees were also working on the dock and accessed the hanging scaffolds by using a ladder from the top of the dock. There is no evidence of difficulty navigating a skiff if an employee fell from the dock or the ladder into an area of the water that was not underneath the dock. Had Excel not abandoned the infeasibility defense, the Court would find Excel failed to establish the infeasibility of complying with § 1926.106(d). An employer is required to provide "limited compliance where it furnishes some protection, even if exact compliance is not possible." *Cleveland Consolidated, Inc. v. O.S.H.R.C.,* 649 F.2d 1160, 1167 (5th Cir.1981)" *Peterson Bros. Steel Erection Co. v. Reich*, 26 F.3d 573, 579 (5th Cir. 1994). Furthermore, Excel touts as its "alternative protective measure" the personal floatation devices provided to its employees. This is not an alternative measure, but is required by § 1926.106(a) ("Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.").

Characterization of the Violation

The Secretary characterized the violation of § 1926.106(d) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996).

Excel focuses on the circumstances of L.G.'s death, arguing it "could not have reasonably foreseen the hazard that eventuated, and the absence of the skiff was not a factor in [L.G.'s] fatality. Several eyewitnesses testified, without contradiction, that [L.G.] fell under the water immediately and that it was not possible to retrieve him from the surface." (Excel's brief, p. 7) With regard to L.G., Excel contends, "A skiff would not have saved him." (*Id.* at 8)

The Court finds Excel's focus solely on the tragic death of L.G. to be too narrow. It is well-established that finding a violation of an OSHA standard is not dependent on the specific facts of a particular accident; a violation may be found in the absence of any accident. *See Boeing Co.,* 5 BNA OSHC 2014, 2016 (No. 12879, 1977) (finding of a violation does not depend on the cause of the particular accident that led to the case); *Concrete Constr. Corp.*, 4 BNA OSHC 1133, 1135 (No. 2490, 1976) ("The Act may be violated even though no injuries have occurred, and even though a particular instance of noncompliance was not the cause of injuries."); *Kansas City Power & Light Co.*, 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982) ("Indeed, both the judge and Respondent improperly define the hazard at issue in terms of the asserted cause of the specific incident that led to injury[.]").

Here, L.G. was working with two other crew members on his side of the scaffold bay. Foreman Ventura was on the top of the dock moving materials, and three members of his crew were on the other side of the bay. Excel leadman Mario Castro, one of those crew members, jumped into the water in an attempt to save L.G. (Tr. 92). To access the hanging scaffolds, Excel employees used a ladder extending from the top of the dock down to the water (Tr. 76). All of these employees were working over or near water on September 12, 2016, and had access to the hazard of falling into the water. If an employee fell but avoided L.G.'s unfortunate circumstance of being attached to a

heavy object that dragged him to the bottom of the bay, the presence of a skiff could well prevent serious injury.

Excel quotes the deposition testimony of David Doucet in support of its argument that failure to provide a skiff was not a serious violation of § 1926.106(d).[2] The testimony, however, underscores Excel's misplaced focus on the details of L.G.'s death. Doucet was asked why he believed the CSHO's determination of high severity for the violation was incorrect.

> Doucet: Because the skiff is -- is there to rescue someone and prevent them from drowning, but since all the employees had on personal flotation devices, then that's -- would prevent them from drowning. At that point the skiff is just to -- there to pull you out of the water. So there wouldn't be a -- a drowning hazard to be able to justify a serious classification.
>
> Q.: Yeah. And if -- if an employee is -- is tied off to -- I don't know how much -- let's say, just for the sake of argument, 100 pounds of -- of steel and equipment -- if he's tied off to it when it falls and goes to the bottom of the channel, would you expect that to happen in less than three to four minutes?
>
> . . .
>
> Doucet: It would be before that, yes, sir.
>
> Q.: Even while -- even if he's wearing a personal flotation device?
>
> Doucet: Yes, sir.
>
> Q.: Would a rescue skiff, in the situation that presented itself in this case, have done anything to have saved [L.G.'s] life?
>
> Doucet: No, sir.

(*Doucet Deposition*, Tr. 84)

Doucet argues the skiff was unnecessary because L.G. sank immediately and could not have been helped by its presence. He also contends the other employees would not have been helped by a skiff if they had fallen into the water "since all the employees had on personal flotation devices [that] would prevent them from drowning." (*Id.*)

The Commission has held, however, that the Secretary is not required to prove a drowning hazard exists to establish a violation of § 1926.106(d). In *RGM Constr. Co.*, 17 BNA OSHC 1229

---

[2] Doucet is a former Area Director for OSHA. Excel proffered him as an expert witness in matters concerning OSHA standards and the items at issue in this case during his April 5, 2018, deposition. The Secretary objected, arguing Doucet's testimony does not meet the standard set out in Fed. R. Evid. 702, and that an expert's interpretation of OSHA standards is not appropriate in Commission proceedings (*Doucet Deposition*, Tr. 18). The Secretary subsequently filed a motion to strike Doucet's testimony. On August 3, 2018, the Court issued an order sustaining the Secretary's objection to the qualification of Doucet as an expert witness in this proceeding. The Court denied the Secretary's motion to strike

(No. 91-2107, 1995), the employer argued it was not in violation of § 1926.106(d) "because RGM did not believe that there was a danger of drowning, as the employees were not working on the water or under the bridge. Unfortunately, the company misconstrued section 1926.106(d) which makes no reference to the danger of drowning. The standard requires that the skiff must be at the worksite at all times when employees are working over or adjacent to water, including when they are working on the deck of the bridge, even if they are working behind guardrails or are otherwise protected by a fall-protection system." *Id.* at 1236.

Excel's failure to have a lifesaving skiff immediately available where its employees were working over or adjacent to water increased the likelihood of death or serious injury to an employee falling into the water. The use of personal flotation devices (which is required by § 1926.106(a)) does not eliminate the hazard of drowning. Guajardo was asked if his flotation device "would hold your head up if you fell into the water." He responded, "Maybe not with tools, but yes." (Tr. 91) If an employee working over or adjacent to water ends up in the water, an unexpected event has already occurred. He or she may have fallen after being injured, or be injured in the fall, depending on the distance. The fallen employee is likely to be disoriented or panicked. Being weighed down by tools or tangled in a lanyard are potential additional stressors. Having a lifesaving skiff immediately available lessens the likelihood of death or serious physical injury.

The Court determines the Secretary properly characterized Excel's violation of § 1926.106(a) as serious.

PENALTY DETERMINATION

"'In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith.' *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). 'Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.' *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted)." *N. E. Precast, LLC; & Masonry Servs., Inc*, 26 BNA OSHC 2275, 2282 (Nos. 13-1169 and13- 1170, 2018).

Doucet's testimony altogether (*Order Sustaining Secretary's Objection to Expert Testimony and Order Denying Secretary's Motion to Strike Expert's Testimony*).

Excel employed over 250 employees. It did not have a history of OSHA violations at the time of the fatality (Tr. 311). Excel has a written safety program, and the Court credits the company with good faith.

The gravity of the violation is high and its severity outweighs the other factors. "'Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors.' *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973)." *Id.*

The absence of a lifesaving skiff when employees are working continually over or adjacent to water exposed the employees to death by drowning. The Secretary states three employees were exposed to the hazard (Secretary's brief, p. 23).[3] The Secretary contends the employees were exposed "for approximately one year." (*Id.*) The alleged violation description, however, alleges the violative condition occurred "on September 12, 2016." The Court finds the duration of exposure to the violation is limited to the day specified in the alleged violation description. OSHA's *Safety Narrative* of the incident states it occurred shortly before lunch (Exh. R-3, p. 2). The Court determines the duration of exposure is approximately four hours. The likelihood of injury was high. Excel required its employees to wear personal flotation devices, which provided some precaution against injury.

Based on the foregoing factors, the Court determines a penalty of §12,675.00 is appropriate for Item 1.

Item 4: Alleged Serious Violation of § 1926.502(d)(15)

Item 4 of the Citation alleges:

> At Dock 34, on September 12, 2016, the anchorage point used by employees working under the dock while erecting the scaffolding was not capable of supporting at least 5,000 pounds.

Section 1926.502(d)(15) provides:

> Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows:

[3] The record indicates more than three Excel employees had access to the violative condition, but the Court accepts the Secretary's representation of three exposed employees for the purpose of determining the penalty.

(i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and

(ii) under the supervision of a qualified person.

Applicability of the Cited Standard

Section 1926.502(d)(15) is found in *Subpart M—Fall Protection*. Section 1926.500(a)(1) provides in pertinent part: "This subpart sets forth requirements and criteria for fall protection in construction workplaces covered under 29 CFR part 1926." Excel was under contract to erect scaffolds at Dock 34 to enable Marathon to repair and repaint the dock, a construction activity. Section 1926.502(d) provides: "Personal fall arrest systems and their use shall comply with the provisions set forth below[,]" which includes § 1926.502(d)(15).

Excel argues § 1926.502(d)(15) does not apply to the cited conditions because § 1926.451(g)(1), found in *Subpart L—Scaffolds*, provides:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

Since it is undisputed L.G. was working less than 10 feet above the surface of the water at the time of the accident (he was approximately 6 or 7 inches above the water's surface), Excel argues he was not required to use fall protection at all; therefore, Excel contends, the cited standard does not apply to the cited conditions.

The Secretary counters with the subparagraph following the one relied on by Excel. Section 1926.451(g)(2) provides:

> Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

The Secretary argues, "Excel determined it was feasible to use fall protection and employees understood that Excel required 100% tie-off while erecting the scaffold (Tr. 141-42, 486). Once Excel required employees to use fall protection, it was required to comply with the OSHA standards outlining its safe use." (Secretary's brief, p. 14)[4] The Secretary also points out § 1926.451(g)(3) incorporates only § 1926.502(d) from the § 1926.502 standards:

[4] Excel requires its employees to tie off when working 6 feet or more above a lower level (Tr. 515).

> In addition to meeting the requirements of 1926.502(d), personal fall arrest systems used on scaffolds shall be attached by lanyard to a vertical lifeline, horizontal lifeline, or scaffold structural member.

The Court agrees with Excel that § 1926.502(d)(15) does not apply to the cited condition, but reaches that conclusion using a different rationale, involving the intertwined elements of applicability and exposure to a hazard. The Court determines the cited standard addresses fall hazards, exacerbated by the fall distance, resulting in death or serious physical injury. It does not contemplate the hazard of drowning and so does not apply to the cited condition.

The Secretary argues L.G. and Donnelly "were exposed when they anchored their lanyards to the vertical leg in an attempt to connect the bottom horizontal runner. [L.G.] was attached to the vertical leg when it collapsed, and he drowned because of the accident. Employee exposure is established." (Secretary's brief, pp. 21-22) The Secretary does not say exposure to *what.* His language implies the hazard to which the violation of § 1926.502(d)(15), a fall protection standard, exposed the employees was that of drowning.

> One of the elements of a violation which the Secretary must prove is that employees were exposed to the violative condition. *Gary Concrete Prod.,* 15 BNA OSHC 1051, 1052, 1991–93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86–1087, 1991). The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in a zone of danger. *Kaspar Electroplating Corp.,* 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90–2866, 1993); *Armour Food Co.,* 14 BNA OSHC 1817, 1824, 1987–90 CCH OSHD ¶ 29,088, p. 38,886 (No. 86–247, 1990).

RGM Constr. Co., 17 BNA OSHC at 1234.

A "zone of danger" is "determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees *which the standard is intended to prevent.*" *Gilles & Cotting, Inc.,* 3 BNA OSHC 2002, 2003 (No. 504, 1976) (emphasis added). Section 1926.502(d)(15) is found in *Subpart M—Fall Protection.* Section 1926.501(b) requires the employer to provide fall protection for its employees when they are working 6 feet or more above a lower level. The standards found in *Subpart M* are, therefore, intended to prevent falls to lower levels of 6 feet or more.

In the present case, it is undisputed L.G. and Donnelly were located approximately 6 to 7 inches above the water when they were tied off to the scaffold component. The Commission has

held the surface of water is a "level" within the meaning of the fall protection standards. Section 1926.500(b) defines *lower levels* as "those areas or surfaces to which an employee can fall. Such areas or surfaces include ... water."

Section 1926.502(d)(15) is intended to prevent death or serious physical injuries resulting from the impact of striking the lower surface, not drowning hazards. Support for this position is found in the discussion of the fall protection standards in *Safety Standards for Fall Protection in the Construction Industry*:

> The Eastern Contractors Association, Inc. (ECA) (Ex. 2-3) commented that "The fall protection requirements 6 feet on open sided floors and 10 feet on scaffolds should remain as is," and explained that the situations were different and each presented unique problems. In the proposed revision to subpart L, Scaffolds, the Agency proposed (§1926.451(e)) that employees working on scaffolds more than 10 feet above lower levels be protected from fall hazards (51 FR 42707, November 25, 1986). The appropriate height threshold for fall protection on scaffolds will be set in the final rule for subpart L. The ECA also stated the height at which fall protection is required should be the same for all trades. OSHA agrees and this final rule reflects that concern.
>
> On the other hand, the SSFI (Ex. 2-89) recommended that the proposed and existing height thresholds for fall protection at unprotected sides and edges, low-pitched floors, roof, etc. be changed from 6 feet (1.8 m) to 10 feet (3.05 m). Based on the BLS injury and fatality data, discussed above (Ex. 3-6), **OSHA believes that employees performing construction work on walking and working surfaces 6 feet (1.8 m) or more above lower levels are exposed to a significant risk of injury and death. Accordingly, more workers would be injured or killed if the height threshold for fall protection were raised to 10 feet (3.05 m).** Therefore, OSHA is not making the suggested change.

Safety Standards for Fall Protection in the Construction Industry, Final Rule, 59 FR 40672-01 (August 9, 1994) (emphasis added).

It is the distance of the potential fall that creates the hazard contemplated by the standards found in *Subpart M.* When the hazard of falling is accompanied by the hazard of drowning, OSHA has promulgated standards that anticipate that possibility. For example, § 1915.71(j)(i), found in *Part 1915—Occupational Safety and Health Standards for Shipyard Employment,* provides

> Scaffolding, staging, runways, or working platforms which are supported or suspended **more than 5 feet above a solid surface**, or **at any distance above the water,** shall be provided with a railing which has a top rail whose upper surface is

> from 42 to 45 inches above the upper surface of the staging, platform, or runway and a midrail located halfway between the upper rail and the staging, platform, or runway.

(emphasis added)

Section 1915.71(j)(1) presumes a hazard of falling to a solid surface when the distance is more than 5 feet, but presumes falling into water from any height is hazardous. Likewise, § 1915.71(j)(3) requires specific equipment to prevent drowning for employees working over water, while requiring fall protection only for employees working more than 5 feet above a solid surface:

> Rails may be omitted where the structure of the vessel prevents their use. When rails are omitted, **employees working more than 5 feet above solid surfaces shall be protected** by safety belts and life lines meeting the requirements of §§ 1915.159 and 1915.160, and **employees working over water shall be protected by buoyant work vests** meeting the requirements of § 1915.158(a).

The standards found in *Subpart M* are specification, not performance standards. "Specification standards, in contrast [to performance standards], detail the precise equipment, materials, and work processes required to eliminate hazards." *Cleveland Wrecking Co.,* 24 BNA OSHC 1103, 1106 (No. 14-0816, 2013). Specification standards presume a hazard if the standard is violated. "Where a standard presumes a hazard, . . . the Secretary need only show the employer violated the terms of the standard." *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016). The fall protection standards presume *fall* hazards, not drowning hazards. Applying § 1926.502(d)(15), a fall protection standard, to a condition that poses a drowning hazard deprives the employer of fair notice. "[H]azards must be defined in a way that gives an employer fair notice of its obligations under the Act by identifying the conditions or practices over which the employer can reasonably be expected to exercise control" *Missouri Basin Well Serv., Inc.,* 26 BNA OSHC 2314, n. 23 (No. 13-1817, 2018).

If § 1926.502(d)(15) were to apply to the cited condition, the Secretary failed to establish exposure to a fall hazard. Neither *Subpart M*, addressing fall protection for construction, nor § 1926.451, addressing fall protection for scaffolds, requires protection for falls of approximately 6 inches. If the hazard at issue is drowning, the cited standard does not apply because drowning is not the hazard § 1926.502(d)(15) is intended to prevent. Although the elements of applicability and exposure are intertwined, the fundamental deficiency in the Secretary's case is the inapposite choice of the standard cited.

The Court concludes § 1926.502(d)(15) does not apply to the cited condition. Item 4 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Item 1 of Citation No. 1, alleging a serious violation of § 1926.106(d), is **AFIRMED** and a penalty of $12,675.00 is assessed; and

2. Item 4 of Citation No. 4, alleging a serious violation of § 1926.502(d)(15) is **VACATED**, and no penalty is assessed.

Sharon D. Calhoun

Sharon D. Calhoun
Administrative Law Judge
Atlanta, Georgia

SDC

CERTIFICATE OF SERVICE

This is to certify that the *Notice of Decision* with a copy of the *Decision and Order* were issued on October 9, 2018, *electronic mail* to the parties as listed below.

OSHRC Docket No. **17-0679**

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SECRETARY OF LABOR, Complainant, v. EXCEL MODULAR SCAFFOLD & LEASING COMPANY dba EXCEL SCAFFOLD & LEASING, Respondent.	OSHRC Docket No. 17-0679

NOTICE OF FINAL ORDER

The Petition for Discretionary Review filed by the Respondent in the above cited action was received by the Commission on October 19, 2018. The case was not directed for review. **Therefore, the decision of the Administrative Law Judge became a final order of the Commission on November 26, 2018.** Commission Rules 90(b)(2) and 90(d), 29 C.F.R. §§ 2200.90(b)(2) and 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A PETITION FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. *See* Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660; Fed. R. App. P. 15.

FOR THE COMMISSION,

Dated: November 27, 2018

John X. Cerveny
Executive Secretary

DOCKET NO. 17-0679

NOTICE IS GIVEN TO THE FOLLOWING:

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NOTE:

17-0679 Notice of Final Order- Callback Phone: 202-606-5400 (OEXS)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60067

EXCEL MODULAR SCAFFOLD & LEASING COMPANY, doing business as Excel Scaffold & Leasing,

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; EUGENE SCALIA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents

Petition for Review of an Order of the
Occupational Safety & Health Review Commission

ON PETITION FOR REHEARING

Before WIENER, HIGGINSON, and HO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter XVII. Occupational Safety and Health Administration, Department of Labor
Part 1926. Safety and Health Regulations for Construction (Refs & Annos)
Subpart E. Personal Protective and Lifesaving Equipment (Refs & Annos)

29 C.F.R. § 1926.106

§ 1926.106 Working over or near water.

Currentness

(a) Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.

(b) Prior to and after each use, the buoyant work vests or life preservers shall be inspected for defects which would alter their strength or buoyancy. Defective units shall not be used.

(c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

(d) At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

SOURCE: 44 FR 8577, Feb. 9, 1979; 44 FR 20940, April 6, 1979; 51 FR 24526, 24528, July 7, 1986; 59 FR 40729, Aug. 9, 1994; 61 FR 9250, March 7, 1996; 63 FR 1297, Jan. 8, 1998; 67 FR 18112, April 15, 2002; 67 FR 46375, July 15, 2002; 72 FR 64429, Nov. 15, 2007; 77 FR 37600, June 22, 2012; 77 FR 68684, Nov. 16, 2012; 79 FR 20693, April 11, 2014; 81 FR 16092, March 25, 2016; 83 FR 9703, March 7, 2018, unless otherwise noted.

AUTHORITY: 40 U.S.C. 3701 et seq.; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911..; 40 U.S.C. 3701 et seq.; 29 U.S.C. 653, 655, 657; Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 5–2002 (67 FR 65008), 5–2007 (72 FR 31160), 4–2010 (75 FR 55355), or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

Notes of Decisions (6)

Current through June 18, 2020, 85 FR 36815, except Title 15, which is current through June 11, 2020, 85 FR 35601.

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