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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HACKNEY, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 91-2490 |

## *DECISION*

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether the Secretary's personal protective equipment standard at 29 C.F.R. § 1910.132(a) requires the use of safety belts. A Commission Administrative Law Judge found a serious violation of the standard based on Hackney's failure to assure that employees used safety belts while working on an overhead crane and trolley. Hackney requests that the Commission reconsider its precedent, which holds that safety belt systems may be required under the standard to protect against fall hazards. *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1982 CCH OSHD ¶ 25,982 (No. 79-310, 1982). Hackney also argues that there was no showing that it could have known of the fall hazards in this case with the exercise of reasonable diligence. For the reasons explained below, we reaffirm *Bethlehem* and uphold the judge's decision, including his penalty assessment of $3,250.

The overhead bridge crane and trolley in question were located at Hackney's manufacturing plant in Ackerman, Mississippi, where it produces carbon steel flanges. The crane and trolley were mounted on rails located approximately 33 feet above ground level.

It is undisputed that Hackney employees worked without safety belts while performing regular repairs and maintenance on the crane and trolley. Although the bridge catwalk had standard railings which protected the employees during some of their work, other areas where they sometimes worked were unguarded. Hackney stipulated that additional fall protection was needed by the maintenance employees while working on some areas of the crane and trolley.

## ANALYSIS

**1. Whether the judge erred in finding that the cited standard is applicable.**

The question presented is whether section 1910.132(a) applies to fall hazards and may require the use of safety belts. That standard provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

In *Bethlehem*, the Commission held that although safety belts are not mentioned under the standard, they are a form of protective equipment that may be required under that standard. It held that a fall hazard is a hazard of "processes or environment" just as much as an absorption or inhalation hazard; that it is "capable of causing injury or impairment" through "physical contact"; and that it can be prevented by the use of safety belts. 10 BNA OSHC at 1472, 1982 CCH OSHD at pp. 32,592-93.[1] Because section

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[1]As Hackney notes, the Commission vacated the citation in *Bethlehem* on the ground that the employer did not have fair notice of the standard's applicability. The Commission noted that, among other factors, it had not previously addressed the issue and the majority of unreviewed Commission judge's decisions had held the standard inapplicable to fall hazards and safety belt systems. However, *Bethlehem* provided the necessary notice that the standard covers those hazards and systems. *E.g., Corbesco, Inc. v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991) (Commission interpretations of an OSHA regulation may supply fair notice of what a broadly worded OSHA regulation specifically requires) (cited in *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1267, 1991-93 CCH OSHD ¶ 29,465, p. 39,744 (No. 88-671, 1991), *vac'd in part on other grounds*, 983 F.2d 1067 (6th Cir. 1992) (unpublished). Thus, the standard may be applied in cases such as this, which arose after the *Bethlehem* decision.

1910.132(a) is broadly worded, however, the Commission requires a showing that a "reasonably prudent employer" would use the protective equipment urged by the Secretary in the circumstances. *E.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1484, 1991-93 CCH OSHD ¶ 29,582, p. 40,035 (No. 88-2691, 1992) (standard applied to fall hazards and safety belts--no claim that standard was inapplicable).

Relying on former Chairman Rowland's separate opinion in *Bethlehem*, Hackney argues that the standard has a "commonsense, plain meaning in light of the context," which precludes applying it to safety belts and fall hazards. 10 BNA OSHC at 1473-74. It contends that a safety belt system is different from the devices specifically mentioned in section 1910.132(a) and its subpart (Subpart I) because the devices mentioned protect employees by restricting or blocking external agents, objects or substances from coming into contact with the employee. *Id.*[2] It also contends that fall hazards cannot be construed as hazards of "processes or environment."

Hackney has not persuaded us that our holding in *Bethlehem* was incorrect. The examples of personal protective equipment mentioned in section 1910.132(a) are merely illustrations, not an exhaustive list. Standards and regulations under the Act are to be broadly and reasonably construed to effectuate the Act's express purpose, which is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *E.g., Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11-13 (1980) (quoting 29 U.S.C. § 651(b)). The purpose of section 1910.132(a) is to promote the safety and health of employees through the use of necessary protective equipment, including personal protective equipment not specifically mentioned. Although

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[2]Hackney also relies on the Secretary's proposal to amend Subpart I to include specific criteria for fall protection systems. 55 Fed. Reg. 13,360 (1990). Hackney argues that the Secretary's proposal "tacitly recognized that 132(a) was not originally intended to cover fall protection." However, Hackney has not pointed to, and we have not found, anything in that document to support its argument. The Secretary recently amended Subpart I in certain other respects. *Final Rule: Personal Protective Equipment for General Industry*, 59 Fed. Reg. 16,334, 16,360 (April 6, 1994). However, section 1910.132(a) was not affected by that rulemaking. *E.g., id* at 16,336; *Notice of Proposed Rulemaking*, 54 Fed. Reg. 33,832, 33,834 (1989) ("[t]he current requirements [for section 1910.132(a) and various other provisions of Subpart I] are not proposed for revision in this proposal and will remain unchanged by this rulemaking").

the standard is ambiguous as to whether fall hazards are covered, we see nothing in it or its subpart that suggests that those are not hazards of "processes or environment" under the standard. The term "environment" need not be read to cover only hazards such as climatic or air-borne hazards. "Environment" is synonymous with "surroundings," and has been defined as "the surrounding conditions, influences, or forces that influence or modify[.]" *Webster's Third New Int'l Dictionary* 760 (1986 ed.). The work environment often includes elevated areas from which an employee could fall and be injured by "physical contact."[3]

Hackney further relies on the maxim *expressio unius*, which it defines as meaning that "express mention in a statute of one thing excludes others not expressed."[4] However, before resorting to such maxims of interpretation to put its own interpretation on the Secretary's regulation, the Commission must address the Secretary's interpretation. Thus, in situations where the regulatory language is found to be ambiguous, the Secretary's interpretation of his standards should be given effect, so long as that interpretation is reasonable. *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150 (1991).

Given our analysis in *Bethlehem*, we find that the Secretary's interpretation is reasonable and consistent with the language and the purposes of the standard.[5] We

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[3]In Commissioner Foulke's view, the standard lacks desired clarity and seems purposefully oriented toward chemical and other hazards that might contact the employee in the course of working. He believes that, although it is strained to apply the standard to fall hazards in certain situations, the standard, however, does not have a plain meaning that clearly precludes it being reasonably applied to the fall hazards in this particular case.

[4]Hackney further relies on the Commission's decision in *Contractors Welding of W. New York, Inc.*, 15 BNA OSHC 1249, 1991-93 CCH OSHD ¶ 29,454 (No. 88-1847, 1991), *vac'd*, No. 91-4179 (2d Cir. May 19, 1992) (unpublished); No. 92-4181 (2d Cir. June 24, 1993) [16 BNA OSHC 1257, 1993 CCH OSHD ¶ 30,099] (unpublished). However, that Commission decision was ordered vacated by the Second Circuit and is not Commission precedent. It is inapposite in any event, because it involved a different kind of interpretational question.

[5]Hackney suggests that under the terms of a directive, CPL 2-1.13 (April 16, 1979), the Secretary concluded that section 1910.132(a) does not require the use of safety belts. However, a footnote in Commissioner Cleary's opinion in *Bethlehem* correctly interprets that directive to state that safety belt violations no longer were to be cited under the standard "because of adverse decisions by Commission judges vacating § 1910.132(a) citations; [the Secretary] did not expressly or impliedly acknowledge the correctness of those decisions."

(continued...)

reaffirm the Commission's precedent in *Bethlehem* that the cited standard may be applied to fall hazards and may require the use of safety belts.[6]

**2. Whether the judge erred in finding that Hackney violated the cited standard.**

In order to prove a violation of a standard, the Secretary must show that: (1) the standard applies to the facts; (2) the employer failed to comply with its terms; (3) employees had access to the hazards; and (4) the employer could have known of the existence of the hazards in the exercise of reasonable diligence. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). As mentioned above, in order to establish noncompliance with a broadly-worded provision such as section 1910.132(a), the Secretary must show that a reasonably prudent employer would use the protective equipment urged by the Secretary in the circumstances.

We have found above that the cited standard applies to the facts because it encompasses fall hazards and safety belt systems. As to noncompliance, there is no dispute that Hackney's maintenance employees failed to use fall protection when working on areas of the crane and trolley where it was necessary. Moreover, we find that a reasonably prudent employer would have required the use of safety belt systems to protect against the

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[5](...continued)
10 BNA OSHC at 1473 n.3, 1982 CCH OSHD at p. 32,593 n.3. The Secretary's interpretation of the standard has been consistent, so far as the record indicates.

Hackney further notes that the OSHA compliance officer ("CO") who conducted the inspection originally recommended that the fall hazards be cited under section 1910.23(c)(1) rather than section 1910.132(a). The former section requires guardrails on open-sided floors and platforms 4 feet or more above adjacent floor or ground level. Hackney did not pursue the CO's reasons for that initial recommendation, however. Whether or not guardrails could have been installed on the trolley platform, there is no indication that they could have been used on all the crane and trolley areas where employees were exposed to the hazards. Thus, there is no indication here that section 1910.23(c)(1) would apply to the exclusion of section 1910.132(a).

[6]We also note that the Fifth Circuit, within which the worksite here is located, has stated in dicta that both sections 1910.132(a) and its construction industry analogue, 1926.28(a), "require the use of personal protective equipment, such as safety belts, when necessary to protect against hazards such as falling." *Turner Communications Corp. v. OSHRC*, 612 F.2d 941, 944 (5th Cir. 1980).

fall hazards in this case. Hackney itself recognized that safety belt systems were the appropriate fall protection. It had safety belts stored at the site and, as discussed further below, it contemplated that employees would use them when exposed to falls from the crane or trolley.

In light of the above, Hackney failed to comply with the terms of the standard because the appropriate personal protective equipment was not used where necessary by reason of fall hazards, which are hazards of physical contact. (The question of whether Hackney's noncompliance may be excused because of its efforts to get employees to use safety belts is discussed below regarding the knowledge issue.) As to employee access to the hazards, it is undisputed that the maintenance employees were actually exposed to them during portions of their regular work on the crane and trolley.

The remaining element to resolve is knowledge. In finding that Hackney had the requisite knowledge of the violative conditions, the judge relied on the testimony of two Hackney's maintenance employees, Thomas Carraway and David McGee.[7] Carraway testified that he had worked on the crane and trolley regularly and frequently without fall protection, while exposed to falls of 30 feet or more. McGee testified that he had never

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[7]Hackney argues that McGee was not a credible witness. The judge stated, however:

> [I] observed nothing in McGee's demeanor while testifying which would reflect upon his credibility. McGee's testimony, except as it related to the existence of safety belts, paralleled that of Carraway on the crucial issues in the case and is given full weight in this regard.

We affirm the judge's credibility finding, as it identified the testimony involved, gave specific and adequate reasons for crediting it, and is supported by the record as a whole. *E.g., Hackney, Inc.*, 15 BNA OSHC 1520, 1522, 1991-93 CCH OSHD ¶ 29,618, pp. 40,106-07 (No. 88-391, 1992). While Hackney notes testimony that after McGee left the witness stand, he was asked to report to the plant and declined, there is no evidence that McGee was unauthorized to decline to report at that time, or any other evidence tending to show that he was dishonest.

Nor was the judge's credibility finding internally inconsistent, as Hackney claims. The judge did not expressly or impliedly discredit McGee's testimony on "the existence of safety belts." He did not address it. McGee's testimony was not parallel to Carraway's on that issue, but was not inconsistent with it. Carraway testified that safety belts had been pointed out to him when he was hired. McGee testified that he had "never seen one at the plant anywhere."

worn a safety belt while working on the crane and that he had never seen anyone else wear one. He further testified that he had never been told to wear a safety belt for that work, and that almost every member of management had seen him doing such work without a safety belt.

Carraway also testified regarding specific incidents within six months before the inspection when supervisors were put on notice of a lack of fall protection for employees working on the crane and trolley. For example, he testified that his foreman, Ralph Bailey, stood at ground level observing him and other maintenance employees while they worked without fall protection, exposed to the hazards, on a night in approximately April or May, 1991. They were replacing the cable on the trolley. Carraway could not say Bailey actually saw enough that night to know that the employees lacked the necessary fall protection. Nevertheless, he testified, "I feel like he should have known we didn't have safety belts on."

Hackney argues that knowledge was not shown because there was no testimony that any Hackney supervisor actually saw that an employee was not wearing a tied-off safety belt *when working on a portion of the crane or trolley where there was no fall protection.* We agree, however, with the judge's reasoning when he disposed of Hackney's rebuttal testimony as follows:

> [R]espondent attempts to establish through the testimony of James Crick, its plant engineer, and Gerald Nelson, its plant manager, that the maintenance employees never worked on unprotected areas of the crane without fall protection or, if they did, this circumstance went undetected by respondent's supervisory personnel. Respondent's counsel, in his direct examination of these witnesses, did not develop just how either Crick or Nelson would have the opportunity to observe the activities of the maintenance employees during the performance of their duties. . . . Curiously, respondent called no foremen as witnesses in the case even though these individuals were the first line supervisors of the maintenance employees, had the best opportunity to observe their activities and were specifically identified by Carraway and McGee as having seen them perform work on the crane without belts. At best, the testimony of Crick and Nelson establishes only that they had no personal knowledge of the violative condition and does not preclude the existence of such knowledge by respondent's foremen which knowledge is imputable to the corporate respondent. *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 1991[-93] CCH OSHD ¶ 29,223 (No. 85-369, 1991). In short, the testimony of respondent's witnesses is wholly insufficient to overcome the more specific testimony of Carraway and McGee.

Further, contrary to Hackney's argument, the Secretary need not show that a supervisor actually saw an employee exposed to the hazards while not using a safety belt. The Commission only requires proof that the employer could have discovered the violative conditions *with the exercise of reasonable diligence*. *E.g., Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-21, 1991-93 CCH OSHD ¶ 29,500, p. 39,809 (No. 86-351, 1991). That test has been met here. Indeed, the record contains no evidence that Hackney supervisors ever checked to determine whether the employees wore safety belts while exposed to the conceded fall hazards. The credited testimony of Carraway and McGee that they never wore fall protection for that work shows that the conditions called for such an inquiry.[8]

Finally, *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982) (alleged violation of section 5(a)(1) of the Act); and *Capital Elec. Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128 (10th Cir. 1982), relied on by Hackney, are inapposite. In *Jones & Laughlin* the Commission stated that where abatement of a recognized hazard requires employee compliance with workrules, an employer is not in violation "if it has established workrules designed to prevent the violation, has adequately communicated workrules to its employees, has taken steps to discover violations of the rules, and has effectively enforced the rule in the event of infractions." 10 BNA OSHC at 1782, 1982 CCH OSHD at p. 32,887. Hackney argues that it established a workrule requiring the use of safety belts when necessary due to fall hazards. However, Hackney's workrule, found in its Employee Safety Manual, merely stated, "use personal protective equipment and observe safeguards as required." As the judge correctly found:

> The [safety manual] reviewed in its entirety makes no mention of safety belts or the need to use belts as a means of providing fall protection when working at elevations. Such a general, non-specific rule utterly fails to qualify as a "rule designed to prevent the violation."

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[8]Hackney notes the testimony of its plant engineer, James Crick, that he had observed maintenance employees wearing safety belts before at Hackney (he had worked there at least 26 years). However, he testified that he could recall two occasions when he observed an employee not wearing a safety belt when exposed to a fall hazard, and that he told those employees to put them on. Crick's testimony shows that Hackney was on notice that employees might not wear safety belts when required.

Furthermore, Hackney does not even argue that the rule was adequately communicated to the employees, that it took steps to discover violations of the rules, or that it effectively enforced the rule.[9] The judge correctly found that Hackney had taken none of the steps mentioned in *Jones & Laughlin* to see that maintenance employees followed the necessary safety belt procedures.[10]

In *Capital Electric*, the Tenth Circuit held that if an employer has effective workrules that are effectively communicated and enforced, it would be unreasonable to require a supervisor to always watch experienced, knowledgeable employees to make sure that they always take the appropriate safety precautions. This situation is quite different from the one in *Capital Electric*, however. Here, there was no effective workrule, or communication or enforcement of the rule. Nor is there evidence that Hackney made an affirmative effort at any time to check on the maintenance employees' compliance with safety belt requirements while working on the crane and trolley, even though the work was done regularly at its own plant. "[E]mployers are required to provide to all their employees, experienced and inexperienced alike, the protection that occupational safety and health standards are designed to accord to them." *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1640, 1991-93 CCH OSHD ¶ 29,689, p. 40,258 (No. 88-2012, 1992) (quoting *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1299, 1977-78 CCH OSHD ¶ 22,481, p. 27,101 (No. 14249, 1978)), *aff'd*, No. 92-70540 (9th Cir. March 23, 1994).

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[9]As Hackney notes, it had safety belts on the jobsite, and had pointed them out to Carraway when he was hired (about two years before the inspection). On the other hand, contrary to Hackney's assertions, the evidence does not show that McGee had been told about their availability, or that Hackney made sure that either employee knew when and how to use safety belts.

[10]There was testimony that it was sometimes difficult to determine from the ground whether safety belts were being used. However, there was no indication that alternative ways of checking on compliance would have been futile, such as climbing the ladder occasionally, and/or asking the employees if they used the safety belts. Certainly, the lack of specificity in Hackney's workrule made it all the more important that the company check regularly to make sure that employees were complying with it.

For the reasons stated above, we find that the Secretary affirmatively proved that Hackney could have known of the violative conditions with the exercise of reasonable diligence. Thus, the Secretary has proved all the elements of a violation.

**3. Classification and Penalty**

As did the judge, we find a substantial probability that a 33-foot fall would result in serious injury. *See* 29 U.S.C. § 666(k). The judge assessed the Secretary's proposed penalty of $3,250, and Hackney does not specifically dispute the penalty amount. We find the judge's assessment was appropriate. The gravity of the violative conditions was high, not only because of the likely injuries, but also because the work was performed regularly. Hackney showed good faith. For example, it installed a cable tie-off system for safety belts to abate the hazards. Thus, the Secretary's proposed 25 percent penalty reduction for good faith is appropriate. Hackney was given a further 10 percent reduction based on its history of violations, although no reduction was given for size (it had an estimated 200 or more employees). The penalty factors set forth in 29 U.S.C. § 666(j) were properly considered here.

Thus, we affirm the judge's finding of a serious violation of 29 C.F.R. § 1910.132(a) and his penalty assessment of $3,250.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: June 9, 1994

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | Docket No. 91-2490 |
| HACKNEY, INC., | : | |
| Respondent. | : | |

## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on June 9, 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

June 9, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2490

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SECRETARY OF LABOR
Complainant,
v.
HACKNEY, INC.
Respondent.

OSHRC DOCKET
NO. 91-2490

# 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 January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 1993 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 3, 1993 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: January 14, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2490

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| SECRETARY OF LABOR,<br>Complainant, | : | |
| v. | : | OSHRC Docket No.: 91-2490 |
| HACKNEY, INC., DIVISION OF TRINITY INDUSTRIES,<br>Respondent. | : | |

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U. S. Department of Labor
Birmingham, Alabama
For Complainant

Robert E. Rader, Jr., Esquire
Rader, Smith, Campbell and Fisher
Dallas, Texas
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

## DECISION AND ORDER

Respondent operates a manufacturing plant in Ackerman, Mississippi, where it employs several hundred workers in the production of carbon steel flanges for shipment in interstate commerce[1] (Tr. 16). As a result of a complaint alleging employees were performing maintenance work on an overhead bridge crane without fall protection, compliance officer Dennis Butler conducted an inspection of respondent's plant on August 6,

[1] Although respondent denied the jurisdictional allegations of the Secretary's complainant in its answer, this appears to be a wholly disingenuous defense (See Exh. C-1). Respondent did not pursue this defense at the hearing or in its post-hearing brief and is obviously an employer "engaged in a business affecting commerce."

1991, under the provisions of the Occupational Safety and Health Act (29 U.S.C. 651, *et seq.*).

On August 16, 1991, the Secretary of Labor issued to respondent a serious citation charging it with a violation of 29 C.F.R. § 1910.23(c)(1) for failure to guard the open sides of a bridge crane with standard railings and a violation of 29 C.F.R. § 1910.27(d)(2)(ii) for its failure to provide standard railings around a landing platform near the top of a 33 foot ladder. The Secretary proposed a total penalty of $4,875.00 for these alleged infractions of the cited standards.

On October 23, 1991, the Secretary filed her complaint in this matter and on November 8, 1991, before respondent had filed its answer, moved to amend Item No. 1 of the citation to charge a violation of § 1910.132(a) in lieu of § 1910.23. On February 26, 1992, respondent filed a motion opposing the Secretary's amendment but the amendment was allowed by this court's order dated March 2, 1992. The case was heard on June 16, 1992, in Jackson, Mississippi, and is now ready for decision.

Serious Citation No. 1, Item 1

This item charges respondent with a failure to provide its maintenance employees with appropriate fall protection while working on an overhead crane in contravention of 29 C.F.R. § 1910.132(a). The cited standard provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Respondent argues that the cited standard applies solely to equipment designed to protect employees from hazardous substances and has no application to the circumstances which form the basis for the Secretary's charge *i.e.* the use of safety belts to protect against falls. In its post-hearing brief (pgs. 1-5) respondent tracks the judicial history of the standard and correctly notes that during the first twelve years of the Act's existence Review Commission judges consistently held that the standard did not encompass the use of safety

belts to afford fall protection. Respondent recognizes, however, that this construction was overturned by the Commission in *Bethlehem Steel Corporation,* 10 BNA OSHC 1470, 1982 CCH OSHD ¶ 25,982 (No. 79-310, 1982). The prevailing view is that the cited standard applies to the use of safety belts in those situations where the evidence reflects "a reasonably prudent employer, concerned about the safety of employees . . ., would recognize the existence of a hazardous condition" and require the use of appropriate fall protection. *Trinity Industries, Inc.,* ___ BNA OSHC ___, 1992 CCH OSHD ¶ 29,582 at 40,035 (No. 88-2691, 1992). Accordingly, respondent's argument that the cited standard does not apply in this case is rejected.

This item centers upon the activities of respondent's maintenance workers during the six month period immediately preceding the Secretary's inspection. These employees are journeyman electricians and their duties include *inter alia* the regular repair and maintenance of respondent's overhead bridge crane and trolley which are mounted on rails located approximately 30 feet above ground level (Tr. 74; Exh. C-4). Except for the bridge "catwalk" which was protected by standard railings, the work areas on top of the crane and trolley used by the maintenance men were not equipped with any form of fall protection and employees working in these areas were subject to falls which could cause serious injury or death.

Respondent does not dispute the fact that fall protection was needed by the maintenance employees while working on some areas of the crane or trolley. Respondent's counsel so stipulated during the course of the hearing (Tr. 136). This circumstance was also conceded in the testimony of James Crick, respondent's plant engineer (Tr. 139).

Two of respondent's maintenance men were called by the Secretary as witnesses and gave testimony concerning duties they performed without the use of safety belts while on unprotected areas of the crane or trolley.

Thomas Carraway, a maintenance employee for approximately two years at the time of the hearing, recalled an incident in April or May, 1991, when he and two other employees were working on top of the trolley replacing cables (Tr. 69, 72). None of these employees wore safety belts during the performance of this work (Tr. 73) even though they were exposed to a fall of "30 - something feet" (Tr. 74). The danger of a fall was increased due

to the presence of grease on "some parts" of the area where the work was performed (Tr. 77). He also recalled a second incident "a few days prior to the OSHA inspection" when he and David McGee were working on the crane without safety belts during inclement weather at a height of 30 feet and received an electrical shock (Tr. 80-85). In addition to the incidents just described, Carraway testified he regularly and frequently worked on the crane without wearing a safety belt (Tr. 86, 87) and that respondent's management personnel had "definitely" seen him on these occasions (Tr. 89). He acknowledged that when he first started his job with respondent, his foreman "showed me where the safety belt was and told me that it was there if I needed it" [2] but he was not told "specifically" when to wear a belt (Tr. 88) nor was he or anyone else working on the crane ever reprimanded by respondent's management personnel for not wearing safety belts. (Tr. 90). He further testified the subject of wearing safety belts was never brought up at the company's monthly safety meeting prior to the Secretary's inspection "but we've had plenty of them since" (Tr. 110). Carraway's demeanor as a witness was carefully observed by the court. He gave straight-forward answers to the questions posed with no suggestion of any intention to slant his testimony in either direction. In the opinion of the court he was a credible witness and his testimony is entitled to full weight.

David E. McGee, who has worked as a maintenance man for respondent for six years, corroborated Carraway's testimony concerning the fact that maintenance personnel worked on top of the crane and trolley without fall protection.[3] It was his testimony that, prior to the Secretary's inspection, he had never worn a safety belt nor had he seen any belts at the job site. Even though he believed all of his foremen had seen him performing work in unprotected areas on the crane without a belt, he had never been told to wear one nor had

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[2] The fact that respondent had two safety belts available at the worksite is not in serious dispute. Although David McGee testified he had never seen a belt on the job *infra* the weight of the credible evidence confirms their existence (Tr. 88, 102, 140, 142, 164, 168).

[3] Respondent attempted to discredit McGee's testimony through its plant manager, Gerald Nelson, who testified McGee was a "troublesome employee" who was "unhappy in his job" (Tr. 159, 160). The court observed nothing in McGee's demeanor while testifying which would reflect upon his credibility. McGee's testimony, except as it related to the existence of safety belts, paralleled that of Carraway on the crucial issues in the case and is given full weight in this regard.

he been reprimanded for his failure to do so (Tr. 116, 117). It was his opinion that belts and lanyards should be worn while working on top of the crane or trolley to protect against falls (Tr. 122) and that the use of such devices was feasible (Tr. 118, 119).

In response to the Secretary's charges, respondent attempts to establish through the testimony of James Crick, its plant engineer, and Gerald Nelson, its plant manager, that the maintenance employees never worked on unprotected areas of the crane without fall protection or, if they did, this circumstance went undetected by respondent's supervisory personnel. Respondent's counsel, in his direct examination of these witnesses, did not develop just how either Crick or Nelson would have the opportunity to observe the activities of the maintenance employees during the performance of their duties. Both Carraway and McGee emphatically testified they worked without belts on the unprotected areas of the crane and that this circumstance was observe by respondent's foremen. Curiously, respondent called no foremen as witnesses in the case even though these individuals were the first line supervisors of the maintenance employees, had the best opportunity to observe their activities and were specifically identified by Carraway and McGee as having seen them perform work on the crane without belts. At best, the testimony of Crick and Nelson establishes only that they had no personal knowledge of the violative condition and does not preclude the existence of such knowledge by respondent's foremen which knowledge is imputable to the corporate respondent. *A.P.O'Horo Co.,* 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223, (No. 85-369, 1991). In short, the testimony of respondent's witnesses is wholly insufficient to overcome the more specific testimony of Carraway and McGee. It is concluded, therefore, that respondent's maintenance employees regularly worked on unprotected areas of the crane or trolley without safety belts thereby exposing these employees to potential falls in excess of 30 feet. It is further found that this circumstance was observed by respondent's foremen who allowed the practice to continue throughout the six-month period immediately preceding the Secretary's inspection.

In the alternative, respondent raises a defense of "unpreventable employee misconduct".[4] To establish this affirmative defense an employer must show "that it had established a work rule designed to prevent the violation, adequately communicated those work rules to its employees (including supervisors), taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated." *Pride Oil Well Service,* 15 BNA OSHC 1809 at 1816, 1992 CCH OSHD ¶ 29,807 at 40,585 (No. 87-692, 1992).

To establish the work rule requirement for this defense respondent offered into evidence its Employee Safety Manual (Exh. R-1). Rule 3 on page 1 of this document provides "use personal protective equipment and observe safeguards as required." The document reviewed in its entirety makes no mention of safety belts or the need to use belts as a means of providing fall protection when working at elevations. Such a general, non-specific rule utterly fails to qualify as a "rule designed to prevent the violation."

Respondent's evidence also fails to establish that it effectively communicated to its maintenance employees the need to wear belts when working on unprotected areas of the crane and trolley. Crick testified such instructions were not "personally" conveyed by him but were "informally" communicated to the maintenance employees through their "individual foremen" (Tr. 141, 147). On cross-examination, Crick admitted he did not know for "certain" that employees were informed of this policy (Tr. 147, 148). Nelson was equally vague with respect to the communication of the alleged policy suggesting only that the subject may have been raised by respondent's foremen at safety meetings but admitting that he did not attend these meetings and had no personal knowledge of what was discussed (Tr. 164, 165). As previously noted, none of respondent's foremen were called as witnesses to verify or amplify the inconclusive statements of respondent's witnesses. Upon full consideration of the evidence the court finds the testimony of Crick and Nelson is insufficient to overcome that of Carraway and McGee and concludes whatever policy, if any,

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[4] In its answer to the complaint respondent also raised the defenses of "infeasibility" and "greater hazard" but abandoned these defenses in its response to the Secretary's second set of interrogatories (See Exh. C-3) and did not pursue these defenses at the hearing or in its post-hearing brief.

respondent may have had concerning the use of fall protection devices this policy was not communicated to its maintenance employees.

In similar fashion, respondent has failed to establish the alleged policy was effectively enforced. Both Carraway and McGee testified they were not disciplined for their failure to wear belts nor had they witnessed the reprimand of any other employee for infractions of safety rules. Respondent offered no evidence of its own to establish that it had an enforcement program to insure that its safety rules were followed by its employees. The only evidence dealing with this aspect of respondent's case was raised in the court's examination of Crick who testified if he observed a safety infraction he would speak to the involved employee and get the situation corrected (Tr. 152). He could recall only two instances in a twenty-six year period when such action was necessary on his part (Tr. 153) and could recall no occasions when an employe had been disciplined "for failure to wear a safety belt" (Tr. 154).

Based upon the foregoing the court concludes respondent has not established a defense of "unpreventable employee misconduct" since the evidence does not support a finding that respondent had a clearly defined work rule prohibiting the proscribed practice or that it effectively communicated and enforced the rule.

Serious Citation No. 1, Item 2

This item charges respondent with a violation of 29 C.F.R. § 1910.27(d)(2)(ii), which provides:

> All landing platforms shall be equipped with standard railings and toeboards, so arranged as to give safe access to the ladder.

A "standard railing" is defined at 29 C.F.R. § 1910.27(e)(5) as "(A) vertical barrier[5] erected along exposed edges . . . of platforms . . . to prevent falls of persons."

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[5] Respondent did not challenge the application of the cited standard during the hearing or in its post-hearing brief. Unlike the definition of "standard railing" contained in the Construction Standards (29 C.F.R. § 1926.500), the cited standard refers to a "vertical barrier" rather than to a "midrail." The term "vertical barrier" is not further defined in the cited standard and, so far as the court can determine, has not been construed by the Review Commission or its judges. The term "barrier" is defined as "a fence, wall or other structure built to bar passage." *American Heritage Dictionary* (Second College Edition). Under this definition it is quite clear that the circumstances described in the testimony of C. O. Butler *infra* would not constitute a "vertical barrier" to prevent falls.

This charge is based upon the testimony of compliance officer Butler that he observed a landing platform near the top of a permanent ladder which was equipped with a standard top rail around its perimeter but had no midrail (Tr. 45). The landing was located approximately 30 to 33 feet above ground level and it was Butler's opinion that an employee using the landing would be exposed to a fall hazard since "you can step right through between the top rail and the platform itself" *(id)*.

The Secretary offered into evidence a photograph taken by Butler from ground level which purports to show the condition which existed on the platform in question (Exh. C-5). The Court has examined this photograph using a magnifying glass and, while the photograph is of poor quality, it does appear to support a conclusion that there was no midrail or any other means of protecting an employee from slipping between the top rail and the floor of the platform.

Respondent offered no evidence of its own to counter the testimony of Butler. Neither Crick nor Nelson gave any testimony concerning this condition. The only other witness who addressed the conditions was Carraway who testified he had used the platform "many times"[6] but had "never noticed" a missing midrail (Tr. 78, 79). Since Butler's testimony was not directly refuted and is supported by the photograph it is concluded the platform was not adequately guarded to prevent falls and this circumstance violates the cited standard.

The Penalty

The Secretary has established the violations set forth in Items 1 and 2 of Citation No. 1 were serious in nature since the potential consequences of non-compliance could result in serious injury or death. The Court has considered the elements set forth in Section 17(J) of the Act (size, gravity, good faith and history) and concludes the Secretary's proposed penalties are appropriate.

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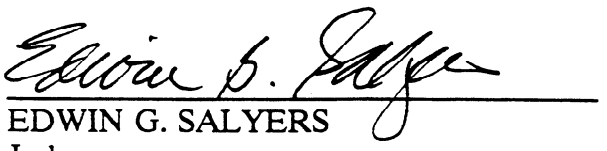
[6] Respondent argues in its brief that the Secretary failed to establish exposure to this hazard. Carraway's testimony, together with the fact that the ladder and landing were regularly used by respondent's employees, puts this argument to rest. It further appears that the knowledge requirement is satisfied since the condition was in "plain view."

It is hereby ORDERED:

1. Serious Citation No. 1, Item 1, is affirmed and a penalty of $3,250.00 is assessed; and

2. Serious Citation No. 1, Item 2, is affirmed and a penalty of $1,625.00 is assessed.



EDWIN G. SALYERS
Judge

Date: January 5, 1993