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SECRETARY OF LABOR, Complainant, v. AMERICAN BRIDGE/LASHCON, J.V., Respondent.	OSHRC Docket No. 91-633

DECISION

Before: WEISBERG, Chairman, FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The Secretary issued a citation alleging that American Bridge/Lashcon, J.V. ("ABL") violated construction standards governing fall protection and cylinder storage at its workplace in Hoffman Estates, Illinois. An administrative law judge of this Commission vacated both items. For the reasons that follow, we reverse the judge and affirm both items.

Section 1926.105(a); Fall Protection Allegation

The Secretary alleged that ABL violated 29 C.F.R. § 1926.105(a)[1] because its employees who walked across a thirteen-inch wide beam, twenty-eight feet above the ground, "were not protected from falling to the ground below by the use of safety nets, safety belts

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[1] Section 1926.105(a) provides:

> **§ 1926.105 Safety nets.**
>
> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

or other fall protection." The beam, which formed the upper level of what was to be a pedestrian walkway, was seventy-five to one hundred feet long. Employees who walked across the beam wore safety belts and lanyards, but were not tied off to the catenary (safety) line that had been strung between vertical posts attached to the walkway's steel skeleton. Nor was there a safety net beneath. ABL took the position that the use of tied-off safety belts was impractical because employees would have to hook and unhook at each post, a procedure which could present problems if the employees traversing the beam were carrying tools or materials. Employees who actually performed work on the walkway structure did use tied-off safety belts. The number of employees who crossed the beam each day is in dispute but was between four and twenty-five. Each employee who traversed the beam made the (less than one-minute) trip up to twenty times a day.

Discussion

To prove that safety nets are required under section 1926.105(a), the Secretary must show that employees were subjected to falls of twenty-five feet or more and that none of the other safety devices listed in the standard were practical -- meaning that they are either not in use or are in use but not practical because they do not protect against the cited fall hazard for a substantial portion of the workday. *Brock v. L.R. Willson & Sons ("Willson III")*, 773 F.2d 1377, 1388 (D.C. Cir. 1985). Here, the judge found that because the employees wore tied-off safety belts for a substantial portion of the work day, safety belt use was practical under the "substantial portion of the work day" test, -- and the standard's safety net requirement was not triggered. We disagree with the judge's reasoning. The circumstances in which providing fall protection for a substantial portion of the work day may constitute full compliance with section 1926.105(a) are extremely limited.[2] *See L.R. Willson & Sons, Inc. v. Donovan ("Willson I")*, 685 F.2d 664 (D.C. Cir. 1982) (stability of structure made tying off infeasible for a short period). Except in those limited circumstances, section 1926.105(a) requires protection against hazards even though they are of short duration.

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[2] Chairman Weisberg notes that, in his view, the standard does not permit employers to leave employees unprotected against fall hazards even though the employees may be protected most of the time. *See Century Steel Erectors v. Dole*, 888 F.2d 1399, 1404 (D.C. Cir. 1989).

Willson III at 1386 and cases cited therein. *See also Century Steel Erectors, supra* n.2 (use of safety belts for substantial portion of the work day not relevant when no protection is provided for another discrete operation). Here, four to twenty-five employees each crossed the beam up to twenty times a day. When ABL realized that employees walking across the beam could not be protected against falls by safety belts because of the need to hook and unhook at each post, ABL was required by the cited standard to provide safety nets or one of the other listed methods of protection.

ABL argues that *Century Steel*, 888 F.2d at 1404-05, requires the Secretary to overcome the employer's evidence of industry custom and practice in order to prove that safety devices other than nets are impractical. However, proof of industry custom and practice is not relevant where, as here, the parties are not arguing about the practicality of any of the fall protection devices listed in the standard. ABL also argues that the catenary line which it supplied provides adequate fall protection. We disagree. Although under the right circumstances, the catenary line could have been used as a lifeline, one of the fall protection methods referred to in the standard, a lifeline is defined at 29 C.F.R. § 1926.107 as "a rope, suitable for supporting one person, *to which a lanyard or safety belt (or harness) is attached*, (emphasis supplied). Significantly, the catenary line failed to meet this definition and consequently it actually provided protection only if the untied-off employee was able to grab onto it. *See Willson III*, 773 F.2d at 1384 (section 105(a) "is not satisfied simply by the use of one of the devices listed in that section without regard to whether such use provides adequate fall protection to employees," citing *National Indus. Constructors, Inc.*, 9 BNA OSHC 1871, 1872, 1981 CCH OSHD ¶ 25,404, p. 31,657 (No. 76-891, 1981)).

We therefore find that ABL violated cited section 1926.105(a). Because ABL employees who walked unprotected across the beam could have fallen 28 feet and sustained death or serious physical harm, we also find that the violation is properly characterized as serious under section 17(k), 29 U.S.C. § 666(k), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"). The Secretary proposed a $560 penalty for this item. ABL stipulated that the penalties for both the items under review were arrived at

properly. Taking into account the penalty factors of section 17(j) of the Act, 29 U.S.C. § 666(j), we assess the proposed $560 penalty.

Section 1926.350(j): Cylinder Storage Allegation

The Secretary alleged that ABL violated 29 C.F.R. § 1926.350(j)[3] by failing to separate -- by a minimum distance of 20 feet or by a noncombustible barrier at least five feet high -- an oxygen cylinder and a propane gas tank stored adjacent to each other in the eastern portion of a parking garage. The cylinders (or "bottles") were not in use. No hoses were connected to either cylinder, and the oxygen cylinder was capped.

The Commission has addressed the issue of whether cylinders are "in storage" within the terms of the standard on numerous occasions. In the earlier cases, evidence that cylinders were either going to be used or were available for immediate use was found sufficient to withstand a finding that the cylinders were "in storage." *See MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1897, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15757, 1981); *Grossman Steel & Alum. Corp.*, 6 BNA OSHC 2020, 2023-24, 1978 CCH OSHD ¶ 23,097, p. 27,915 (No. 76-2834, 1978). More recently, however, in determining whether the standard applies, the Commission has considered other factors, including the length of time the cylinders are not in use. *See Newport News and Shipbuilding and Dry Dock Co.*, 16 BNA OSHC 1676, 1679-80, 1994 CCH OSHD ¶ 30,380, pp. 41,916-17 (No. 90-2658, 1994)(cylinders at site of ongoing burning operations which would not be used up in a day were "in storage" under 29 C.F.R.

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[3] Section 1926.350(j) provides:

> **§ 1926.350 Gas Welding and Cutting.**
>
> . . . (j) *Additional rules.* For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting, shall apply.
>
> ANSI Z49.1-1967 provides, in pertinent part:
>
> Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil and grease) a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire resistance rating of at least 1/2 hour.

§ 1910.253(b)(4)(iii)); *Hackney/Brighton Corp.*, 15 BNA OSHC 1884, 1887-88, 1991-93 CCH OSHD ¶ 29,815, pp. 40,618-19 (No. 88-610, 1992)(where acetylene cylinder kept together with oxygen cylinders in oxygen cylinder storage area between 3:00 p.m. one day and 9:30 a.m. next day, cylinders "in storage" under 29 C.F.R. § 1910.252(a)(2)(iv)(c)).

In vacating this item, the administrative law judge found that the testimony of project superintendent Lewis established that the cylinders were not "in storage" but rather were available for immediate use under *MCC of Florida*. Although portions of Lewis' testimony may be read as supporting a finding that the cylinders were going to be used quite soon, we believe, contrary to the judge, that the evidence as a whole establishes that the cylinders had not been used during the previous day and might not have been used for another day or two. *See Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976) (Commission is the ultimate fact-finder). In this regard, when asked directly by the judge if he knew "of . . . [his] own knowledge" whether the bottles were being utilized on the day of inspection, Lewis testified that *he did not know*. When asked when the cylinders were last used, Lewis initially testified that the two bottles were being used by a "detail crew on the east end of the crossover bridge," but that employees sometimes get switched from working in one area to working in another and that, although he was "quite sure that those bottles were being used the day before . . . and the people intended to come back and use the bottles, maybe even before the day was out, *I don't know*." From this testimony, it is unclear when the cited cylinders were last used or when they were to be used next. It is clear, on the other hand, that while the crew intended to come back, the cylinders were not going to be used immediately and may well have been left out on the site for one or two nights. Indeed, it is entirely possible that the cylinders remained unused for at least two days, the day of the inspection and the day before the inspection. Accordingly, we find that, consistent with Commission precedent set forth above, the cylinders were "in storage" within the meaning of the standard.[4] The cited standard requires that such cylinders be separated

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[4] In finding that these cylinders were "in storage," Chairman Weisberg would also rely on the fact that some twenty potentially combustible cylinders were not routinely put away after a day's use but rather were left scattered around the site for employees to use whenever they

(continued...)

by a minimum distance of twenty feet or by a proper noncombustible barrier. There being no dispute that they were not separated as required, we find that ABL violated the cited standard. Because storing the cylinders together could result in an explosion that could produce a serious fire hazard or could turn the cylinders into harmful projectiles, we also find that the violation is properly characterized as serious under section 17(k), 29 U.S.C. § 666(k), of the Act.

Because we decide this case on the basis of established Commission precedent and affirm the Secretary's citation item, it is not necessary for us to address the Secretary's argument that the Commission must defer to his interpretation of "in storage" under the dictates of *Martin v. OSHRC (C.F. & I. Steel)*, 499 U.S. 144, 150-58 (1991).[5] *See Newport News*, 16 BNA OSHC at 1680, 1994 CCH OSHD at p. 41,917.

The Secretary proposed a $240 penalty. ABL stipulated that the penalty was arrived at properly. After a consideration of the penalty factors found at 29 U.S.C. § 666(j), we assess a $240 penalty.

Order

Accordingly, we reverse the judge and affirm Serious Citation 1, Item 1, alleging a violation of section 1926.105(a) and assess a $560 penalty. We also reverse the judge and

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[4](...continued)
were needed, be it the next day or a few days later. Worker safety is better assured by permitting only those oxygen cylinders actually in use or available for immediate use to be within twenty feet of fuel gases.

[5] The Secretary contends that his interpretation of "in storage" is reasonable and deserving of deference because it comports with the construction given the terms "cylinder storage" by the American National Standards Institute ("ANSI") since 1973 and the National Fire Protection Association ("NFPA") since 1974. ANSI Z49.1-1973, ¶ 2.6; NFPA 51-1974, p. 51-4. However, as the Secretary has readily acknowledged, neither the ANSI nor the NFPA definition has been made a part of the OSHA standards despite considerable litigation on the meaning of "in storage" over the years. Including these definitions in the OSHA standards through the exercise of rulemaking would significantly reduce the amount of case-by-case litigation concerning "cylinder storage" and in the process conserve resources.

affirm Serious Citation 1, Item 2, alleging a violation of section 1926.350(j) and assess a $240 penalty.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: June 28, 1994

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SECRETARY OF LABOR, Complainant, v. AMERICAN BRIDGE/ LASHCON, J.V., Respondent.	:	Docket No. 91-633

NOTICE OF COMMISSION DECISION

The attached decision order by the Occupational Safety and Health Review Commission was issued on June 28, 1994. **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

Ray H. Darling, Jr.

June 28, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-633

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SECRETARY OF LABOR
Complainant,
v.
AMERICAN BRIDGE/LASHCON, JOINT VENT.
Respondent.

OSHRC DOCKET
NO. 91-0633

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 February 3, 1992. The decision of the Judge will become a final order of the Commission on March 4, 1992 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 February 24, 1992 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:

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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 3, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0633

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SECRETARY OF LABOR,

Complainant,

v.

AMERICAN BRIDGE/LASHCON,
Joint Venture,

Respondent.

OSHRC DOCKET
NO. 91-0633

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U. S. Department of Labor, Chicago, IL

For the Respondent:
Richard R. Nelson, II., Esq., Pittsburgh, PA

DECISION AND ORDER

Cronin, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, American Bridge/Lashcon, A Joint Venture (American Bridge), at all times relevant to this matter, maintained a workplace at Amertech Center, Hoffman Estates, Illinois, where it was engaged in structural steel erection. Respondent employed approximately 25 workers at the Amertech site and is involved in a business affecting commerce (Tr. 141). Respondent, therefore, is an employer within the meaning of the Act.

On September 11, 1990, an Occupational Safety and Health Administration (OSHA) team conducted an inspection of Respondent's Amertech worksite (Tr. 15-16, 38). As a

result of that inspection, Respondent was issued a citation on January 25, 1991 alleging "serious" violations of 29 CFR §§1926.105(a), 1926.350(j), 1926.500(d)(1), 1926.500(e)(1)(iv) and 1926.501(f).

By filing a timely notice of contest to all citations, Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On September 25, 1991, a hearing was held in Chicago, Illinois. At the hearing the Secretary's motion to amend her complaint to include an alleged violation of 29 CFR §1926.750(b)(1)(ii) as an alternative to the §1926.105(a) violation alleged in item 1 was granted. (Tr. 5, 12).

Respondent filed a comprehensive brief, and this matter is now ready for decision.

Alleged Violations

Citation 1, item 1 alleges:

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

> (a) West of Main Building - Employee(s) were observed walking the top beam of the pedestrian bridge which was 28 feet above the ground. The employee(s) were not protected from falling to the ground below by the use of safety nets, safety belts or other fall protection. Conditions existed Tuesday, September 11, 1990.

The cited standards provide:

§1926.105(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

§1926.750(b)(1)(ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. . ..

Citation 1, item 2 alleges:

29 CFR 1926.350(j) Section 3.2.4.3 American National Standards Institute Z49.1-1967 as adopted by 29 CFR 2926.350(j): Oxygen cylinders in storage were not separated from fuel-gas cylinders, reserve stocks of carbides, or highly combustible

materials (especially oil or grease) by a minimum distance of 20 feet or by a noncombustible barrier at least five high feet [sic] having a fire-resistance rating of at least ½ hour:

> (a) At the pedestrian bridge to east garage 68 line: an oxygen cylinder and a propane gas tank were stored adjacent to each other and not separated by the proper distance or a fire wall.

The cited standard provides:

§1926.350(j) For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting shall apply.

ANSI Z49.1-1967 states:

Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease) a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire resistance rating of at least 1/2 hour.

Citation 1, item 3 alleges:

29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

> (a) In the Main Building, 2nd floor, south - two employees were walking down a metal stairway that was missing standard guard rails at the landings exposing employees to a fall hazard of approximately 12 ft.

The cited standard provides:

§1926.500(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. . ..

Citation 1, item 4 alleges:

29 CFR 1926.500(e)(1)(iv): Stairways more than 44 inches wide but less than 88 inches wide having four or more risers were not provided with one standard stair railing on each open side and one standard handrail on each closed side:

(a) In the Main Building, 2nd floor south, two employees were walking down a metal stairway that was missing standard stair rails on each open side.

The cited standard provides:

§1926.500(e) *Stairway railings and guards.* (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified below. . ..

Citation 1, item 5 alleges:

29 CFR 1926.501(f): Permanent metal stairways or landing with hollow pan-type treads that are to be filled with concrete or other materials were not filled to the level of the nosing with solid material when used during construction:

(a) In the Main Building, 2nd floor South, two employees were walking down a metal stairway that had hollow pan type treads that were not filled to the level of the nosing with solid material.

The cited standard provides:

§1926.501(f) Permanent steel or other metal stairways, and landings with hollow pan-type treads that are to be filled with concrete or other materials, when used during construction, shall be filled to the level of the nosing with solid material. This requirement shall not apply during the period of actual construction of the stairways themselves.

Issues

1. Whether 29 CFR §1926.750(b)(1)(ii), or 1926.105(a), or both, are applicable to the steel erection operation for the Amertech parking garage elevated walkway?

2. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of 29 CFR §1926.105(a) on September 11, 1990?

3. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of §1926.750 (b)(1)(ii) on September 11, 1990?

4. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of §1926.350(j) on September 11, 1990?

5. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of §1926.500(d)(1) on September 11, 1990?

6. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of §1926.500 (e)(1)(iv) on September 11, 1990?

7. Whether Complainant has shown, by a preponderance of the evidence, that Respondent was in violation of §1926.501(f) on September 11, 1990?

Applicability of §§1926.105(a) and 750(b)(1)(ii)

The application of the steel erection fall protection standards under §1926.750, and their relationship to the general fall protection standard at §1926.105(a) have been extensively litigated, both before the Commission and in the Circuit Courts of Appeals.

An early Commission case, *Daniel Construction Co.*, 5 BNA OSHC 1005, 1976-77 CCH OSHD ¶21,521 (No. 7672 & 7734, 1977) *(Daniel I)* held that §1926.750 applies only to "tiered buildings," which must be "multi-floored structures." In *Jake Heaton Erecting Co.*, 6 BNA OSHC 1536, 1978 CCH OSHD ¶22,701 (No. 15892, 1978) and *Havens Steel Co.*, 6 BNA 1564, 1978 CCH OSHD ¶22,689 (No. 13463, 1978) the Commission affirmed that a single storied structure, without floors between the ground level and roof, is not a "tiered building," and 750(b)(1)(ii) is not applicable.

In *Builder's Steel*, 622 F.2d 367, (8th Cir. 1980) the Eighth Circuit, however, held that the 750 standards are not limited to tiered buildings, and, in its view, are applicable to all skeleton steel erection.

Shortly thereafter the Commission, in *Daniel Construction Company*, 9 BNA OSHC 1854, 1981 CCH OSHD ¶25,385, (12525, 1981) *(Daniel II)*, overruled *Daniel I* and held that the term "tiered building" is not limited to multi-floored structures, but includes any building or structure in which a skeleton steel framework is erected in "vertically stacked steel columns." See also; *National Industrial Constructors*, 10 BNA OSHC 1081, 1981 CCH OSHD ¶25,743(No. 76-4507, 1981) [citing *Daniel II* as dispositive].

The citation in this matter involves an elevated bridge walkway. According to Henry Lewis, American's Project Superintendent, the walkway was constructed on a single vertical column, to which two levels of horizontal beams were attached to serve as floor and roof (Tr. 132-133). Although Complainant's CO at one point in his testimony agreed with Respondent's counsel that the walkway was a structural steel framework erected in vertically

stacked columns (Tr. 32), Lewis's testimony and the project blueprints refute the CO's belief that the walkway was erected on vertically stacked columns. (Ex. R-7).

Although this Judge is persuaded that the Eight Circuit's decision in *Builders Steel*, which holds that the 750 standards apply to all skeletal steel erection, is reasonable, he is constrained to follow Commission precedent set forth in *Daniel II* and *National Industrial Constructors*. Because the Amertech elevated walkway did not consist of vertically stacked columns, it is not subject to the 750 standards, and only §1926.105(a) applies in this case.

In order to obviate the need for a remand, however, should the Commission decide on review that §1926.750 (b)(1)(ii) does apply, the alleged violation of both standards will be addressed.

Alleged Violation of §1926.105(a)

During the September 11, 1990 inspection of the Amertech site, Compliance Officers Richard Dub and Ron Payne observed and photographed an American Bridge employee, Brett Kane, walking across the top beam of a single story pedestrian bridge under construction between the Amertech building and an adjacent parking garage (Ex. C-1, C-4; Tr. 16-17, 19-20, 38). The COs testified that the beam was approximately 100 feet long and 28 feet above the ground, and there was no safety net beneath the walkway (Tr. 17-20, 47). Although Kane was wearing a safety belt and lanyard, and a catenary line had been installed between vertical stanchions attached to the walkway's steel skeleton, he was not tied off when walking[1] (Tr. 17-20, 42; Ex. C-12, C-13).

Henry Lewis also testified, without contradiction, that the catenary line was constructed of ½ inch cable anchored at either end with three crosby clamps, and had a tensile strength of 14 to 15 thousand pounds (Tr. 43, 52, 110). Mr. Lewis declared that the cable was suitable not only as a perimeter line or handhold, but for usage as an anchorage for a lanyard (Tr. 110, 128-129).

American Bridge has a well documented policy requiring fall protection for employees who have reached their work site. Fall protection for workers moving from point to point,

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[1] CO Payne defined a catenary line as "[a] horizontal line that is suspended between two secure anchors, to which safety belt lanyards may be attached," as stated in American National Standard Institute (ANSI) standard 81013-89 (Tr. 55).

however, is not required, unless the worker is more than 30 feet above a flat surface (Tr. 31, 61, 84, 112-122; Ex. R-4, R-6). Henry Lewis testified that it is impractical for workers in transit, who often are carrying tools, to clip and unclip, or tie and untie, a lanyard to get around intermediate posts which are necessary to maintain tension on the catenary line (Tr. 122-124, 130).

Mr. Lewis testified that employees used their safety belts to tie off to the safety line for a substantial portion of the work day, and spent only a small fraction of their time moving from point to point (Tr. 135-136). As demonstrated by Complainant's videotape, Brett Kane spent under a minute walking one way across the walkway beam (Tr. 60; Exhibit C-4). Mr. Lewis estimated that perhaps 20 such trips a day were necessary (Tr. 154).

Discussion

In *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, (D.C. Cir. 1985), the D.C. Circuit held that:

> "To prove a violation of §.105(a), the Secretary must show only that (1) the workplace is twenty five feet above the ground and (2) none of the listed safety devices are practical, meaning that they are either not used or are used but not practical because they do not protect against the cited fall hazard for a substantial portion of the work day."

Id. at 1388.

In this case, it is uncontested that the workplace was more than 25 feet above the ground. American Bridge employees, however, were provided with, and actually used, safety belts attached to a catenary line in performing work on the Amertech elevated walkway. They simply did not tie off when walking across the beam. The record establishes that employees' trips across the walkway beam, approximately 20 a day, took under a minute apiece, and constituted a small portion of their workday. Under the "substantial portion of the workday" test of *L. R. Willson*, therefore, the employee's use of safety lines while working on the bridge was practical. The net requirement of 105(a), therefore, was not triggered, and Respondent was not in violation of that standard on September 11, 1990.

Alleged Violation of §1926.750(b)(1)(ii)

Although this Judge has determined that the steel erection standards at §1926.750 et seq. were inapplicable to the Amertech pedestrian bridge walkway, the alleged violation of §1926.750(b)(1)(ii) will be discussed as if that 750 standard was applicable.

Until 1990, the state of the law in this area was in conflict. From 1984 to 1990, the Commission persistently clung to its position that the steel erection standards at 29 CFR 1926 Subpart R preempted application of general construction industry fall protection standards, including §1926.105(a). E.g., *Williams Enterprises of Georgia Inc.*, 12 BNA OSHC 2097, 1986-87 CCH OSHD ¶27,692 (No. 79-4618, 1986), *rev'd*, 832 F.2d 567, (11th Cir. 1987). Four Circuit Courts of Appeals, however, rejected the Commission's position and have held that §1926.105(a) applies to the steel erection industry, and specifically to exterior fall hazards, which are not addressed by the 750 standards. See; *L.R. Willson & Sons*, 773 F.2d 1377, (D.C. Cir. 1985); *Adams Steel Erection*, 766 F.2d 804, (3rd Cir. 1985); *Donovan v. Daniel Marr & Son Co.*, 763 F.2d 477, (1st Cir. 1895); and *Williams Enterprises, supra.* In 1990, the Commission in *Bratton Corp*, 14 BNA OSHC 1893, 1987-90 CCH OSHD ¶29,152 (No. 83-132, 1990) finally agreed with the various appellate court decisions cited that drew a distinction between interior and exterior falls and held that the 750 standards did not preempt applications of the general construction standards to exterior falls. Thus,assuming arguendo that the elevated bridge walkway was being erected in vertically stacked steel columns, the 750 standards would have applied only to interior fall hazards from that structure.

The interior net fall protection requirement of 750(b)(1)(ii) is activated only when the temporary floors required by 750(b)(2)(i) are not practicable. Also, under (b)(2)(i), "temporary floors are only required when the fall distance is two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed. . .." Because the distance between the walkway beam in question and the ground was less than 30 feet, a temporary floor was not required here. Section 750(b)(1)(ii), therefore, was not triggered, and Respondent had no duty to comply with its net requirement.

As previously noted, the Secretary also must prove that temporary floors were not practical, meaning either that they were not used or were used but were not practical because they did not protect against the existing fall hazard. In this case, the ground offered the same protection from a fall of 30 feet or less as the use of a temporary floor. See *Builders Steel, supra* at 1365, where the Court equated the ground with a temporary floor and described both as "practical" at heights of 30 feet or less. Because the ground here was a practical alternative to a temporary floor, no net was required.

Alleged Violation of §1926.350(j)

Section 1926.350(j) adopts American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting standards, which require oxygen cylinders in storage to be separated from combustible materials, including fuel gas cylinders, by a minimum of 20 feet or by a fire wall.

In a case involving the alleged violation of §1926.350(j), *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1981 CCH OSHD ¶25,420 (No. 15757, 1981), the Commission adopted a holding set forth in two earlier cases dealing with a parallel general industry standard §1910.252(a)(2)(iv)(c), *United Engineers & Constructors, Inc.*, 3 BNA OSHC 1313, 1974-75 CCH OSHD ¶19,780 (No. 2414, 1975) and *Grossman Steel & Aluminum Corporation*, 6 BNA OSHC 2020, 1978 CCH OSHD ¶23,097 (No. 76-2834, 1978). *MCC* held that cylinders are not "in storage," and, therefore, do not fall within the plain meaning of 350(j), where they are "available for immediate use in the area where they [are] located. . .." See also; this Judge's decision in *Rudolph & Sletten*, 88 OSHRC 31/D4 (No. 87-1983, 1988) (ALJ).

In this case, CO Walter Gulik observed an oxygen cylinder adjacent to a propane cylinder while inspecting the eastern section of the Amertech parking garage (Tr. 66). The cylinders were not in use; no hoses were connected to either cylinder, and the oxygen cylinder was capped (Tr. 66-67). The CO, however, did not know when the cylinders were last used or when they were to be used next (Tr. 87).

Henry Lewis testified that the two gas bottles were used by a detail crew the day preceding the OSHA investigation (Tr. 141). Lewis stated that bottles which are not being used are stored in a separate storage area near American's tool complex. However, the steel erection process involves trimming and revising the steel on almost a daily basis, and

bottles are frequently left out, available for employees' use (Tr. 141-143). Bottles are only returned to storage if no use for them is anticipated in the next few days (Tr. 144).

The evidence fails to establish that the cited cylinders were "in storage," . . .. Therefore, Respondent cannot be found in violation of the cited standard.

Alleged Violations of §§1926.500(d)(1), (e)(1)(i) and 1926.501(f)

During the course of the inspection, CO Gulik noted two American Bridge employees using a metal pan stairway between the first and second floors that had no perimeter guarding on its landings, and was not equipped with stair rails (Tr. 69-71, 80). Further, the metal pan treads, which were to be filled with concrete at a later date, were not level with the nosing (Tr. 69, 71).

The stairway in question was under construction, and American Bridge had erected only the steel skeleton stringers and risers; another firm, Turner Construction, was to pour the concrete for the pans and handrail (Tr. 81, 147). At safety meetings, American Bridge instructed its employees not to use the unfinished stairs and designated completed maintenance stairways for their use (Tr. 83, 147, 149; Ex. R-9D). American Bridge also requested that Turner barricade the stairs (Ex. R-10), and cables, barricades and caution ribbons were strung across the stair access platforms to keep employees off (Tr. 148). CO Gulik admitted that the stairway he observed was barricaded with a wire cable, indicating that it was not to be used, and that the employees used the stairs contrary to an established work rule (Tr. 70, 80, 82).

Patrick Schragel, one of the American Bridge employees seen using the uncompleted stairs testified that he had received instructions prohibiting their use from American, and that he had only used the stairs the one time (Tr. 186). He stated that he had never seen any other employees using the unguarded stairs (Tr. 187, 193). Mr. Schragel and his partner were verbally reprimanded, but not terminated or suspended (Tr. 153, 230).

The cited standard §1926.500(d) is inapplicable to the stairway landings cited here, because those landings were not "platforms" as that term is defined at §1926.502(e), i.e. "[a] working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment. See *Globe Industries,*

Inc., 10 BNA OSHC 1596, 1982 CCH OSHD ¶26,048 (No. 77-4313, 1982)[An elevated flat surface not automatically a "platform" merely because employees occasionally set foot on it while working.]

Moreover, "stair platforms" are separately defined at 502(h), and are included under the term "stairway" at 502(j). Requirements for stairway railings and guard rails, which are distinct from the railing requirements at 500(d) are contained in 500(e) and (f) and under §1926.501. (See Tr. 79, testimony of CO Gulik).

Items 3, 4 and 5

That American Bridge employees used an unguarded, unleveled stairway is undisputed. In defense, American Bridge raises the defense of unpreventable employee misconduct.

The Commission has stated that in order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. *H.E. Wiese, Inc.*, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD ¶25,985, p. 32, 614 (Nos. 78-204, 78-205, 1982).

The evidence establishes that the metal pan stairway was not provided for employee use during the construction period. Respondent had an established rule prohibiting use of the stair and had adequately communicated the rule to its employees, including the employees observed using the stair. In addition, the stair was physically blocked off to prevent infractions of this rule.

Nothing in the evidence demonstrates that Respondent knew of the infraction or had any reason to take additional steps to discover it. The employees violating the rule were reprimanded.

Respondent has proven the affirmative employee misconduct defense, which is dispositive of all three violations arising from the employees' use of the metal pan stairs.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal

Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

Conclusions of Law

1. 29 CFR §1926.750(b)(1)(ii) is not applicable to the steel erection operation for the Amertech parking garage elevated bridge walkway.

2. Respondent's use of safety belts as fall protection was "practical,". Therefore, the use of nets under 29 CFR §1926.105(a) was not required..

3. The fall protection provisions of 1926.750(b)(1)(ii) are not triggered unless temporary floors are required under 750(b)(2)(i) and are not practicable. Temporary floors were not required because the fall distance was less than 30 feet. The ground also was a practical alternative to a temporary floor and, therefore, no net was required.

4. Complainant failed to show, by a preponderance of the evidence, that Respondent's oxygen and propane cylinders were "in storage" which triggers the operation of §1926.350(j).

5. 29 CFR §1926.500(d)(1) is inapplicable to stair platforms.

6. The violations of §1926.500(e)(1)(iv) and 501(f) on September 11, 1990 were the result of unpreventable employee misconduct.

Order

Based upon the entire record, it is ORDERED:

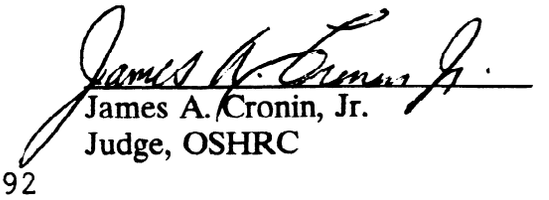
1. Serious Citation 1, item 1, alleging a violation of 29 CFR §1926.105(a), and 29 CFR 750(b)(1)(ii) in the alternative, is VACATED.

2. Serious Citation 1, item 2, alleging a violation of 29 CFR §1926.350(j) is VACATED.

3. Serious Citation 1, item 3, alleging a violation of 29 CFR §1926.500(d) is VACATED.

4. Serious Citation 1, item 4, alleging a violation of 29 CFR §1926.500(e)(1)(iv) is VACATED.

5. Serious Citation 1, item 5, alleging a violation of 29 CFR §1926.501(f) is VACATED.



James A. Cronin, Jr.
Judge, OSHRC

Dated: January 27, 1992