UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W.— 9th Floor
Washington, DC 20036–3419

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-1597
SUPERIOR ELECTRIC COMPANY,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

At issue is whether on remand Administrative Law Judge ("ALJ") Paul L. Brady properly vacated a citation item issued to Superior Electric Co. ("Superior" or the "company") alleging a repeated violation of 29 C.F.R. § 1926.500(d)(1)[1] for failing to provide standard guardrails on a

[1]That standard provides:

> **1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

platform from which its employees worked. We find that the judge erred and affirm a repeated violation of the cited standard. We assess a $5000 penalty.

Background

Superior was the electrical subcontractor at a warehouse in Columbus, Ohio, that was being renovated and remodeled for use as corporate offices. After one of its employees, a journeyman electrician named Bobby Stansberry, stepped off an unguarded catwalk onto a ladder, fell, and was injured, a compliance officer ("CO") of the Occupational Safety and Health Administration ("OSHA") inspected the accident site. Subsequently, the present citation was issued and the case went to a hearing before the judge. He found that the cited standard did not apply because the catwalk was not a platform, and vacated the citation. On review, the Commission reversed the judge on this issue and remanded the case to him to resolve the other issues disputed by the parties. *Superior Elec. Co.*, 16 BNA OSHC 1494, 1993-95 CCH OSHD ¶ 30,286 (No. 91-1597, 1993). On remand, the judge again vacated the citation, finding that (1) the Secretary of Labor ("Secretary") had failed to prove that Superior had knowledge of the violation and (2) Superior had proven the affirmative defense of unpreventable employee misconduct.

Facts

After drywall had been installed, and ceilings had been put up for most of the offices in the warehouse, the catwalk was installed above the ceiling by the drywall contractor. It provided access -- after the ceilings were completely installed -- to air conditioning/heating equipment and electrical junctions located above the ceiling. The approximately 150-foot long catwalk ran the entire side of the building and was made of 2-inch x 8-inch boards laid side-by-side. Estimates of the width of the catwalk vary from 18 to 24 inches to three feet. On one side of the catwalk was a stud wall made of uncovered upright 2-inch x 4-inch studs to which the walls below the ceiling were attached. The studs were spaced on 16-inch centers, which meant that a person could step (or fall) between them. The other side of the catwalk had no railing or other guard. Employees could access the catwalk through the trap doors located at either end.

Superior had installed all the junction boxes before the catwalk was put up and was nearing completion of its wiring work by the day of the accident. On the day before the accident, company

foreman Larry Rockhold assigned two journeyman electricians, Stansberry and Gordon Stevens, to finish running wires from the distribution panels in the electrical equipment room to junction boxes and then on to the receptacles and light fixtures in the individual offices.

After they completed their assignment, the electricians discovered that the circuit serving one of the offices was not properly energized. In order to correct this problem, Stansberry climbed a ten-foot ladder and stepped through an opening in the insulation onto the wooden catwalk. After kneeling on the catwalk and making the repair to the junction box, Stansberry stood up and stepped off the catwalk with his right foot onto the top of the ladder a few inches below. In doing so, he caught his pant leg in a metal brace, lost his balance, fell to the floor and was injured.

Discussion

In vacating the section 1926.500(d)(1) citation, the judge found that the "record evidence establishes that Superior could not with reasonable diligence have known of the violative condition." He stated that it "could be assumed Superior was on notice that work could be performed by the employees while on the catwalk," but Superior exercised reasonable diligence in that it had formulated and implemented adequate training programs and work rules to ensure employees performed their work safely. The judge found that the "record also shows that a specific safety rule applied to the alleged violation in this case" and that Stansberry (the employee who fell) admitted that he was in violation of the foreman's instructions and received a verbal warning for his conduct. The judge thus concluded that Superior proved its affirmative defense of unpreventable employee misconduct.

We conclude that the judge's findings are not correct. First, we find that Superior had constructive knowledge through its foreman, Rockhold. He testified that he gave electricians Stevens and Stansberry the following safety instructions:

> I informed them that I didn't think their job would necessitate them getting above the ceiling, but that if it did, and they had to perform any work on the catwalk, that there were safety belts and trouble lights available, and they should use them . . . I pointed out the two accesses to the catwalk that were available.

This testimony demonstrates that the foreman knew of the existence of the unguarded catwalk and knew that his employees might use it. When a supervisory employee has actual or constructive

knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proving knowledge without having to demonstrate any inadequacy or defect in the employer's safety program. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,479 (No. 91-862,1993).

Second, we find that Superior failed to establish the affirmative defense of unpreventable employee misconduct. Although Superior had in place numerous elements of a general safety program, including weekly safety meetings, safety notes in pay envelopes, supervisory safety checks, and disciplinary procedures, the essential element of the defense is a showing that the employer had established a work rule designed to prevent the violation. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1810, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). Superior had no such rule. Although there is evidence in the record that Superior had company rules encompassing "safety at heights," we find no evidence that Superior had safety rules specifically about guardrails. Superior's rule requiring the wearing of safety belts does not help its cause. The Commission has held that "an argument that an employee's failure to tie off to a safety belt was unpreventable employee misconduct does not establish a defense to a citation where the violation alleged is the lack of a standard guardrail." *Power Plant Div., Brown & Root, Inc.*, 10 BNA OSHC 1837, 1840, 1982 CCH OSHD ¶ 26,159 (No. 77-2553, 1982)(violation alleged lack of standard guardrail around open-sided floor).[2] Since it failed to establish its unpreventable employee misconduct defense, we find that Superior violated the cited guardrail standard at section 1926.500(d)(1).[3]

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[2]We note that our finding of a violation here does not turn on the fact that an accident occurred. Rather, the record clearly establishes that Superior's employees were exposed to the violative condition although, apparently, the condition was not the direct cause of the accident which precipitated the inspection.

[3]Superior also raises on review the multi-employer worksite affirmative defense. We do not consider the affirmative defense because (1) it was not raised in the company's answer, as required by Commission Rule 34(b)(3), 29 C.F.R. § 2200.34(b)(3), (2) it was not specifically argued before

(continued...)

Repeated Characterization

The evidence also establishes that the violation is repeated under section 17(a), 29 U.S.C. § 666(a), of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678. Under *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979), a violation is repeated if "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." A prima facie case of substantial similarity is established by a showing that the prior and present violations were for failure to comply with the same standard. *Id.* The evidence here shows that Superior was issued a citation alleging a violation of section 1926.500(d)(1) on August 13, 1990. It is undisputed that this citation became a final order. The Secretary has therefore established a prima facie repeated violation. Superior attempts to rebut this showing by contending that the prior citation, where it was cited for a guardrail that lacked a midrail, was not substantially similar to the present citation, where there was no guardrail at all. We find that both citations involve the same standard and the same hazard of falling from an elevated surface and therefore are substantially similar. Because Superior has failed to rebut the Secretary's evidence of substantial similarity, we affirm the violation as repeated.

Penalty

Superior is a large company, employing about 300 people. Its prior history of violations is demonstrated by the guardrail citation upon which the repeated characterization in this case is based.[4] The gravity of the violation falls in the moderate range, involving the exposure of two employees who were briefly on the unguarded catwalk on numerous occasions and who could have been seriously injured by a 10-foot fall off the catwalk. While we do not consider the gravity

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[3](...continued)
the judge, and (3) Superior does not now argue that it had good cause for not raising the defense in its answer or before the judge.

[4]The Secretary proposed a penalty of $25,000. Superior does not argue in its brief that the Secretary's proposed penalty should be lowered if a repeated violation is found.

to be as high as the Secretary suggests,[5] we find that the record shows that the gravity is more considerable than what our dissenting colleague finds. Good faith is also a factor to be considered in the determination of the level of penalty. Here, we note that, while Superior was aware of the problem with the catwalk and the likelihood that its workers might use it, there is no indication that it undertook to call this problem to the attention of the prime contractor, or other contractor(s) with more immediate responsibility for the catwalk. Based on the statutory criteria in section 17(j) of the Act, 29 U.S.C. § 666(j), discussed above, and particularly considering that this is a repeated violation, Chairman Weisberg and Commissioner Guttman join in assessing a $5000 penalty.

Order

Accordingly, we affirm a repeated violation of section 1926.500(d)(1) and assess a penalty of $5000.

Stuart E. Weisberg
Chairman

Daniel Guttman
Commissioner

Dated: May 30, 1996

[5]As noted above, we do not rely on Stansberry's fall under the particular circumstances of this case.

MONTOYA, Commissioner, concurring in part and dissenting in part:

While I agree with my colleagues that the Secretary has established a repeat violation of section 1926.500(d)(1) here, I consider the gravity of this violation to be low and would therefore assess a more nominal penalty. The Secretary has asserted that the fact of employee Stansberry's accident supports his conclusion that this guardrail violation presented a high probability of an accident. However, as the majority acknowledges, Stansberry fell when his pant leg became hooked on a ladder as he was *exiting* the catwalk. It seems to me, then, that Stansberry's fall was entirely unrelated to the failure of Superior, or any other contractor, to provide the guardrail protection required by the standard. I also consider the comparatively brief use that Superior's employees made of the catwalk as a further indication that this violation was of low gravity.

Velma Montoya
Velma Montoya
Commissioner

Dated: May 30, 1996

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SECRETARY OF LABOR, Complainant, v. SUPERIOR ELECTRIC COMPANY, Respondent.	OSHRC Docket No. 91-1597

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on May 30, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: May 30, 1996

Ray H. Darling, Jr.
Executive Secretary

91-1597

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
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Respondent.

OSHRC DOCKET
NO. 91-1597

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 20, 1994. The decision of the Judge will become a final order of the Commission on June 20, 1994 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 9, 1994 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:

Daniel J. Mick, Esq.
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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 20, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1597

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SECRETARY OF LABOR, Complainant, v. SUPERIOR ELECTRIC COMPANY, Respondent.	OSHRC Docket No. 91-1597

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For Complainant

Michael S. Holman, Esquire
Bricker & Eckler
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER ON REMAND

This matter was remanded by the Occupational Safety and Health Review Commission for consideration of the merits of the case. The parties were allowed the opportunity to file written briefs in this regard.

In order to prove a violation under section 5(a)(2) of the Occupational Safety and Health Act (Act) as in this case, the Commission has held that the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative conditions; and (4) the employer knew

of the violative conditions or could have known with the exercise of reasonable diligence. *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1992 CCH OSHD ¶ 29,829 (No. 88-1167, 1992); *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), *aff'd*, 681 F.2d 69 (1st Cir. 1982).

The Commission determined in its decision of December 8, 1993, that the standard applies to the conditions cited. The elements remaining to be decided relate to whether the terms of the standard were not met and whether the employer knew of the violative conditions or could have with reasonable diligence.

Briefly, the facts which are not in dispute show that Superior Electrical Company (Superior) had been engaged in performing all electrical work required to convert a warehouse into an office area. Superior was working on the ground floor of the building and nearing completion of the renovation project which lasted about three months. Approximately a week before the inspection, a drywall subcontractor installed a catwalk above the ceiling to provide access to heating and air conditioning equipment and other electrical and mechanical equipment located there. Superior had installed all the junction boxes above the ceiling and completed most of the wiring before the catwalk was installed.

The ceiling over which the catwalk was located was approximately 10 feet above the ground floor. The catwalk ran from one side of the building to the other, and there was a trap door at each end of the catwalk in the offices at the far east and west ends of the corridor to provide access. The catwalk was approximately 150 feet long and was made of three or four 2 x 8s laid side by side. On one side of the catwalk was a "studwall" made of uncovered upright 2 x 4 "studs" to which the walls below the ceiling were attached. The studs were spaced on 16-inch centers. The other side of the catwalk had no railing or other guard.

Journeymen electricians Bobby Stansberry and Gordon Stevens were assigned by their foreman, Patrick Rockhold, to run wires from the junction boxes located above the ceiling in the office area to receptacles and fixtures in the individual offices. In the performance of this work, Stansberry fell off a 10-foot ladder to the floor. He testified that he had been on the catwalk for five to ten minutes on the day he fell and for short periods several days prior thereto.

Superior admits that no guardrails were installed on the catwalk, and an employee was on it without safety protection. The evidence sufficiently establishes that the terms of the cited standard were not met, and employees were exposed to a fall of 10 or more feet.

The central issue is whether Superior knew or could have known of the violative condition with the exercise of reasonable diligence. The Secretary essentially relies on the facts which disclose that Rockhold assigned Stansberry and Stevens to clean up any loose ends on the branch circuit wiring. If a problem with an overhead circuit was discovered, Rockhold believed the electricians could reach it from a ladder through the open ceiling. He told them he did not believe the job would require them to get on the catwalk; however, if they did, safety belts were available.

Acknowledging that foreman Rockhold did not actually observe the employees on the catwalk and it was hidden from view, the Secretary argues Superior had constructive knowledge of the violative conditions. In support of this contention, the Secretary relies on the Commission decision in *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1992 CCH OSHD ¶ 29,546, p. 39,905 (No. 89-1027, 1991), which states:

> In determining whether an employer has constructive knowledge of a violation, it is appropriate to examine whether the employer has exercised reasonable diligence to discover and eliminate violative conduct. This reasonable diligence requires adequate supervision of employees and the formulation and implementation of adequate training programs and work rules, all for the purpose of ensuring that the employees perform their work safely.

Respondent asserts that the Secretary has failed to show it could have discovered and eliminated the alleged violative conditions with reasonable diligence. It is argued that the employees were at no time instructed to work while on the catwalk. In fact, the foreman believed the necessary work could be performed while standing on a 10-foot ladder (Tr. 27, 37-38, 89-90, 156).

From all the evidence in this case, it is clear Superior exercised reasonable diligence to "eliminate the violative conduct" proscribed by the standard. It could be assumed Superior was on notice that work could be performed by the employees while on the catwalk. But consistent with the Commission's decision in *Mosser, supra*, the employer had

formulated and implemented adequate training programs and work rules to ensure employees performed their work safely.

Mr. Kenneth Swackhammer, Occupational Safety and Health specialist who conducted the inspection, testified Superior's safety program appeared to be a good one (Tr. 153). The evidence shows that supervisory personnel monitor the jobsite and take action to abate any potential hazards (Tr. 108-109).

The record shows that the safety program includes an orientation for new employees for both journeymen and apprentices. It requires employees to attend weekly job safety meetings where electrical work hazards are discussed and information is provided. Work rules are part of the program, and they are communicated and enforced as part of a disciplinary policy. The record also shows that a specific safety rule applied to the alleged violation in this case. Finally, it is shown that Stansberry admits he was in violation of the foreman's instructions, and he received a verbal warning for his conduct (Tr. 98, 109, 116-117). Testimony shows that following verbal and written warnings, employees have been discharged for violation of Superior's safety rules (Tr. 206).

The record evidence establishes that Superior could not with reasonable diligence have known of the violative condition. Furthermore, Superior has proven its affirmative defense of unforeseeable employer misconduct, and it took the necessary steps to prevent occurrence of the alleged violation. *See General Dynamics Corp. v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979). Clearly, the conduct of Stansberry was in violation of Superior's safety policy which was communicated and enforced, and such conduct was unforeseeable. *See Brock v. L. E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1277 (6th Cir. 1987).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Federal Rules of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

That the citation for the repeat violation of 29 C.F.R. § 1926.500(d)(1) is vacated.

PAUL L. BRADY
Judge

Date: May 5, 1994