UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. NOOTER CONSTRUCTION CO., Respondent.	OSHRC Docket No. 91-237

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

Nooter Construction Company, a heavy construction company specializing in petrochemical and power plant construction and the erection of pressure vessels, was building four new coke drums at a refinery in New Jersey. The site was inspected between September 18 and October 11, 1990 as part of an Occupational Safety and Health Administration ("OSHA") national emphasis program on the petrochemical industry. Following the inspection, OSHA cited Nooter for violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), for its alleged failure to comply with standards governing compressed gas cylinders, ladders, and scaffolding. The judge vacated the cylinder and guardrail violations but affirmed the ladder violation. He assessed a total penalty of $590 ($490 for the ladder violation and $100 for a violation not on review). Both the Secretary of Labor and Nooter petitioned for review of the judge's decision. Review was directed on the following issues:

> (1) Whether the judge erred in finding that the employer *was not* in violation of 29 C.F.R. § 1926.350(a)(7) for failure to provide a "suitable cylinder truck, chain or other steadying device;"

(2) Whether the judge erred in finding that the employer *was* in violation of 29 C.F.R. § 1926.450(a)(5) for failure to provide an appropriate ladder extension; and

(3) Whether the judge erred in finding that the employer *was not* in violation of 29 C.F.R. § 1926.451(a)(4) because the evidence supported that it had established an unpreventable employee misconduct defense.

I. Cylinder Item

The evidence establishes that two cylinders at the worksite were standing upright in a "cylinder truck," a cart especially designed to hold compressed gas cylinders. The Secretary alleged that Nooter had failed to comply with section 1926.350(a)(7)[1] because a chain attached at one corner of the truck was dangling, unfastened to the opposite side, leaving the truck open at one end. The judge vacated the item. He found that the standard "requires compliance with only one of the three devices: a suitable cylinder truck *or* a chain *or* another steadying device," not simultaneous use of both a truck and a chain.

Parties' Arguments

The Secretary emphasizes that the standard requires a "*suitable* cylinder truck, chain or other steadying device . . . to keep cylinders from being knocked over while in use" (emphasis added), and argues that as used by Nooter, the truck was not "suitable" because it failed to prevent the cylinders from being knocked down. The compliance officer, Louis Cugno, testified that cylinder trucks are designed and manufactured with a strap or chain for securing the cylinders inside the truck. The Secretary maintains that the three sides of the truck alone might have prevented the cylinders from falling backwards or sideways, but the danger contemplated by the standard was still present because there was no strap or chain across the open end. The Secretary argues that Nooter failed to show that the truck

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[1]The standard provides:

§ 1926.350 Gas welding and cutting.

(a) *Transporting, moving, and storing compressed gas cylinders.*

. . . .

(7) A suitable cylinder truck, chain, or other steadying device shall be used to keep cylinders from being knocked over while in use.

was being used as intended, rendering its use improper and inadequate to protect against the hazard. He points to testimony by Benny Butler, a supervisor for the last twelve of his twenty-one years with the company, that it is Nooter's "normal practice" to have the chains around the tanks, not hanging down unfastened, and that had a foreman seen someone leaving a chain unfastened, he would have warned the individual and hooked the chain across himself. Nooter argues that the judge, who vacated the citation item, properly construed the standard.

In addition to disputing the practical issue of whether the three-sided truck sufficiently secured the cylinders, the parties differ on whether the Secretary's position constitutes an "interpretation" of the standard. The Secretary claims that since the meaning of the standard is clear, no administrative interpretation is needed. "If one were necessary, however, the position taken by the Secretary is reasonable and entitled to deference," the Secretary adds, citing *Lyng v. Payne*, 476 U.S. 926, 939 (1986) (cited in *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991) ("*CF&I*"). Nooter contends, to the contrary, that "ever since [*CF&I*], the Secretary has resorted to reading otherwise specific and clear regulatory language in ways that grammar school teachers would find bewildering, all in the name of 'administrative interpretation.'" Nooter claims that since even *with* the chain or strap fastened, an entire cylinder truck could itself be toppled over, thus frustrating the purpose of the standard, the Secretary's interpretation is unreasonable and not entitled to deference. To construe the word "suitable" as requiring a truck to have a strap or chain fastened across its open end, is, in Nooter's view, a "wholesale change in the requirements of the standard contrary to its plain language" calling for full rulemaking proceedings under the Administrative Procedure Act, 5 U.S.C. § 551-559 ("the APA").

Discussion

We do not agree with the Secretary's argument that the meaning of the standard is clear and that administrative interpretation is therefore unnecessary. In our opinion, both the syntax of the standard and the term "suitable" raise ambiguities. The judge and Nooter both construed the disjunctive structure of the standard to require either a "truck" or a

"chain," but not both. In doing so, neither the judge nor Nooter considered the operative effect of the adjective "suitable."

Under the well known principles enunciated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984), we first examine the language of the standard and then, if necessary, the available legislative history, to determine the standard's meaning. If no determination can be reached, we then inquire whether the Secretary's interpretation is "reasonable," that is, whether it "sensibly conforms to the purpose and wording of the regulations," *Northern Indiana Pub. Serv. Co. v. Porter Co. Chap. of Izaak Walton League, Inc.*, 423 U.S. 12, 15 (1975) (cited in *CF&I*, 499 U.S. at 151). *See Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03 (No. 89-1555, 1993), citing *Securities Indus. Assoc. v. Federal Reserve System*, 847 F.2d 890 (D.C.Cir. 1988). In this case, the text and structure of the standard do not make the meaning plain, and there is no pertinent legislative history, as the standard was adopted from section 107 of the Contract Work Hours and Safety Standards Act ("Construction Safety Act"), 40 U.S.C. § 333, pursuant to section 6(a) of the OSH Act, 29 U.S.C. § 655(a). We must therefore consider whether the Secretary's interpretation -- that a truck, chain, or other device is "suitable" only if it keeps the cylinders from being knocked over in any direction -- is a reasonable interpretation of the standard that is consistent with the purposes of the OSH Act.

We find the Secretary's interpretation is not unreasonable. The cylinder truck here was equipped with a chain to guard its open side. The record indicates that the chain was not fastened, thereby rendering the truck unsuitable for the statutory purpose, namely, "to keep cylinders from being knocked over while in use." Nooter failed to rebut this showing. *See Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1992 CCH OSHD ¶ 29,662 (No. 88-1545, 1992) (consolidated).[2]

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[2]Nooter asserts that the Secretary's interpretation represents a "wholesale change in the requirements of the standard contrary to its plain language" subject to APA rulemaking procedures. The cases Nooter cites in support of this characterization are, however, inapposite. *In Budd Co.*, 1 BNA OSHC 1548, 1555, 1973-74 CCH OSHD ¶ 17,387, p. 21,919 (No. 199, 1974) (consolidated), *aff'd*, 513 F.2d 201 (3d Cir. 1975), the *dissent* argued that the Secretary's interpretation of the expression "valve end up" as meaning "vertical" would require APA rulemaking procedures to be enforced. In *Chamber of Commerce of the United States v. OSHA*, 656 F.2d 464 (D.C. Cir. 1980), the court held that the Secretary's new "interpretive rule and general statement of policy" that employees are to be paid for time spent accompanying an inspector on a walkaround was a legislative rule requiring an APA notice-and-comment period.

Finally, Nooter's argument that even a truck considered "suitable" by the Secretary could tip over if it were hit hard does not affect our result. We are not charged with assessing the wisdom of the standard. *Budd Co.*, 1 BNA OSHC 1548, 1973-74 CCH OSHD ¶ 17,383 (No. 199, 1974) (consolidated), *aff'd on other grounds*, 513 F.2d 201 (3d. Cir. 1975).

We therefore conclude that the evidence supports finding a violation of the standard. The compliance officer testified that damage to the valves on impact could cause the cylinders to become dangerous projectiles which could strike employees. Serious injury or death could result. The Secretary proposed a penalty of $280. That figure originally included another subitem which was abandoned by the Secretary. Following our review of the penalty factors outlined in section 17(j) of the Act, 29 U.S.C. § 666(j), we assess a $140 penalty for this serious violation.

II. Ladder Item

This item involved an employee who climbed a fixed ladder up to the fourth level of scaffolding where the top of the ladder ended flush with the top of a guardrail. In other words, the last two rungs of the ladder were actually the two rails of the guardrail. When the employee reached the top, he vaulted over the guardrail to the floor approximately 3½ feet below. The Secretary cited Nooter for a violation of the ladder specification standard at section 1926.450(a)(5)[3] because the ladder's side rails did not extend 3½ feet beyond the top of the guardrail.

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[3]At the time of the inspection, the cited standard provided:

> **§ 1926.450 Ladders.**
>
> (a) *General requirements.*
>
> . . . .
>
> (5) Fixed ladders shall be in accordance with the provisions of the American National Standards Institute, A14.3-1956, Safety Code for Fixed Ladders.

As the Secretary notes in his brief, at the time of the inspection, Section 6.3 of the pertinent ANSI standard stated in part: "The side rails of through or side-step ladder extensions shall extend 3½ feet above parapets and landings. For through ladder extensions, the rungs shall be omitted from the extensions." We note that section 1926.450(a)(9) of the OSHA standard itself provided: "The side rails shall extend not less than 36 inches above the landing. When this is not practical, grab rails, which provide a secure grip for an employee moving to or from the point of access, shall be installed." The Secretary adds that as amended in 1990 and renumbered as 29 C.F.R. § 1926.1053(a)(24), the OSHA standard now provides in part: "The side rails of through or side-step fixed ladders shall extend 42 inches (1.1 m) above the top of the access level or landing platform served by the ladder."

The judge, implicitly finding that there was an underlying physical violation of the ladder standard, concluded that Nooter failed to establish the affirmative defense of unpreventable employee misconduct. He found that Nooter did not adequately communicate to its employees rules designed to prevent them from using the ladder in this manner. In affirming the citation item and assessing a $490 penalty, the judge suggested that Nooter could at least have posted a warning sign on the ladder advising employees to climb no higher.

Parties' Arguments

Nooter contends that there was no violation of the standard because the ladder extended well beyond the landing of the third level, the level intended to be serviced by that ladder. Nooter argues that other ladders were available for access to the fourth and higher levels and that there was, in any event, sufficient extension above the *fourth*-level *landing* to satisfy the standard. Nooter also claims that because of the feasibility problems involved in blocking off access to the fourth level, there was no violation if the employee could use the guardrail as a "grab rail." Nooter claims that this alternative is specifically authorized by the standard.[4] Nooter's witness, Butler, testified that under the cited circumstance an employee would not have to jump down to the platform, but could climb down the ladder on the reverse side, and that this could be a safe practice if the "ladder goes up to the point where they've still got something to hold onto the ladder while they step over the handrail."

Nooter argues, in the alternative, that it has proved that any violation was due to unpreventable employee misconduct. Nooter introduced evidence that upon being hired, the employee involved in the alleged violation certified that he had read Nooter's work rules and safety regulations and that throughout the course of the job, the employee had attended weekly safety meetings. Nooter contends that "[t]his is not a situation where the employer relies totally on the employee's realization of 'obviously' unsafe work practices," as the employer did in *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1992 CCH OSHD

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[4]Nooter apparently relies on terms found in section 1926.450(a)(9). *See supra* note 3. Nooter appears to believe that the Secretary inadvertently cited section 1926.450(a)(5), intending to cite section 1926.450(a)(9). Nooter does not argue inapplicability or preemption of the cited standard as a defense, and seems to consider the Secretary's selection a typographical error or other oversight. We conclude that Nooter has not provided us with a basis for questioning the Secretary's choice.

¶ 29,902, p. 40,811 (No. 90-2668, 1992) (rejecting company's argument that dangers of rising water in sewers when it rains were obvious to any reasonable employee and a matter of "common sense," noting erroneous placement of burden on employees); or *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619, 1992 CCH OSHD ¶ 29,681 (No. 90-2019, 1992) (rejecting company's reliance on employees' recognition of trench hazard). There is no showing, according to Nooter, that it breached its duty to provide such training as would a reasonably prudent employer.

The Secretary observes that the applicable ANSI standard (*see supra* note 3) requires a ladder's side rails to extend above "parapets and landings." In this case, according to the Secretary, the fourth level might be considered a "landing," except that the guardrail is essentially the equivalent of a parapet[5]; the extension is to be *beyond* the top of this "parapet," not level with it. The Secretary notes in his reply brief that Nooter's own witness testified that "the ladder's got to be up above the handrail."

Discussion

There is no dispute that the ladder was sufficiently extended for safe access to the landing on the *third* level. At issue is whether the ladder was sufficiently extended for safe access to the *fourth* level where the employee was observed.

We find that it was not. The guardrail served as a parapet protecting the fourth-level scaffold, with what would technically be the "landing" or floor approximately 3½ feet beneath the top of the parapet. The standard requires the side rails to extend beyond the top of such parapets, not to end flush with the uppermost surface of the parapet, as was the case here. Moreover, even if the guardrail were not characterized as a parapet, and we were to focus solely on Nooter's contention that the side rails extended above the "landing" or floor of the fourth level, Section 6.4 of the ANSI standard requires the rungs to be omitted from the extension. They were not.[6] Thus we conclude that the ladder failed to

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[5]Although neither section 1926.450 nor the ANSI standard incorporated by reference offers a definition of the term "parapet," we note that "parapet" is defined as "2: a low wall or *railing* to protect the edge of a platform, roof, or bridge." *Webster's Seventh New Collegiate Dictionary* 611 (19th ed. 1971). (Emphasis added).

[6]Rungs were removed to create the through ladder extension on the third floor, however.

meet the requirements of the standard. It is also clear that Nooter knew or with the exercise of reasonable diligence could have known of the condition of the ladder.[7]

This leaves the question of whether Nooter's employees had access to the ladder. Nooter contends in its brief and the judge found that the fourth level was not being used at the time of the inspection. However, we could not find testimony or other evidence to that effect. The only testimony on point was the compliance officer's statement that "people [were] working on it, yes, at all levels." However, even if the fourth level were not a focus of construction activity on the day of the inspection, the Secretary need only prove that employees have access to an area of potential danger, as was the case here. *See Adams Steel Erec., Inc.*, 766 F.2d 804, 812 (3d Cir. 1985). There is evidence that Nooter did not intend the fourth level to be serviced by the ladder in question since at least one other ladder provided access to the upper levels. There is no indication in the record, however, that Nooter relayed this intention to its employees. As Nooter's supervisor, Butler, testified, the ladder "actually gave the employees an opportunity to come right up to the top and crawl over the [fourth-level guardrail], which was not the intent of that ladder, because [they were to get off at the third level]." Not only were employees more or less free to use the ladder in this way, but one was actually observed doing so.

Nooter argues that this employee exposure at the fourth level was the result of unpreventable employee misconduct.[8] Nooter claims that it introduced "extensive evidence" that the offending employee had been properly instructed and trained in ladder usage. However, we find, as did the judge, that no workrule or other instruction pertaining to the type of violation at issue was communicated, either verbally or in writing. There is a rule in the Nooter "Health and Safety Manual" that provides, in the section on Ladders: "The side rails shall extend not less than 36 inches above the landing. When this is not practical,

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[7]The Secretary, who acknowledges that the Commission has held that the Secretary bears an initial burden to show employer knowledge, continues to argue that while employer knowledge is relevant to characterization of a violation, it is not an element of the Secretary's prima facie case. The Commission continues to hold that the Secretary bears the burden of establishing employer knowledge.

[8]The Third Circuit, to which this case may be appealed, has held that the burden is on the Secretary to show how the employer could have foreseen and prevented the employee misconduct. *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984) ("*PP&L*"). The result would not differ under this test.

grab rails, which provide a secure grip for an employee moving to or from the point of access, shall be installed." This manual is used only by supervisors, however, and is not generally given to employees as a training aid. Nooter also relies on our recent decision in *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1993 CCH OSHD ¶ 30,231 (No. 90-1106, 1993), but we conclude that it does not help Nooter here, because Nooter failed to introduce any evidence that it instructed its employees about the violative condition at issue in this case.

Nooter did not dispute the characterization of a fall from the fourth level as likely to result in serious injury, nor did Nooter challenge the amount of the proposed penalty. In affirming this serious violation, we have considered the penalty factors in section 17(j) of the Act, 29 U.S.C. § 666(j), and find the penalty of $490 proposed by OSHA and assessed by the judge to be appropriate.

III. Guardrail Item

At the time of the inspection, a proper standard guardrail had been installed at the perimeter of the ninth-level scaffolding. Blocks of insulation were being transported from the ground by a rope-and-pulley mechanism. During this operation, an employee on the ninth level stepped outside the standard guardrail onto a cantilevered landing platform which extended out from the scaffolding. This platform measured 4 feet by 8 feet and was unguarded on its three open sides. From this thrust-out platform, the employee reached out to grab the hoisting rope as the blocks of insulation were delivered. Nooter was cited for a violation of the platform guarding standard at section 1926.451(a)(4)[9] for exposing employees to a 72-foot fall to the ground while receiving materials from the open side of the platform attached to the sectional scaffold. The judge vacated the citation item, finding that the employer established the unpreventable employee misconduct defense by showing that

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[9]The standard provides:

> **§ 1926.451 Scaffolding.**
>
> (a) *General requirements.*
>
> . . . .
>
> (4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor. . . .

the employee unexpectedly and unforeseeably stepped outside the work area contrary to his orders and safety training.

Parties' Arguments

The parties focus not on lack of guarding around the smaller, thrust-out landing platform, but on the instruction given to the employee who stepped out onto it without protection of any kind. Nooter claims that the hazardous condition was the result of unpreventable employee misconduct. The company emphasizes that it was only the offending employee's second day on the job and that he had attended the orientation session where he received instruction concerning fall protection when working from elevated surfaces. According to Nooter, employees were taught that tied-off safety belts are required when working from incomplete scaffolds or temporary work locations not constructed for normal employee work activities. Nooter further contends that the employee observed by the compliance officer was not required to climb over the railing to do his job. Nooter adds that Superintendent Butler's vigilant supervision and visual policing of the operation, as well as the prompt discipline administered following this incident, show that Nooter established all the elements of the unpreventable employee misconduct defense.

The Secretary, arguing that Nooter failed to establish the defense, counters that the only instruction the newly hired employee received was in the form of a booklet containing sixteen "General Safety Regulations," one of which provides that "[s]afety belts and tail lines are required where approved fixed scaffolds or ladders are not provided."[10] He claims that this written rule, along with similar oral warnings along the same lines at the orientation, suffers from the "defects of generality and incompleteness." The Secretary criticizes Nooter for failing to explain what "approved" means and expresses his concern that Nooter's oral orientation covering the "do's and don'ts of how to properly use the scaffolding" was of the same caliber as its safety booklet. Finally, the Secretary notes that the Commission has found that a prudent employer will make an effort to assure that instructions are both

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[10]The Secretary supports this argument by asserting that although the supervisor's safety manual contains a rule -- requiring belts "when [w]orking from completed scaffold/decking where employees may be required to place themselves outside the protected area" -- that is seemingly more on point than the rule Nooter relies on, this manual is never given to new employees. The Secretary asserts further that the newly hired employee would not yet have attended any weekly safety meetings and that there was no evidence that the employee had been instructed in the specific manner in which Nooter intended the work to be done.

understandable and understood, citing *Pressure Concrete*, 15 BNA OSHC at 2017, 1992 CCH OSHD at p. 40,812. He compares the rule in this case to the one in *Concrete Construction* forbidding employees to enter an excavation that is not "laid-back" or the one in *Bechtel Power Corp.*, 10 BNA OSHC 2003, 2008, 1982 CCH OSHD ¶ 26,261, p. 33,172 (No. 77-3222, 1982), requiring use of "appropriate" ladders.

Discussion

In order to establish the affirmative defense of unpreventable employee misconduct under Commission case law, an employer bears the burden of proving (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered. *See Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979).

The evidence establishes that employees were not required to go outside the scaffolding guardrail to carry out the insulation operation. The supervisor, Butler, who was with the compliance officer when he observed the employee on the unguarded landing platform, testified that his crew had been lifting the insulation for two to three weeks and that the operation did not require anyone to go outside the main scaffold guardrail and, up to this time, no one had.

Although they have a duty to promote compliance among their employees, employers are not held strictly liable for the acts of their employees. *See PP&L*, 737 F.2d at 354. The one documented work rule the parties in this case agree may be relevant provides that "safety belts and tail lines are required where approved fixed scaffolds or ladders are not provided." The Secretary claims that an employee could reasonably believe that since the cantilevered platforms were deliberately left unguarded, they constituted "approved" places to work without a safety belt. However, even if the "psychological barrier" embodied in the safety belt workrule was fairly general, we believe that the guardrail on the main scaffold served as a physical barrier, alerting employees that the landing platform beyond the rail was not intended as a working space.

Thus, although we agree with the Secretary that the wording of the rule might have been clearer, we find that the company's workrule was designed to prevent the violation at

issue in this case.[11] The evidence that the rule was effectively communicated and enforced was unrebutted by the Secretary. *See Texland Drilling Corp.*, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980); *Floyd S. Pike Elec. Contrac., Inc.*, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978). The result is the same under the Third Circuit's test in *PP&L*. The Secretary failed to prove that the employee's actions were foreseeable. The citation is vacated.

IV. Order

Accordingly, we find as follows:

(1) The judge erred in vacating the cylinder item, Citation 1, item 2, a serious violation of section 1926.350(a)(7). That citation is affirmed and a penalty of $140 is assessed.

(2) The judge did not err in affirming the ladder item, Citation 1, item 4, a serious violation of section 1926.450(a)(5). That citation is affirmed and a penalty of $490 is assessed.

(3) The judge did not err in vacating the guardrail item, Citation 1, item 5, a serious violation of section 1926.451(a)(4). That citation is vacated.

The total assessed penalty, attributable to the items on review, is $630.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: January 31, 1994

[11]That the offending employee had only been on the job for a couple of days, implying that he was inexperienced and unfamiliar with the operation, does not weigh in Nooter's favor. To the contrary, the Commission has expressed a special concern that new hires be made aware of hazards on the job. *See, e.g., Pressure Concrete*, 15 BNA OSHC at 2016, 1992 CCH OSHD at p. 40,811; *General Dynamics Corp.*, 6 BNA OSHC 1753, 1758, 1978 CCH OSHD ¶ 27,663, p. 22,873 (No. 12212, 1978); *Turner Welding & Erec. Co., Inc.*, 8 BNA OSHC 1561, 1980 CCH OSHD ¶ 24,553 (No. 16235, 1980). The rule in this case was flexible enough to apply to a variety of situations employees might encounter on the worksite, but not so general as to be meaningless, even to a new hire.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-0237
NOOTER CONSTRUCTION CO.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on January 31, 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.

January 31, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-0237

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SECRETARY OF LABOR
Complainant,
v.

NOOTER CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 91-0237

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, 1992. The decision of the Judge will become a final order of the Commission on June 19, 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 June 9, 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:

Executive Secretary
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1825 K St. N.W., Room 401
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Petitioning parties shall also mail a copy 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: May 20, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0237

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SECRETARY OF LABOR, Complainant v. NOOTER CONSTRUCTION COMPANY Respondent.	OSHRC Docket No. 91-0237

Appearances:

Esther Curtwright, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

John J. Gazzoli, Jr., Esq.
Lewis, Rice & Fingersh
St. Louis, MO
For Respondent

Before: Admistrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act") to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act. Respondent has admitted jurisdiction in its Answer.

On December 11, 1990, the Secretary issued citations to Nooter Construction Company ("Nooter") alleging that serious and other than serious safety violations had occurred at Nooter's worksite, the Mobil Oil ("Mobil") Paulsboro Refinery in Gibbstown,

New Jersey, during the period September 18, 1990 to October 11, 1990. The Secretary's complaint charged Nooter with serious violations of 29 C.F.R. § 1926.350(a)(1), 29 C.F.R. § 1926.350(a)(7), 29 C.F.R. § 1926.350(h), 29 C.F.R. § 450(a)(5) and 29 C.F.R. § 1926.451(a)(4); and an other than serious violation of 29 C.F.R. § 1926.405(j)(1)(i). The Secretary proposed a penalty of $1,610.00 for the serious violations. No monetary penalty was assessed for the other than serious violation.

By filing a timely notice of contest, Respondent brought this proceeding before the Occupational Safety and Health Review Commission ("Commission"). A hearing was held in New York, New York on January 14, 1992. The parties have submitted their briefs and this matter is now ready for decision.

SUMMARY AND EVALUATION OF THE EVIDENCE

The citations herein arose from a general OSHA inspection of the Mobil refinery in Gibbstown, New Jersey based upon a national emphasis program for the petrochemical industry. Mr. Louis Cugno, a compliance officer with the Occupational Safety and Health Administration, was assigned to investigate Nooter which is a firm specializing in heavy construction in the petrochemical industry, power plants, municipal building construction, and erecting pressure vessels. (T-135). Nooter had a contract with Mobil to build four new coke drums. The construction took place on a site which was about a quarter to a half mile square. (T-136). The coke drums were approximately seventy-five (75) feet tall. Mr. Cugno was accompanied during the inspection by Mr. Thomas A. Norton, a safety specialist with Mobil, and by Mr. Benny Butler, a construction superintendent from Nooter. (T-10). The

inspection commenced on September 18, 1990, and continued on the 19th and 20th with a closing conference held on October 11, 1990. (Tr.-186).

It is well settled that the burden of proving all elements of an OSHA violation rests with the Secretary. The Secretary must prove by a preponderance of the evidence that the hazards the cited standards address existed at the worksite when the inspection was conducted; that the persons exposed were the Respondent's employees or under the control of the Respondent and that the Respondent had actual or constructive knowledge of the hazards.

A. Serious Citation No. 1, item no.1 (§ 1926.350(a)(1))

This item alleges that valve protection caps were not in place on compressed gas cylinders. This item assesses a penalty of $280.

Both Messrs. Cugno and Norton testified that they observed a stored cylinder that did not have a valve protection cap. Mr. Cugno testified that the hazard which could occur is that of the valve being struck and the cylinder becoming a projectile. Mr. Norton also testified that it was possible for materials to fall on the cylinders, because employees were working on the scaffolding above the cylinders and the force of the wind could carry something five to fifty feet. The Secretary offered no evidence on whether the cylinders were full or empty asserting that the standard does not differentiate between full and empty cylinders and thereby applies to both.[1]

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[1] The Secretary stated that Respondent in its Answer stated: "... all non-empty cylinders were properly capped,...". However, I do not consider that general statement to be an admission that the cylinders in question were full.

Nooter does not dispute that caps were not in place on a couple of stored oxygen cylinders. Its position is that although the cylinders were in plain view near an active work area, the cylinders themselves were not in an active work area and, even if there was compressed gas in the cylinders, there was no hazard or danger of any workers being hit by a projectile cylinder.

I find that the Secretary has proven a violation of § 1926.350(a)(1). Respondent admits that valve protection caps were not in place on some cylinders. Moreover, the credible testimony supports a finding that Nooter's employees were working in the area of the uncapped cylinders and that the valve could be struck from above or aside causing the cylinder to become a projectile. Whether the cylinders are full or empty is irrelevant to the determination of the existence of a violation of § 1926.350(a)(1). The Secretary correctly states that the standard does not differentiate between full and empty cylinders. The contents of the cylinders are, however, relevant to the characterization of the violation.

To prove a *serious* violation, the Secretary must establish "a substantial probability that death or serious physical harm could result" from a condition or practice at Respondent's workplace. Section 17(k), 29 U.S.C. § 666(k). Absent evidence that a cylinder contained compressed gas, the Secretary cannot prove that there was a substantial probability that death or serious physical harm could result. As the Secretary did not prove the elements of a *serious* violation, I am reducing the citation to an *other than serious* violation and assessing a penalty of $100.

B. Serious Citation No. 1, item no. 2 (§ 1926.350(a)(7))

This item, comprised of two subitems, alleges that compressed gas cylinders in use were not secured by means of a steadying device.[2] This item assesses a penalty of $280.

The testimony of Complainant's witnesses was to the effect that oxygen and acetylene or mat gas cylinders were in use and unsecured. A potential hazard existed because if one of the cylinders fell it could become a projectile that could strike exposed employees. The evidence establishes that Nooter was the controlling employer of this worksite and had the duty to eliminate hazards, which it knew or could have known of with the exercise of reasonable diligence, regardless of whose employees were exposed to the hazard.

Here, the evidence shows that the cylinders were stored in a cylinder truck with railings and equipped with an attached chain which was not secured to the cylinders. The Secretary asserts that the truck/cart was not a sufficient steadying device to secure the cylinders and that a strap was needed to secure the bottles in the rack.

Section 1926.350(a)(7) requires a "suitable cylinder truck, chain, or other steadying device" be used. The standard on its face requires compliance with only one of the three devices: a suitable cylinder truck OR a chain OR another steadying device. Simultaneous use of both a cylinder truck and chain is not required. The Respondent is correct when it states that the standard does not require a chain to be secured to the cylinders while the cylinders are stationary and stored in a suitable cylinder truck. Accordingly, serious citation no. 1, item no. 2 is vacated.

C. Serious Citation No. 1, item no. 3 (§ 1926.350(h))

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[2] The Secretary did not introduce any evidence at the hearing as to subitem 2(b) and therefore that portion of this item is dismissed.

This item alleges that oxygen, and fuel gas pressure regulators, or their related gauges were not in proper working order while in use at the cogeneration jobsite.

Mr. Leonard Drew, a compliance officer with the Occupational Safety and Health Administration assigned to investigate a company other than Nooter, found a leak on a hose fitting on the low pressure or "down stream" side between a gauge and an oxygen tank. Respondent thereupon had a fire watch tighten the fitting.

The language of this standard does not support the alleged violation. There is no evidence that the pressure regulators and gauges in question were not in proper order. In fact, Mr. Drew testified that there was nothing wrong with the regulator or the gauge. If a hazard was present because of the oxygen leak, it was unrelated to whether the regulators and gauges were in proper working order and therefore not covered by § 1926.350(h). Moreover, the record reveals that the oxygen tank in question was equipped with a flash back arrester, which would have prevented any hazard by automatically shutting off the oxygen tank if there was a fire. Accordingly, this item is vacated.

D. Serious Citation No. 1, item no. 4 (§ 1926.450(a)(5))

This item alleges that the side rails of through or side-step ladder extensions did not extend 3 1/2 feet above the landings.

It is undisputed that a Nooter subcontractor installed a portable extension ladder and scaffolding. The ladder was 30 to 40 feet tall and extended past the third level of the scaffolding with the top of the ladder even with the fourth level railing. Mr. Cugno testified that he observed a Nooter employee (Randy Thomas) climb to the top of the ladder and hop over the fourth level railing. The fourth level platform was not being used at the time

of the inspection and, according to Nooter, was not intended to be serviced by the ladder in question. Nooter asserts that other ladders in other locations were installed and available to give employees access to levels above the third level. Nooter asserts unpreventable employee misconduct as a defense.

After carefully reviewing the evidence regarding this item, I find that Nooter has failed to establish that it adequately communicated to its employees rules designed to prevent this type of violation and has therefore not established the unpreventable employee misconduct defense. While Nooter introduced evidence of its safety training and enforcement program, nowhere in the submission could I find material related to the type of violation at issue. The Secretary is correct when she states that Nooter relied on "common knowledge" regarding the specific use of ladders on scaffolding at issue here. Although Nooter stated in its letter to me of April 16, 1992, that "...Mr. Butler clearly testified that ladder and scaffolding usage was part of the employee's orientation at the job site", the transcript reveals otherwise. Mr. Butler's testimony at Tr. 191 is as follows: "I mean that's just common knowledge that everybody knows, that you're not supposed to go above or crawl over a ladder that does not extend up above the handrail --".

At the very least, Nooter could have posted a warning on the ladder advising employees at what point they should not proceed any further. This was not done. Accordingly, this item is affirmed and a penalty of $490. is assessed.

E. Serious Citation No. 1, item no. 5 (§ 1926.451(a)(4))

This item alleges that standard guardrails and toeboards were not installed on all open sides and ends of platforms more than 10 feet above the ground or floor.

The evidence establishes that Nooter employees were receiving light-weight insulation materials by hoist from inside the guardrails about 90 feet above the ground. Nooter maintains that the hoisted materials were swung into the employees standing behind the guardrails, in accordance with standard industry practice, so that crossing the guardrails was not necessary. Mr. Butler, Nooter's superintendent, testified that this operation had been ongoing for 2 1/2 to 3 weeks, and that he had personally observed the operation during that time with no violations observed.[3]

Mr. Butler also testified that during the inspection he and Mr. Cugno saw an individual on the wrong side of the handrail. The wrong side of the handrail was in fact an unguarded cantilevered platform which extended out from the scaffolding. In response to what he saw, Mr. Butler instructed Nooter's project engineer, Mr. Chris Semarelli, to reprimand the employee.

Again, Nooter asserts unpreventable employee misconduct as a defense. The employer bears the burden of establishing this defense and must show the following: (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered. *See Jenson Construction Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664 (1979). Nooter argues that the employee in question had been hired the day before the incident; had attended the employee orientation session; had received instruction concerning fall

[3] The Secretary's argument that Nooter's method to raise materials would necessarily result in many occasions during the course of a day when an employee would be exposed to a fall hazard in order to retrieve a load is not supported by the record.

protection when working from elevated surfaces (wear fall protection and be tied-off by lanyard when working from incomplete scaffolds or temporary work locations not constructed for normal employee work activities); but had unexpectedly and unforeseeably stepped outside the work area contrary to his orders and safety training. Nooter further asserts that standard guardrails and toeboards were in fact installed for all elevated work areas and this employee was not required to climb over the railing to do his job. A careful review of the evidence supports Nooter's contention that it has established the unpreventable employee misconduct defense. Accordingly, this item is vacated.

F. Other Than Serious Citation No. 2, item no. 1 (§ 1926.405(j)(1)(i))

This item alleges that a lampholder socket in a string of temporary lighting was missing a light bulb. Mr. Norton testified that a hand could easily come in contact with the socket and that he had seen this happen. Mr. Cugno testified that an employee coming into contact with exposed electrical parts could sustain a shock which could range from a mild shock to the full electrical current if a ground fault circuit interrupter did not work.

Respondent asserts that there is no possibility of an employee unintentionally placing his finger in contact with the live part of the fixture. Respondent further asserts that a ground fault circuit interrupter was provided and was tested by the OSHA compliance officer and found to be working properly. The credible evidence supports a finding that no hazard existed here. Accordingly, this item is vacated.

Section 17(j) of the Act requires the Commission to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the

employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I have determined that a total penalty of $590. is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious Citation No. 1, item no. 1 is REDUCED to an Other Than Serious violation and a penalty of $100 is ASSESSED.

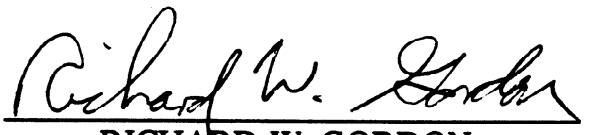
2. Serious Citation No. 1, item no. 2 is VACATED.

3. Serious Citation No. 1, item no. 3 is VACATED.

4. Serious Citation No. 1, item no. 4 is AFFIRMED and a penalty of $490 is ASSESSED.

5. Serious Citation No. 1, item no. 5 is VACATED.

6. Other Than Serious Citation No. 2, item no. 1 is VACATED.



RICHARD W. GORDON
Judge, OSHRC

Dated: May 15, 1992
Boston, Massachusetts