

IN THE MATTER OF

THE NEW YORK STATE THRUWAY AUTHORITY  
AND ITS SUBSIDIARY  
THE NEW YORK STATE CANAL CORPORATION

Petitioner

A proceeding pursuant to NY Labor Law § 27-a (8) (c) and  
12 NYCRR 803 regarding a petition for a Permanent  
Variance from affected safety and health standards.

**DECISION  
OF  
HEARING OFFICER**

P-002-09

A hearing was held on July 23, 2009 at Albany, New York involving a proceeding brought by the Commissioner of Labor pursuant to New York Labor Law § 27-a (a)(8)(c) and 12 NYCRR § 803 to revoke and/or modify Permanent Variance P-002-99 previously granted to the New York State Thruway Authority and its subsidiary The New York State Canal Corporation (“Canal Corp.”). After the hearing closed, the interested parties, through their respective counsel, served written briefs dated October 9, 2009, all of which were received by October 13, 2009.

**APPEARANCES**

The Department appeared and was represented by the Department’s Counsel’s Office (Benjamin T. Garry, Sr. Attorney, Of Counsel). The Canal Corp. appeared and was represented by its attorneys, Bond, Schoeneck & King, PLLC (Ryan M. Finn, Esq., of Counsel). The Civil Service Employees Association, Inc. (“CSEA”) also appeared and was represented by its Counsel’s Office (Steven A. Crain, of counsel).

**PRELIMINARY STATEMENT**

In advance of the hearing, the parties met and conferred in an effort to resolve all issues raised by the Commissioner’s proposed revocation of Permanent Variance P-002-99. The Canal Corp. determined that it would come into compliance with Section 1910.23 (c)(3) of Article 29 of the Code of Federal Regulations (the “Standard”), which requires that

safety railings be installed on both sides of the lower catwalk of a dam (12 CFR 1910.23 [c][3]), by installing safety railings on the upstream portion of the lower catwalks. The Canal Corp. indicated it could take some time to complete the installation and, based on an estimate of time it provided to the Department, the Department proposed to give the Canal Corp. until August 1, 2011, to come into compliance with the Standard.

The interested parties also attempted to resolve their differences over what safety conditions should be required in a variance covering the period of transition to full compliance with the Standard. Prior to the Department seeking revocation of the Permanent Variance, the Canal Corp., in cooperation with CSEA, had developed and implemented “Moveable Dam Procedures” (Dept. Ex. 3) that contained more comprehensive safety protocols for routine maintenance work on the lower catwalks than the conditions set out in Permanent Variance P-002-99 granted September 17, 2001.<sup>1</sup> The Department proposes, with the modifications set forth in Department Exhibit 1, to incorporate those procedures into a new interim variance (Dept. Ex. 1, pp.2-4).

As the Canal Corp. had decided to install safety railings on the upstream portion of the lower catwalk, I understood that it agreed to the revocation of the existing variance, and to the implementation of a new interim variance, and that it only objected to the Department’s proposed requirement to have a minimum of three, rather than two, employees present for routine maintenance on the lower catwalk. In view of the Canal Corp. having already implemented almost every requirement the Department sought in a modified variance, and having further determined that it would install the necessary safety railings to bring itself into compliance with the Standard, the evidence adduced at hearing only concerned the disputed issue of whether two or three employees should be present when routine maintenance work is performed on the lower catwalk.

In its post-hearing brief, however, the Canal Corp. maintains that it had only agreed to the revocation of the variance on the condition that it be required to have only two employees present for routine maintenance on the lower catwalk. That not having been agreed to, it now takes the position that the current Permanent Variance is as safe as the

---

<sup>1</sup> I note that this action is itself evidence of a perceived need for enhanced safety conditions above and beyond those contained in the existing variance.

Standard and should not be revoked. Alternatively, it argues that if the Permanent Variance is revoked, an interim variance should only require two employees to be present when routine maintenance is performed from the lower catwalk.

The Department and CSEA both maintain that the only issue presented at the hearing was whether, as a condition of a modified variance, two or three employees should be present for routine maintenance on the lower catwalk, which was my understanding of the issue at the close of the hearing (T. 142-144).

A review of the transcript makes plain that all interested parties contemplated that the existing variance would be replaced with a new or modified interim variance incorporating the many agreed upon safety protocols, and that the sole unresolved disputed matter involved the minimum staffing requirement for routine maintenance on the lower catwalk (T. 26-47; 49-52; 76-85, 142-144). At least implicitly, the Canal Corp.'s decision to adopt the additional safety protocols set forth in its "Moveable Dam Procedures" memorandum (Dept. Ex. 3) and its decision to install the additional railing to come into compliance with the Standard evidences a perceived inadequacy with the existing Permanent Variance. In fact, prior to the adoption of the additional safety protocols, there were accidents, one of which resulted in a fatality (T. 60-62, 70, 125). Recognizing the dangers involved, the Canal Corp. implemented a policy, not required under the existing Permanent Variance, to have two people present on the lower catwalk whenever anyone was out on the catwalk (Dept Ex. 3; T. 88-89, 113-114, 122). Since the entire proceeding assumed the replacement of that existing variance with a modified interim variance, this decision is addressed to the sole issue presented at hearing, to-wit: whether three rather than two employees should be required to be present at the dam whenever routine maintenance is performed from the lower catwalk.<sup>2</sup>

### **ISSUE**

Whether, when routine maintenance is performed from the lower catwalk, considering all of the agreed safety protocols being adopted, the presence of three rather than two employees would be necessary to create a condition that is as safe as that which would

---

<sup>2</sup> The Department stipulated that it was not seeking a requirement that three employees be present when the

exist if the Standard were complied with.

### **FINDINGS OF FACT**

Variance P-002-99 grants the Canal Corp a variance from the safety standard set forth in Section 1910.23 (c)(3) of Article 29 of the Code of Federal Regulations (the “Standard”), which requires that safety railings be installed on both sides of the lower catwalk of a dam. The Variance permits the Canal Corp. to assign employees to work on the lower catwalk of the dams without a safety railing on the upstream portion of the lower catwalk (Dept. Ex. 1, p.1). The Commissioner moves to revoke that Variance based upon the recommendation of the Department’s Engineering Services Unit and proposes that a new variance be granted with the conditions contained in Department Exhibit 1 (T. 11; Dept. Ex. 1, pp. 2-4), which variance shall remain in effect until August 1, 2011, by which time it is expected that the Canal Corp. will come into compliance with the Standard through the installation of safety railings on the upstream side of the lower catwalks. A copy of Department Exhibit 1 and Department Exhibit 3 [the “Moveable Dam Procedures” safety protocols] are annexed hereto and made a part hereof as “Exhibit A,” and together constitute the proposed interim variance.

With regard to the conditions contained in Department Exhibit 1, the only disputed issue addressed at the hearing was whether, during this interim period, the Canal Corp. should be required to have three rather than two employees present at the dam when routine maintenance is performed from the lower catwalk (T. 26-47; 49-52; see, Dept. Ex. 1, pp. 2-3 [three person condition]). The determination turns on whether, considering all of the safety protocols that have been agreed to, having three rather than two employees present during routine maintenance would be necessary to create a condition as safe as that which would prevail if the Standard were complied with.

The Standard is obviously designed to prevent injury or death resulting from a fall from the lower catwalk. The presence of railings on both sides of the lower catwalk would create a condition where a fall from the catwalk would be unlikely, and any injury resulting from such a fall therefore remote. The lack of a railing on the upstream portion of the lower

---

activity on the lower catwalk was limited strictly to observation (T. 49-50).

catwalk increases the risk of a fall (see, T. 129-130), so the measures to reduce the likelihood of injury or death resulting therefrom must be correspondingly increased. The proposed interim variance would require, *inter alia*, that employees performing routine maintenance on or from the lower catwalk use a “Buddy System” (Dept. Ex. 1, p. 3, para. 2), be provided with appropriate personal flotation devices (*Id.* at para. 5), be provided with fall protection equipment in the form of retractable lanyard devices that would be clipped on and tethered to an upright whenever an employee was working on the lower catwalk (*Id.* at para. 3), and would be provided with annual documented training (*Id.* at p. 4, para. 7). The Canal Corp. also purchased a rescue system to recover a person who had fallen and was suspended over the side of the catwalk (Dept. Ex. 2; Resp. Ex. 1; T. 89-92, 103-104).

The Department asserts, and CSEA agrees, that in addition to those safety measures, a minimum of three employees should be present at the dam (not necessarily all on the lower catwalk) whenever routine maintenance is being performed (T. 58-59, 63, 127). The Canal Corp. maintains that given the safety measures already adopted and to be incorporated into an interim variance, requiring three instead of two workers would be burdensome and unnecessary in order to create a condition as safe as that which would exist if the Standard were complied with.

The Department and CSEA argue that the presence of three employees is necessary because that it would create a condition where a third more detached observer would be present to summon help and then assist in the event of a fall while the other two employees were paired to perform maintenance from the lower catwalk (T. 55, 68-69). This would become particularly necessary if one of the workers became incapacitated as a result of the fall (T. 127-132). They further argue that the manufacturer’s own specifications for the rescue system device intended to be utilized by the Canal Corp. in the event of a fall recommends that a third person be present during the procedure (T. 32). Although the manufacturer contemplates that the rescuer would lower the victim to lower floor where a third person would be necessary to retrieve the victim, whereas in the case of the dam, the victim cannot be lowered to the water, but must be pulled back up to the catwalk (T.92), a third person would nevertheless still be necessary to assist in the process of pulling the victim back up to the catwalk (T. 127-132).

Contrary to the contention of the Canal Corp., it does not appear that requiring the presence of three workers at the dam for routine maintenance would be burdensome. First, the need to conduct debris removal, the principle subject of routine maintenance from the lower catwalk, occurs, depending on how rainy the season is, from between once or twice a month to maybe once or twice a week (T. 95,108-109). There is a daily two hour overlap between work shifts on the canal when three employees would be available for a debris clearance procedure from the lower catwalk, which is when the procedure is most often done (T. 115), and both the maintenance crew and the first shift of the lock crew are available 7:00 am. to 3:00 p.m. (T. 121). The need to remove debris at night, when fewer employees are available, occurs relatively infrequently, perhaps once or twice a month (T. 112-113). In fact, the Canal Corp. prefers not to clear debris when it is dark (T. 111). If there is debris blocking one gate, then another gate can be used to regulate water flow (T. 111). Removal of debris from one lock does not then necessarily mean that employees would need to immediately travel to the next lock to clear the same debris (T. 109-110). Furthermore, in an emergency situation requiring prompt action, the Canal Corp. would be able get three people on site to conduct a debris removal procedure (T. 118). Under these circumstances, it would appear that the impact on staffing levels of a variance requiring the presence of three rather than two employees for maintenance operation from the lower catwalk would be slight – typically, sufficient staffing would already be available on a daily basis. Given that, I find no reason to deviate from the Department’s and the manufacturer’s recommendation to have three individuals present for a fall rescue operation (Dept. Ex. 2).

Based on the foregoing, the Department recommendation that Permanent Variance P-002-99 be revoked and replaced with an interim modified variance containing the terms and conditions specifically outlined in Exhibit A, which is annexed hereto and made a part hereof, is reasonable and necessary and would create a condition that is as safe as that which would exist if the Standard were complied with.

### **CONCLUSIONS OF LAW**

Under the circumstances of this case, the recommendations by the Department to revoke Permanent Variance P-002-99 and substitute therefore an interim modified variance incorporating the terms set forth in Exhibit A are reasonable and within the legal

guidelines. Petitioner's compliance with the terms and conditions of the interim modified variance will provide employment and place of employment as safe and as healthful as that which will prevail when the Canal Corp. complies with the applicable Standard.

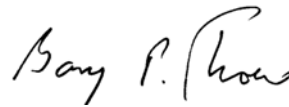
### DECISION

Upon the sworn and credible testimonial and documentary evidence adduced at hearing, the Decision of the Hearing Officer is to:

REVOKE Permanent Variance P-002-99; and

GRANT to the Canal Corp. an Interim Variance from the Standard through August 1, 2011, allowing its employees to work on the lower catwalks of dams without a safety railing on the upstream side of the lower catwalk, subject to its compliance with all of the terms and conditions contained in Exhibit A, with the understanding that the requirement in Exhibit A to have three employees present at a dam whenever an employee is on the lower catwalk shall not be applicable in the circumstance of an employee present on the lower catwalk solely for the purpose of observation, but shall apply whenever some form of maintenance, such as debris removal, is involved; and

ORDER that the failure to comply with all the Terms and Conditions of Hearing Officer's Decision shall render the variance null and void.



Dated: February 19, 2010  
Albany, New York

Gary P. Troue  
Hearing Officer