SECRETARY OF LABOR, Complainant, v. C &C ERECTING, INC., Respondent.	OSHRC Docket No. 00-2282

ORDER

This matter is before the Commission on a direction for review entered by Chairman Thomasina V. Rogers on October 18, 2001. The parties have now filed a Stipulation and Settlement Agreement disposing of all issues on review. Accordingly, the Stipulation and Settlement Agreement is approved.

/s/

Date: July 25, 2002

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

2002 OSHRC No. 2

00-2282

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 00-2282
C &C ERECTING, INC.,	:	
Respondent.	:	

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached an agreement on settlement and disposition of all outstanding issues in this proceeding currently pending before the Commission.

II

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, C&C Erecting, Inc. that:

1. Complainant hereby amends Item l(a) of Citation I in Docket Number 00-2282 to characterize the alleged serious violation of 29 C.F.R. § 1926.21(b)(2) as other than serious. The proposed penalty for this citation item is amended to $0.

2. Complainant hereby amends Items 2(a) and 2(b) of Citation I in Docket Number 002282 to characterize the alleged serious violations of 29 C.F.R. §1926.453(b)(2)(v) and (vi) as other than serious. The proposed penalty for these citation items is amended to $0.

3. Complainant hereby amends Item I of Citation 2 in Docket Number 00-2282 to

characterize the alleged willful violation of 29 C.F.R. § 1926.105(a) as other than serious. The proposed penalty for this citation item is amended to $0.

4. In his decision in Docket Number 00-2282, Judge James H. Barkley vacated Items l(b) and I (c) alleging a violation of 29 C.F.R. § 1926.21(b)(2) and Item 3 of Citation I alleging a violation of 29 C.F.R. §1926.750(b)(1)(ii). Complainant hereby withdraws these citation items.

5. Respondent hereby withdraws its notice of contest to the citations and penalties as amended above.

6. Complainant and Respondent agree that this Stipulation and Settlement Agreement disposes of all issues raised in the notice of contest.

7. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

8. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and Health (OSH) Act of 1970.

9. Respondent states that no authorized representatives of affected employees have elected party status.

10. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

11. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its main office on the 24th day of June, 2002, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 24 day of June, 2002.

Respectfully submitted,

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C&C ERECTING, INC.

By /s/
President

/s/
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SECRETARY OF LABOR, Complainant, v. C & C ERECTING, INC., Respondent.	OSHC DOCKET NO. 00-2282

APPEARANCES:

For the Complainant:
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For the Respondent:
Charles Palmer, Esq., Palmer & Finerty, Waukesha, Wisconsin

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, C & C Erecting, Inc. (C&C), at all times relevant to this action maintained a place of business at the Besse Forest Products construction site in Rice Lake, Wisconsin, where it was engaged in structural steel erection. Respondent admits it is an employer engaged in construction, a business affecting commerce, and is subject to the requirements of the Act.

On August 31, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of C&C's Rice Lake work site. As a result of that inspection, C&C was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest C&C brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 12, 2001, a hearing was held in Milwaukee, Wisconsin. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

Compliance Officer (CO) Mary Bauer testified that as she drove by C&C's Rice Lake construction site, she noticed C&C workers on the roof of the building (Tr. 18, 23-25, 58; Exh. C-1, C-2). The roof of the Besse Forest Products building was approximately 35 feet from ground to eave, and 38-42 feet from ground to peak (Tr. 33-34; 204). The roof pitch was .5 to 12 (Tr. 34). According to Bauer two of the employees were on the leading edge of the roof, rolling insulation out on top of the trusses, and applying decking panels over the insulation (Tr. 32-33; Exh. C-3; C-7). The employees on the roof were not wearing fall protection equipment (Tr. 32, 34, 42). No safety nets, catch platforms, or temporary floors were used for fall protection (Tr. 43). Bauer observed the men for approximately ten minutes, and took photographs of the work taking place on the roof (Tr. 19-20, 40).

The C&C personnel then left the roof during the lunch hour; CO Bauer next saw them riding a "snorkel" lift back up to the roof around 1:00 p.m. (Tr. 20, 58; Exh. C-4). Bauer testified that she saw five C&C employees in the lift, which was operated by C&C foreman, Jeffrey Mahanna (Tr. 25). A placard on the lift basket listed the snorkel lift's maximum capacity as 650 pounds (Tr. 25-26, 139). At the hearing, Mahanna admitted that five employees had ridden the lift basket together (Tr. 187). Mahanna testified that he had received a copy of the manufacturer's rules on safe use of lifts in 1995, and had attended training programs with respect to the operation of the lifts (Tr. 185-86, Exh. R-9). Mahanna knew that the lifts had a weight limit, and that allowing too many men in the basket would exceed the limit (Tr. 186). He further understood that he would be written up for violation of the weight limits (Tr. 186). Mahanna, and the other employees riding the overloaded lift received written reprimands for violating the weight requirements (Tr. 186; Exh. R-21).

In addition, Bauer testified that the men in the basket did not appear to be tied off while in the lift (Tr. 28, 30). Bauer testified that should the lift fail, the men would be thrown to the ground (Tr. 28-29). At the hearing Mahanna admitted that he and one other supervisor rode the lift without tying off on the day of the inspection, and that they and other supervisory personnel had done so in the past (Tr. 190-91). Mahanna indicated that when employees were actually working from the snorkel lifts, they did wear harnesses and were tied off (Tr. 200-01).

Bauer further stated that the employees did not put on any fall protection before returning to work on the roof (Tr. 59; Exh. C5, C-6).

After accessing the roof herself, Bauer noted clamps and screw guns within inches of the leading edge; she believed the employees must have been working within 6 inches to a foot of the edge (Tr. 35). Bauer also noted two openings in the roof, which were left open for heating and ventilation (Tr. 37, 60;

Exh. C-7). The openings had "curbs" around them, but were not covered (Tr. 37). Bauer testified that there were tools adjacent to the open roof holes (Tr. 37). At the hearing Jeffrey Mahanna stated that he installed the roof openings from a snorkel lift the day before (Tr. 199). Mahanna knew that the roof openings were unguarded, but stated that it was the general contractor's responsibility to cover the openings. Mahanna testified that he asked the general contractor to cover the openings (Tr. 199).

Jeffrey Mahanna stated that during the actual erection of the Besse Forest Products building, *i.e.,* the mainframes and purlins, his men used fall protection. Each man wore a five point harness attached to a cable system running through stanchions (Tr. 172-76; Exh. C-8). Mahanna testified that, normally, when decking roofs over 30 feet, C&C crews use harnesses with 50 foot retractable lines, which attach to stanchions bolted into the standing seam roof (Tr. 178, 195). The fall protection was not on the site, however, on the morning of the OSHA inspection. According to Mahanna, prior to August 31, 2000, C&C had been decking a lower roof, where such fall protection was not required (Tr. 178-79). On the afternoon of August 30, the general contractor, BCI, asked Mahanna to start work on the higher roof immediately (Tr. 179, 185, 203-04; Exh. C-9). Mahanna knew the higher roof was in excess of 30 feet above the ground, and that he did not have the equipment necessary to provide fall protection for his crew on the higher roof (Tr. 179, 184-85, 193, 196). Mahanna testified that he called his field supervisor, Bill Whirry, that evening, and was told that Whirry would bring the safety lines, brackets and clamps to the Rice Lake site as soon as possible the next morning (Tr. 180, 185, 194-95, 204-05). According to Mahanna, Whirry told him to start on the higher roof, but not to work further in than he could reach using the existing static lines (Tr. 205-06).

The C&C crew began decking the high roof on the morning of August 31 (Tr. 196). Mahanna stated that the crew tied off to existing stanchions on the edge of the roof as long as they could, but the employees could only use the fall protection on the site to six feet in from the edge (Tr. 177, 180, 197). As the work progressed away from the stanchions, Mahanna decided to allow his men to continue working without fall protection, though he knew that doing so violated C&C policy (Tr. 180, 193, 196-97). Mahanna testified that he believed that he could ensure his crew's safety by acting as a monitor; moreover, he believed that monitoring complied with OSHA regulations (Tr. 176, 180, 193, 197, 209). Roy Paul, another C&C foreman (Tr. 172), told Mahanna that he had been told safety monitoring was a viable method of fall protection for roofing work after OSHA inspected another job site (Tr. 209). In addition, Mahanna had the men run cable through the roof curb openings; the men could tie off to the cable as long as they were working in the area between the floor holes (Tr. 177-78, 197). Mahanna admitted that the crew worked without fall protection for approximately an hour an a half before lunch

(Tr. 198, 210). Bill Whirry arrived with the clamps at approximately 1:30 p.m. on August 31, 2000 (Tr. 180, 194-95).

Mahanna testified that C&C conducted safety training covering fall hazards on a "regular basis" (Tr. 201). Mahanna stated that once a year C&C had a safety and co-business meeting. In February or March (sic), C&C would hold a safety meeting before the company Christmas party (Tr. 201-02). Specifically, a March 15, 1995 memo indicates that all foremen were to be instructed in fall protection immediately thereafter (Exh. R-4). Mahanna signed an affidavit indicating that he received the required fall protection training in August, 1995 (Exh. R-26). Mahanna testified that he had also seen a July 1994 C&C memo setting out OSHA's requirement that employees working over 24 feet must be tied off (Tr. 171; Exh. R-3). Nonetheless, it was Mahanna's understanding that 100% fall protection was only required at 30 feet, and then, "depending on if we're roofing" (Tr. 171, 202).

The 1994 memo states that "[a]nyone using an aerial lift platform/snorkel, etc. must be tied off to the lift" (Exh. R-3). A February 2000 memo reminds foremen that everyone must be tied off when working from baskets and lifts (Exh. R-7). Dawes, the snorkel lessor, provided safety information training in the operation of its lifts for C&C personnel (Tr. 186; Exh. R-8).

Mahanna maintained that C&C's fall protection rules were strictly enforced (Tr. 207). Mahanna, however, felt pressured by the general contractor to move faster, and so chose to move on to the unprotected roof (Tr. 208).

Alleged Violation of §1926.21(b)(2)

Serious citation 1, item 1 alleges:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) North bay, west side of the Besse Forest Products construction site; standing seam roof decking was installed without fall protection. 35' fall potential from the west roof edge to the ground (exterior fall). 39' fall potential from the leading edge of the decking to the interior of the building floor.

(b) North bay, west side of the Besse Forest Products construction site; HVAC roof opening/curbs were not covered after being cut into the roof and flashing installed.

(c) North bay, west side of the Besse Forest Products construction site; no fall protection used in the over-grossed aerial lift.

The cited standard provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Discussion

The Commission has held that:

> To prove a violation of §1926.21(b)(2), the Secretary must show that the cited employer failed to instruct employees on "(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." An employer's instructions must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them," and modeled on the applicable OSHA requirements. [citations omitted]

O'Brien Concrete Pumping Inc., 18 BNA OSHC 2059, 2061, 2000 CCH OSHD ¶32,026 (No. 98-0471, 2000). The employer must address those hazards a "reasonably prudent employer" would have been aware of, and provide the instructions a reasonable employer would provide under the same circumstances. *Pressure Concrete Constr. Co.,* 15 BNA OSHC 2011, 1992 CCH OSHD ¶29,902 (No. 90-2668, 1992).

Roof fall protection. The position now taken by both OSHA and the Commission, is that §1926.750 applies to falls to the interior of a structure during steel erection, and that §1926.105(a) applies to falls to the exterior of a structure during steel erection. *L.R. Willson and Sons, Inc.*, 18 BNA OSHC 1698, 1999 CCH OSHD ¶31,796 (No. 94-1546, 1999). Section 1926.105(a) requires the use of nets, ladders, scaffolds, catch platforms, temporary floors, or safety harnesses and lanyards, and is violated when none of the enumerated means of fall protection are used. C&C was cited under §1926.105(a) three times between 1993 and 1998 (Tr. 47-48). In 1994, C&C issued a memo to all its foremen mandating that employees be tied off when working on any project that has an eave height or peak height over 24 feet (Exh. R-3).

The only C&C employee testifying, Jeffrey Mahanna, claimed to have received regular training in fall protection (once a year), and to have been aware of the C&C memo requiring the use of fall protection at heights over 24 feet (Tr. 172, 201; Exh. R-3). Finally, Mahanna testified that the night before the OSHA inspection he was warned by his immediate supervisor, Bill Whirry, not to send his crew out on to the high roof until he, Whirry, arrived with the necessary fall protection equipment. Instead, based on the bare opinion of C&C's main foreman, Roy Paul, that roof monitoring was a viable fall protection method when roofing, Mahanna opted to act as a safety monitor, while allowing his men to work on the higher roof (Tr. 180).

According to CO Bauer roof monitoring *may* be used during the application of roof decking under some conditions pursuant to SENRAC (Steel Erection Negotiated Rulemaking Advisory Committee) guidelines[1] (Tr. 84-87). However, CO Bauer testified that under the SENRAC, C&C would have to develop a site-specific written monitoring plan establishing a visibly demarcated controlled access zone, and limiting access to workers who had been trained in the monitoring plan (Tr. 126). C&C was familiar with the SENRAC requirements. After receiving a citation in 1998 for not providing fall protection at their Grace Baptist Church work site in Racine, Wisconsin, C&C developed a SENRAC compliant fall protection plan for the installation of roof panels (Tr. 213; Exh. R-5, R-31). The plan designated a controlled access zone, which was marked with flagged warning lines. A C&C supervisor, Roy Paul or Kurt White, was to train each employee who would be allowed in the controlled access zone (Exh. R-31).

According to Mahanna, Roy Paul, C&C's main foreman, told him that he could use a monitoring system in lieu of tying off (Tr. 181). There is no evidence, however, that Paul informed Mahanna of the specifics required for such a plan under SENRAC. As a result, Mahanna did not develop a written plan. No controlled access zone was demarcated. No flag lines were used.

Mahanna's testimony establishes that he was unclear about the conditions under which fall protection is required by OSHA in general, and was completely unfamiliar with the requirements for use of a monitor during the application of roof decking. Mahanna had not been trained in the requirements for a safety monitoring system, although C&C had previously used a SENRAC compliant roof monitoring program to apply roof decking, and though the application of roof decking is a regularly performed operation at C&C.

This judge finds that, because its employees were engaged in steel erection and were routinely exposed to fall hazards, C&C should have instructed its foremen in every available means of controlling fall hazards. After its management and top supervisory personnel became aware that roof monitoring could be used to provide fall protection pursuant to SENRAC guidelines, a reasonably prudent employer would have instructed its second tier supervisors in the proper means of complying with SENRAC. The evidence establishes that C&C failed to provide such information, and so was in violation of the cited standard in regard to this item.

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[1] The final steel erection standards developed by SENRAC were issued on January 17, 2001. The standards do not go into effect until January 18, 2002, in order to allow the construction industry to become familiar with the new requirements.

Floor holes. The only evidence in the record establishes that Mahanna was aware of the cited floor holes, and the need to cover them. Mahanna testified that it was the responsibility of the general contractor to cover the holes, and stated that he had asked the general to do so. In the meantime, Mahanna had strung a cable between the floor holes, which his crew could tie off to while working in the vicinity of the holes. The evidence is insufficient to establish that C&C failed to train its personnel about floor hole hazards and the means of avoiding such hazards.

Aerial lifts. In its 1994 memo C&C addressed aerial lifts, stating that "[a]nyone using an aerial lift platform/snorkel, etc. must be tied off to the lift" (Exh. R-3). Mahanna testified that he had seen the memo, yet rode the lift without tying off. The Secretary relies entirely on the failure of Mahanna and C&C's other employees to tie off when they rode the lift to establish this violation. However, in a recent case, the Commission held that a training violation cannot be established merely by showing the employer failed to enforce compliance with its work rules, or by demonstrating that its employees violated such rules. *N&N Contractors, Inc. (N&N),* 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000).

The record establishes that C&C employees uniformly violated the work rule set forth in C&C's 1994 memo, which required them to tie off while using snorkel lifts. The Secretary did not prove, however, that C&C failed to instruct its employees in the recognition and avoidance of that condition. It is clear that Mahanna regularly rode the aerial lift without tying off, and that, during the OSHA inspection, no employees tied off while riding the lift. That evidence alone, however, is insufficient to establish a training violation, in light of C&C's evidence that they had a work rule requiring such fall protection, and such rule was communicated to its employees, including Mahanna.

The Secretary has failed to establish, by a preponderance of the evidence, that C&C failed to instruct its employees in the recognition and avoidance of unsafe conditions and/or in the regulations applicable to their work environment. This violation is vacated.

Penalty

A penalty of $2,500.00 was proposed for this item. CO Bauer testified that the proposed penalty reflects a 40% reduction of the original gravity based penalty, $5,000, as C&C is a smaller company. Bauer testified that the original penalty was reduced an additional 10% based on C&C's recent history (Tr. 68-70). Though only one of the three items was affirmed, the gravity of that violation is high. Because Mahanna was not properly trained to establish a controlled access zone on the roof, he exposed eight employees to fall hazards of 35 feet for approximately an hour and a half (Tr. 68, 182, 198).

Severe injuries, up to and including death would likely be the result of falling from the eave of the cited building to the ground.

Taking into account the gravity of the violation, the proposed penalty of $2,500.00 is appropriate.

Alleged Violations of §1926.453(b)(2)

Serious citation 1, item 2a alleges:

29 CFR 1926.453(b)(2)(v): A body belt was not worn and a lanyard attached to the boom or basket when working from an aerial lift:

Note: 1926.502(d) provides that body belts are not acceptable as part of a personal fall arrest system. The use of a body belt in a tethering system or in a restraint system is acceptable and is regulated under 1926.502(e).

(a) West side of the Besse Forest Products construction project in Rice Lake, WI; five workers, without belts or fall arrest harnesses rode in the Snorkel Lift TB420 from the ground to the roof deck.

The cited standard provides:

A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Serious citation 1, item 2b alleges:

29 CFR 1926.453(b)(2)(vi): Boom and basket load limits specified by the manufacturer were exceeded:

(a) West side of the Besse Forest Products construction site; the TB420 Snorkel Lift had an unrestricted platform capacity of 650 lbs. Five workers rode the lift from the ground to the roof level.

The cited standard provides:

Boom and basket load limits specified by the manufacturer shall not be exceeded.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

§1926.453(b)(2)(v). The record establishes that C&C's employees, including supervisory personnel, rode the cited lift without fall protection. C&C argues that the cited standard is not

applicable because the employees were merely using the snorkel lift as transportation, and were not actually "working" from the lift.

The Secretary maintains that the employees were "on the clock" when using the snorkel lift. They were required to use the lift to reach their job stations and did so as an integral and necessary part of accomplishing the tasks assigned to them. Because riding the lift was a part of their job responsibilities, the employees riding the lift were "working" at the time of the alleged violation (Tr. 108-09, 127, 137). CO Bauer also pointed out that the 31 foot fall hazard cited was the same, whether the employees were working or merely riding the lift (Tr. 27, 166).

It is well settled that the interpretation of a standard by the promulgating agency is controlling unless clearly erroneous or inconsistent with the regulation itself. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991); *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). The Secretary's litigation position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard and so is entitled to some weight on judicial review. *CF& I Steel, supra.* Because, in this case, the Secretary's interpretation of "working" is well reasoned, and because it furthers the purpose of the Act, to "assure so far as possible. . . safe and healthful working conditions" for "every working man and woman in the Nation" [*See,* §651(b) of The Act], her interpretation is adopted, and the violation is affirmed.

§1926.453(b)(2)(vi). C&C admits that five employees were riding in the cited snorkel lift. C&C maintains, however, that the Secretary failed to carry her burden of proof, because she failed to introduce evidence showing the actual weight of the employees in the lift. C&C also raises the affirmative defense of employee misconduct.

Preponderance of the evidence. The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts as asserted by a proponent are more probably true than false." *Ultimate Distrib. Systems, Inc.*, 10 BNA OSHC 1568, 1570 (1982); 1982 CCH OSHD ¶26,011 (No. 79-1269, 1982). Moreover, the Commission found that a judge's conclusions may properly be based on reasonable inferences drawn from circumstantial evidence. *Id.*

In this case, the CO testified that to meet the weight limitation each of the five men in the lift would have to weigh no more than 130 pounds. CO Bauer estimated the weight of the foreman at 200 pounds. In her opinion the other men on the crew weighed more than 112 pounds each. (Tr. 26; Exh. C-1, C-2, C-4, C-5, C-6). None of the crew members pictured in the Secretary's photographs appears anorexic, and this judge agrees with CO Bauer's assessment. Furthermore, C&C appears to have recognized the validity of this item when it issued written reprimands to the employees involved. The violation has been established.

Employee misconduct. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules 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. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

C&C introduced some evidence that its lift operators received training in the proper operation of the snorkel lift. C&C did not conduct such training itself, however, relying on the lift's lessor, Dawes Rental, to train lift operators. C&C could not, therefore, vouch for the specific content or the adequacy of training its employees received. The record indicates that the enforcement on C&C's work sites was provided by Brad Stenho, an insurance agent with R & R Insurance Services, who audits client work sites (Tr. 145-47). Stenho testified that he conducted surprise inspections of C&C's work sites, and reported back to Jim Lange about employee compliance with safety rules (Tr 149). C&C documented seven inspections during 1999 and 2000 (Exh. R-11 thorough R-19). None of the inspection reports mentions lift loads.

The record does not establish that C&C had a specific work rule intended to prevent overloading the lifts. C&C introduced no evidence that laborers other than lift operators received any training warning them against overloading the lift. According to Mahanna, he knew, generally, that lifts had weight limits that should not be exceeded, however, he did not demonstrate any knowledge of the specific limitations on the snorkel lift he was using August 31, 2000. Moreover, it is clear that whatever training he received was not effective in preventing his overloading the lift.

Though not conclusive, the Commission has held that misconduct by supervisor constitutes strong evidence that safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991). In addition, unanimity of noncomplying conduct by all employees suggests an ineffective safety program. *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Because C&C introduced no evidence that the four laborers were instructed about the lift's weight limitations, because five employees were involved in the cited misconduct, and because one of the employees involved was a supervisor, this judge finds that C&C failed to establish the affirmative defense of unpreventable employee misconduct.

The violations alleged at citation 1, items 2a and 2b have been established.

Penalty

A combined penalty of $2,500.00 is proposed for this item. The gravity of these violations is high. Five employees were exposed to the cited hazard. Severe injuries, up to and including death would likely be the result of falling 31 feet to the ground. The likelihood of falling was heightened by Mahanna's overloading the snorkel. CO Bauer testified that the proposed penalty reflects a 40% reduction of the original gravity based penalty, $5,000, as C&C is a smaller company. Bauer testified that the original penalty was reduced an additional 10% based on C&C's recent history (Tr. 68-70).

Taking into account the relevant factors, this judge finds the proposed penalty of $2,500.00 is appropriate.

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

Serious citation 1, item 3 alleges:

29 CFR 1926.750(b)(1)(ii): On tiered buildings or structures not adaptable to temporary flooring and where scaffolds were not used, safety nets were not installed and maintained where the fall distance exceeded two stories or 25 feet:

> (a) North bay, west side of the Besse Forest Products construction site; 3' X 3' roof holes/curbs/openings were not covered after the opening was cut into the roof and flashing installed.

The cited standard provides:

> (b) *Temporary flooring–skeleton steel construction in tiered buildings.* (1) . . . (ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. . ..

Discussion

CO Bauer testified that the Besse Forest Products building was not a tiered building, because the steel columns were not stacked (Tr. 45). Because the cited standard applies only to skeletal steel construction in tiered buildings, it is inapplicable here. The violation is vacated.

Alleged Violation of §1926.105(a)

Willful citation 2, item 1 alleges:

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

> (a) North bay, west side of the Besse Forest Products construction site; standing seam roof decking was installed without fall protection. 35' fall potential from the west roof edge to the ground (exterior fall). 39' fall potential from the east leading edge towards ridge/peak) of the decking to the interior of the building floor.

The standard states:

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

Discussion

The record establishes that C&C's employees installed metal roof decking at heights between 35 and 42 feet without fall protection, while under the direction of their supervisor, Jeff Mahanna. C&C argues that the cited standard, when viewed in combination with other, conflicting, fall protection

standards, is unconstitutionally vague; that §1926.105 applies only to exterior fall hazards, and that its employees were not exposed to the cited fall hazards for "a substantial portion of the work day." Lastly C&C argues that, if proven, the cited violation resulted from employee misconduct, and was not willful.

Vagueness. It is well settled that the application of external objective criteria, including the knowledge and perceptions of a reasonable person may be used to give meaning to a broadly worded, or ambiguous standard. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 86-2059, 1993). For instance, prior Commission decisions may put employers on notice of their duty under a given standard. *Corbesco, Inc. v. Dole*, 926 F.2d 422 (5th Cir. 1991). The applicability of §§1926.750 and 1926.105(a) to fall hazards during steel erection has been extensively litigated before the Commission and the courts of appeals. The position now taken by the Commission is that §1926.750 applies to falls to the interior of a structure during steel erection, and that §1926.105(a) applies to falls to the exterior of a structure during steel erection. *L.R. Willson and Sons, Inc.*, 18 BNA OSHC 1698; 1999 CCH OSHD ¶31,796 (No. 94-1546, 1999).[2] In any event, the record establishes that C&C was aware that OSHA requires fall protection for employees working at heights over 24 feet, *see* Jim Lange's memo of 07/01/1994 (Exh. R-3). Though C&C's foreman, Mahanna, may not have known precisely which OSHA standard was applicable in this situation, he did know that fall protection was required when working at heights over 30 feet; specifically, he knew that it was required in the cited circumstances. Where an employer has actual notice of an OSHA requirement, that employer cannot argue that the applicable standard is vague. *Martin v. OSHC (CF&I Steel)* 941 F.2d 1051 (10th Cir. 1991).

The cited standard is not unconstitutionally unenforceable.

Exterior Falls. C&C acknowledges that there were exterior fall hazards from the west and north edges of the cited roof (C&C's Post Hearing Brief, p. 20, fn. 9). It is clear from the photographic evidence that the work on the roof deck had been completed prior to OSHA's arrival on site (Exh. C-1, C-2, C-4, through C-7). It is also clear from both the photographs and from the very nature of the work the C&C performs, *i.e.* rolling out insulation, clamping and screwing the roof decking in place, that the

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[2] C&C also refers to fall protection standards for low slope roofs at **Subpart M – Fall Protection**. At §1926.500 **Scope, application, and definitions applicable to this subpart,** the standard defines roofing work as "the hoisting, storage, application, and removal of roofing materials and equipment, including related insulation, sheet metal, and vapor barrier work, *but not including the construction of the roof deck.*" [emphasis added]. In this case C&C was engaged in steel erection, and specifically in roof deck construction. While so engaged, C&C employees were subject to the steel erection standards at **Subpart R – Steel Erection** at §1926.750, *et seq.*, and §1926.105(a), and not to the fall protection provisions of subpart M. Because the inapplicability of Subpart M to roof decking is clear on the face of the regulation, its mere existence cannot render either §1926.750 or §1926.105(a) unconstitutionally vague.

crew completing the decking would have been exposed to exterior fall hazards. The evidence shows that, at most, employees could have tied off to existing stanchions on the north end, and were, in fact, exposed to fall hazards posed by the unguarded west roof edge.

Substantial portion of the workday. C&C argues that, under Commission precedent, its employees need only use fall protection for a "substantial portion of the workday" to comply with the standard, *citing, L.R. Willson & Sons, Inc. v. Donovan,* 685 F.2d 664 (D.C. Cir. 1982), and *Century Steel Erectors, Inc. v. Dole*, 888 F.2d 1399 (D.C. Cir 1989). This judge notes that the Commission limited the application of the D.C. Circuit's "substantial portion of the workday" exception in a more recent case, *Armstrong Steel Erectors, Inc. (Armstrong),* 18 BNA OSHC 1630, 1999 CCH OSHD ¶31,758 (No. 97-250, 1999). In *Armstrong,* the Commission noted that an employer may argue that it substantially complied with the fall protection requirements only where employees using safety harnesses and lanyards are temporarily unable to tie off because of "unexpected or unusual circumstances," and where the disputed citation is based on the Secretary's allegations that the employer should have used alternative fall protection in addition to safety belts. *Id.* at 1632, p. 46,422.

Mahanna testified that safety harnesses had been used to perform earlier work, and could have been used for the work Mahanna's crew performed on the morning of August 31, 2000, had the necessary equipment been on site. That Mahanna's supervisor, Whirry, did not arrive earlier with the equipment the crew needed to tie off was neither unexpected, nor unusual. Whirry was 4-1/2 hours away from the work site and did not intend to drive up to the work site until the morning of August 31 (Tr. 180). Mahanna knew this. There was work still to be completed on a lower roof where fall protection was not required (Tr. 179). Mahanna did not have to accede to the general contractor's request that he move to the higher roof, or unnecessarily expose his crew to the cited fall hazard. Because the use of safety harnesses and lanyards was feasible, C&C, may not argue that it substantially complied with the requirements of the cited standard. *Id.*

Willful

A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1996). In *Propellex Corporation (Propellex),* 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999), the Commission held that the Secretary must differentiate a willful violation by showing that the employer had a "heightened awareness" of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations. The Commission noted that heightened awareness has been found where an employer has been previously cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards, and was on notice of the existence of the violative conditions. *Id.*

In this case, CO Bauer testified that C&C has been cited for violations of the fall protection standards before (Tr. 114). C&C's foreman, Mahanna admitted that he deliberately chose to have his crew work on a roof where they would be exposed to exterior fall hazards in excess of 35 feet, rather

than fall behind, fearing he would "be kicked off the job" (Tr. 208). Mahanna knew that OSHA required fall protection above 30 feet, and that he did not have the fall protection equipment he needed. C&C, however, argues that a finding of willfulness is not justified because Mahanna made a good faith effort to comply with the fall protection requirements by acting as a safety monitor, relying on the advice of C&C's main foreman, Roy Paul, who recalled that after a 1998 fall protection citation C&C was allowed to abate the fall hazard by developing a roof monitoring plan.

The Commission has held that the test of good faith for these purposes is an objective one. *Morrison-Knudsen Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶30,048, p. 41,281 (No. 88-572, 1993). A finding of good faith is justified only if the employer's belief concerning the interpretation of a standard was reasonable under all of the circumstances. *Id*.

As CO Bauer testified, under some conditions roof monitoring *may* be used during the application of roof decking. Mahanna's monitoring system, however, was woefully incomplete. Unlike C&C's 1998 monitoring plan, Mahanna's monitoring was not conducted pursuant to a written site-specific plan. No controlled access zone was developed. No flag lines were used. None of the employees involved were specifically trained. The photographic evidence establishes that Mahanna was an inattentive and, therefore, ineffective monitor (Exh. C-1, C-6). Mahanna's monitoring plan clearly failed to comply with the SENRAC guidelines as set forth by CO Bauer; moreover, it did not conform in any way to C&C's prior safety monitoring system. The record as a whole fails to establish that Mahanna could reasonably have believed that his sporadic monitoring complied with OSHA requirements. *See; J.A. Jones Construction Co.*, *supra.* [An employer is not necessarily spared from a finding of willfulness by taking minimal measures to enhance employee safety]. This judge did not find Mahanna's testimony in this regard credible, and cannot find that Mahanna's decision to substitute monitoring for physical fall protection was made in good faith. The evidence establishes that Mahanna had the heightened awareness of the illegality of his actions to support a finding of willfulness.

The Commission has found that the employer is responsible for the willful nature of its supervisors' actions to the same extent that it is responsible for their knowledge of violative conditions. *Tampa Shipyards, Inc.,*15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). The employer can rebut the Secretary's *prima facie* showing of willfulness by establishing that the failure of its supervisory employee to follow proper procedures was unpreventable. In particular, the employer must establish that it had relevant work rules that it adequately communicated and effectively enforced. *Chesapeake Operating Company*, 10 BNA OSHC 1795, 1982 CCH OSHD ¶26,142 (No. 78-1353, 1982).

. C&C has not met its burden in this case. Although C&C claimed to have a safety program including "regular" safety training, no written program was introduced into evidence. A memo from 1993 indicates that all foremen were provided with OSHA documents; the foremen were instructed to conduct weekly safety meetings (Exh. R-2). C&C introduced no testimony or documentation establishing that the mandated safety meetings were ever held. In July 1994, C&C's Jim Lange sent out a memo clarifying OSHA fall protection requirements. C&C introduced evidence that foremen,

including Jeff Mahanna, received training regarding the 1994 memo's contents and current OSHA fall protection requirements in August 1995 (Exh. R-4, R-26). The only evidence of subsequent training was Mahanna's statement that "regular" safety training was provided during the yearly business meetings, which were held before the company's belated Christmas party. There is *no* evidence that the foremen's minimal training included any information on SENRAC, or the requirements it imposes on monitoring of controlled access zones.[3]

The evidence establishes that C&C completely delegated its enforcement duties to its casualty insurance broker, Brad Stenho (Tr. 148). Stenho's enforcement consisted entirely of a surprise evaluation of each of C&C's job sites (Tr. 149). Stenho had no disciplinary authority, and merely reported his observations to Jim Lange (Tr. 148-49). Stenho's one negative evaluation, in 1999, concerned a Milwaukee work site where Randy Dykstra acted as job foreman (Tr. 151; Exh. R-13). The evaluation resulted in a memo, which was, apparently, placed in Dykstra's file (Exh. R-14). Stenho testified that he intended to visit more of Dykstra's work sites, but that Dykstra was fired shortly thereafter (Tr. 152-53). Stenho did not know why Dykstra was fired, and could not testify that his firing resulted from his violation of safety rules (Tr. 153). The only evidence of disciplinary action offered by C&C consisted of written warning notices issued to the employees involved in the misconduct cited as a result of *this* OSHA proceeding (Exh. C-21).

The evidence establishes that C&C conducted minimal training; there is no evidence that it provided any training in the negotiated SENRAC rules regarding fall monitoring. C&C's monitoring of safety compliance was haphazard; only a single inspection of each work site was conducted by its insurance carrier. The record contains no credible evidence that C&C had an effective disciplinary system designed to enforce compliance with safety rules. In sum, there was insufficient evidence to establish that C&C exercised reasonable diligence in discovering violations of its work rules, or had an effective disciplinary plan incorporating increasingly harsh measures taken for infractions of work rules. *See, Precast Services, Inc.* 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (93-2971, 1995). The record establishes that C&C's safety program was deficient.

C&C failed to rebut the Secretary's showing of willfulness, and the violation will be affirmed as willful.

Penalty

A penalty of $35,000.00 was proposed for this item.

The violation is found to be willful. C&C's safety program and training and the knowledge of its foremen lag significantly behind similar employers of is size in the steel erection industry. Eight employees were exposed to the exterior fall hazard for approximately an hour and a half. The alternative means of protection Mahanna claims to have provided was minimal at best. Employees

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[3] Alternatively C&C could have prohibited the use of roof monitoring, or reliance upon SENRAC guidelines, which, as noted above, have not yet become effective.

were not trained for roof monitoring; no warning lines were placed around the work area. Moreover, the photographic evidence shows that Mahanna's attention was not on his employees.

Because the exposure was for a short duration and no employees were injured, however, this judge believes that the gravity of the cited violation is overstated. A penalty of $15,000.00 is deemed appropriate and will be assessed.

ORDER

1. Serious citation 1, item 1(a), alleging violation of §1926.21(b)(2) is AFFIRMED, and a penalty of $2,500.00 is ASSESSED.
2. Serious citation 1, items 1(b) and (c), alleging violation of §1926.21(b)(2)(a) are VACATED.
3. Serious citation 1, item 2a and 2b, alleging violations of §1926.453(b)(2)(v) and (vi) are AFFIRMED, and a combined penalty of $2,500.00 is ASSESSED.
4. Serious citation 1, item 3, alleging violation of §1926.750(b)(1)(ii) is VACATED.
5. Willful citation 2, item 1, alleging violation of §1926.105(a) is AFFIRMED, and a penalty of $15,000.00 is ASSESSED.

/s/

James H. Barkley
Judge, OSHC

Dated: September 13, 2001