

STATE OF NEW YORK : DEPARTMENT OF LABOR

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.

**ORDER ON
EXCEPTIONS TO
FEBRUARY 19, 2010
HEARING OFFICER
DECISION**

P-002-09

Procedural Background

On August of 1987, the New York State Thruway Authority and its subsidiary, the New York State Canal Corporation (hereinafter referred to as the “Canal Corp.”) was granted a variance by the New York State Department of Labor (hereinafter referred to as “the Department”) from the safety standards set forth in 29 CFR Section 1910.23(c) (3)¹ dispensing with the requirement that safety railings be installed on both sides of the lower catwalks on a certain lock location along the Erie Canal. The variance was applicable to Lock 14, and it allowed the Canal Corp. to assign employees to work on the lower catwalk of Lock 14 without safety railings on the upstream portion of the lock.

In October of 1990 the Department granted a further variance expanding the ability of the Canal Corp. to operate Locks 10 through 13 and 15, in the same manner as Lock 14. Again in 2001 the Department expanded the scope of the variance and granted Variance No. P-002-99 (hereinafter referred to as “the Variance”) to apply to Locks 8 through 15.

In March of 2009, the Department gave notice to the Canal Corp. under New York Labor Law Section 27-a(8) and 12 NYCRR Section 803.10 that it was going to revoke the Variance and allow for an interim variance to remain in place so as to allow the Canal Corp. to come into compliance with the federal regulation. The Canal Corp. demanded a hearing on the Department’s application. On July 23, 2009 a hearing was held before the Honorable Gary P. Troue, a Hearing Officer with the Department’s Adjudicative Office on the issues of (1) revocation of the Variance thereby requiring the Canal Corp. to comply with 29 CFR 1910.23(c)

¹ (c) Protection of open-sided floors, platforms, and runways...(3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.

(3) by installing permanent railings on the upstream side of each catwalk on Locks 8 through 15 and (2) issuance of an interim temporary variance so as to allow the Canal Corp. time to install the federally required safety railings. The Department and Canal Corp. were both represented by legal counsel. Also appearing at the hearing through counsel was the Civil Service Employees Association. A Decision was rendered by the Hearing Officer on February 19, 2010² (hereinafter referred to as “the Decision”) that (1) revoked the Variance and (2) granted the Canal Corp. an interim variance from the federal standard through August 1, 2011 as set forth in the annexed copy of the Decision at Exhibit A. Three Exceptions to the Decision, pursuant to 12 NYCRR 803.22, were filed by the Canal Corp. on March 15, 2010.

Discussion of Exceptions

The Canal Corp.’s Exception 1 to the Hearing Officer’s finding is without merit. There was consensus by counsel for all parties, both before testimony was taken and after all testimony was received into the record, that the Variance be revoked and that the Canal Corp. come into compliance with 29 CFR 1910.23(c)(3). The sole issue left in dispute dealt with the implementation of the interim variance, the time period between the revocation of the Variance and the installation of the railings on the lower catwalk so as to bring the Canal Corp. into compliance with 29 CFR 1910.23(c)(3). Record of Hearing held July 23, 2009 at pages 26 through 52 and 141 through 145, hereinafter referred to as the “Record.”

Prior to the taking of any testimony counsel for the Canal Corp. stated,” [t]here is much agreement here and I am very hopeful that we’ve come to a very good agreement here. The sole issue sole issue in dispute is not the setting or removing of dams. We’re talking about a situation, day-to-day basis, what the Canal Corporation, how they should run their business. And the procedure that we have advised, having two individuals on the lower catwalk for routine maintenance and debris removal, we believe...is safe.” Record at page 33, lines 18-24, page 34, lines 1-5. The sole issue of the amount of manpower needed on the lower catwalk for debris removal and cleaning is again agreed to at the end of the hearing. After the taking of all testimony and documentary evidence, the Hearing Officer stated, "My understanding is that the parties have essentially consented to the revocation of the existing permit variance and to comply with the requirements of the OSHA standard contained in 29 CFR 1910.23(c)(3); ...and that the parties have reached agreement on substantial terms of the procedures which should be governed by that interim variance; and that the only dispute with regard to the procedures that ought to be applicable with regard to the interim variance relate to whether two or three people are necessary to create a condition as safe as if rails were provided; and that that is the sole issue to which the testimony here has been addressed.” Record at page 142, lines 21-24, page 143, line 1-15. "My understanding is that the only dispute is directed to that, and, therefore, the proposed findings

² Notice of Filing was made February 22, 2010.

relative to this matter would be directed to that, and that the only decision that needs to be made is whether two or three ought to be the number required for any work to take place on the catwalk." Record at page 143, lines 20-24, page 144, lines 1-2. All parties, including counsel for the Canal Corp., agreed that the Variance was revoked and that the only remaining issue to be determined by the hearing process was the manpower needed for debris removal and cleaning during the time period it would take to install the federally mandated safety railings. Record at page 144, lines 3 – 21.

The Commissioner also finds that the Canal Corp.'s Exceptions numbered 2 and 3 are not persuasive so as to upset the decision of the Hearing Officer. Upon revocation of the Variance, the Canal Corp. could not conduct any operations on the lower catwalks. In recognition of the time it would take to install the federally mandated safety railing, the Department's revocation application also included an "abatement period" until August 1, 2011. This abatement period would allow for the installation of the safety railings and provide a temporary procedure to insure the safety of the Canal Corp.'s employees during the installation period. While the Department had no obligation to demonstrate that during the abatement period its proposal was as safe as the federal railing standard, it did offer such credible proof in the form of documentary evidence. The Department introduced into evidence the DBI Sala Rollgliss, R250 Rescue Kit Installation and Operating Instructions. Record at pages 14- 16, the Department's Exhibit 2 in evidence. This rope safety system, chosen by the Canal Corp., allows for rescue of workers in case of falls from the lower catwalks that did not yet have the safety railing installed. The manufacturer of the fall protection system operating instructions provide that "[a]lthough a rescue using this device can be performed using one person, a second person is highly recommended to assist." Emphasis added. By requiring that three Canal Corp. employees be present on the lower catwalks during the abatement period for the cleaning of debris, the Department's position is supported by credible evidence that should one employee fall off the catwalk, that two other rescuers were at the ready to operate the peer rescue system in accordance with the safety recommendations of the manufacturer. While counsel for all parties put forth their respective battle of the experts on the issue of two versus three employees, the manufacture's recommendation alone is sufficient to support the Hearing Officer's finding that during the abatement period an interim variance be granted requiring three Canal Corp. employees on the lower catwalk until such time as each individual lock in the series of Locks 8 through 15 comes into compliance with 29 CFR 1910.23(c) (3). The decision requiring three employees on the catwalks during debris removal was not based upon mere speculative opinion, but an objective and unbiased recommendation of the manufacturer.³

³ The Canal Corp.'s Exhibit 1 in evidence is a DVD demonstrating the operation and use of the DBI Sala Rollgliss, R250 Rescue Kit. In making this decision, the Commissioner is cognizant that the DVD shows one person, not two, operating the peer rescue system.

Decision

Based upon the above, it is determined by the Commissioner of Labor of the State of New York that the three Exceptions of the Canal Corp. dated March 15, 2010, while duly noted, are not sufficient to disturb the Decision dated February 19, 2010. The Decision revoking the Variance and granting an interim variance through August 11, 2011 is affirmed.

Dated: August 23, 2010
Albany, New York

SO ORDERED:

Colleen C. Gardner

Commissioner of Labor of the State of New York
Colleen C. Gardner