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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 92-0756 |
| JOHN H. QUINLAN, d/b/a QUINLAN ENTERPRISES, | : | |
| Respondent. | : | |

*DECISION*

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

BY THE COMMISSION:

At issue is whether the judge erred in affirming 4 items alleging that John H. Quinlan, doing business as Quinlan Enterprises ("Quinlan"), failed to comply with various provisions of the construction standards at a construction project in Savannah, Georgia. The items were for Quinlan's alleged failure to: (1) have a fire extinguisher available in the cab of its crane; (2) have a written hazard communication program available; (3) provide fall protection for its employees exposed to falls greater than 25 feet; and (4) post a rated load capacity chart in the cab of the crane. For the reasons that follow, we affirm the judge's decision.

I. Issues

A.

Citation no. 1, item 2 alleged a serious violation of 29 C.F.R. § 1926.550(a)(14)(i), a standard for cranes and derricks. The standard requires that "[a]n accessible fire extinguisher . . . shall be available at all operator stations or cabs of equipment." It is undisputed that Quinlan did not have a fire extinguisher in the cab of the crane it used that day at the worksite. The compliance officer testified that Quinlan's foreman, who had operated the

crane earlier that day, told him that there had been one inside the cab the day before or the night before but that it "must have been stolen." The Secretary cited Quinlan for a serious violation of the standard, and proposed a penalty of $750. The judge found a serious violation of the standard but assessed a penalty of $400.

We find no reason to disturb the judge's finding. There is no basis for Quinlan's claims that the foreman did not have an opportunity to purchase a fire extinguisher or that it should have been given at least one full day to obtain one. The cranes and derricks standard requires that "[a]ny deficiencies shall be repaired, or defective parts replaced, before continued use." 29 C.F.R. § 1926.550(a)(5).[1]

B.

The judge's affirmance of citation no. 2, item 1, as *de minimis* rather than as other-than-serious presents us with no real issue to resolve. We have held that an employer cannot seek review of a finding of a *de minimis* violation because it carries no penalty assessment or abatement requirement and cannot be used in future proceedings as evidence of a history of previous violations. *Blocksom and Co.*, 11 BNA OSHC 1255, 1261 n.15, 1983-84 CCH OSHD ¶ 26,452, p. 33,599 n.15 (No. 76-1897, 1983). *See also Super Excavators Inc.*, 15 BNA OSHC 1313, 1315, 1991-93 CCH OSHD ¶ 29,498, p. 39,803 (No. 89-2253, 1991).

C.

Citation no. 1, item 3, alleged a serious violation of 29 C.F.R. § 1926.105(a). The standard provides that "[s]afety 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." At the time of the inspection, Quinlan's foreman Reynolds and employee Clifton were installing corrugated roof decking on the top of the 36-foot, 4-inch high tower. The compliance officer saw Reynolds walking along the edge of the tower laying roof deck. The employees were not

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[1] We also find no support for Quinlan's claim that this violation as well as the hazard communication and fall protection violations were caused by unpreventable employee misconduct. Quinlan does not even suggest that it met the Commission's requirements for the unpreventable employee misconduct test for any of these citations. Instead, it offers comments on the merits of the test itself, which we decline to consider.

provided with any fall protection. The judge affirmed a serious violation of the standard and assessed the proposed penalty of $2,500.

We find no reason to disturb the judge's finding. The record is clear that the Secretary established all the elements of a prima facie case: applicability, noncompliance, employee exposure, and knowledge, and that Quinlan failed to rebut that showing. Quinlan's claim that the steel erection standards apply rather than section 1926.105(a) is without merit. The steel erection standards in Subpart R do not provide exclusive fall protection requirements for employees engaged in steel erection. The general fall protection standards for the construction industry apply to conditions not addressed by Subpart R. Section 1926.105(a) applies to the conditions cited in this case, the hazard of a fall from the perimeter to the outside of the building. *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1198, 1993 CCH OSHD ¶ 30,052, p. 41,298 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). The Secretary established a prima facie case of noncompliance with section 1926.105(a) by showing that Quinlan's employees were subject to falls of twenty-five feet or more and none of the safety devices listed in the standard were utilized. *American Bridge/Lashcon, J.V.*, 16 BNA OSHC 1867, 1868, 1994 CCH OSHD ¶ 30,484, p. 42,105 (No. 91-633, 1994), *petition for review filed*, No. 94-1557 (D.C. Cir. Aug. 15, 1994). Quinlan's claim that the roof deck the employees were working on was a form of fall protection is misplaced. A roof is not a temporary floor and does not satisfy the requirements of section 1926.105(a). *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1158, 1993 CCH OSHD ¶ 30,042, p. 41,224 (No. 90-2894, 1993). Employee exposure is clearly shown and is not disputed by Quinlan. The involvement in the violation of Quinlan's foreman Reynolds, Clifton's supervisor, establishes a prima facie showing of knowledge.[2] *Jersey Steel Erectors*, 16 BNA OSHC 1162,

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[2] Quinlan argues that "[a]lthough Reynolds held the title of foreman, he had no supervisory authority" and notes that the compliance officer "never asked Reynolds what he did." However, Mr. Quinlan testified that Reynolds was Mr. Clifton's supervisor and that Reynolds "was in charge." An employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992)(consolidated).

1164, 1993 CCH OSHD ¶ 30,041, p. 41,216 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

Quinlan also failed to establish either the greater hazard or infeasibility affirmative defenses to the section 1926.105(a) citation. To establish the greater hazard affirmative defense, the employer must prove that: (1) the hazards caused by complying with the standard are greater than those encountered by not complying, (2) alternative means of protecting employees were either used or were not available, and (3) application for a variance under section 6(d) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 655(d) would be inappropriate. *Peterson Bros.*, 16 BNA OSHC at 1204, 1993 CCH OSHD at p. 41,304. We do not need to reach Quinlan's argument that the hazards caused by complying with the standard are greater than those presented by not complying because it failed to establish that alternative means of fall protection could not be safely implemented. "Before an employer elects to ignore the requirements of a standard because it believes that compliance creates a greater hazard, the employer must explore *all* possible alternatives and is not limited to those methods of protection listed in the standard." *State Sheet Metal Co.*, 16 BNA OSHC at 1159, 1993 CCH OSHD at p. 41,225 (emphasis in original). Quinlan also failed to indicate why application for a variance would be inappropriate.

An employer who raises the affirmative defense of infeasibility must prove that: (1) literal compliance with the requirements of the standard was infeasible under the circumstances and (2) either an alternative method of protection was used or no alternative means of protection was feasible. In its brief, Quinlan focuses on the use of safety nets for fall protection, and claims that it is not feasible to erect the nets.[3] However, Quinlan also has the burden of showing that alternative forms of protection were used or that no alternative form of protection was feasible, just as it must do to prove the greater hazard affirmative defense. *State Sheet Metal Co.*, 16 BNA OSHC at 1161, 1993 CCH OSHD at p.

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[3] Under the terms of section 1926.105(a), nets are the least-preferred means of protecting employees. If one of the other methods specified can be used, it should be used. *State Sheet Metal Co.*, 16 BNA OSHC at 1161, 1993 CCH OSHD at p. 41,227.

41,227. Here, as we noted above, Quinlan did not show that alternative forms of protection would have been infeasible and thus fails to establish the defense.

D.

Citation no. 2, item 2, alleged an other-than-serious violation of 29 C.F.R. § 1926.550(a)(2). The standard requires as follows:

> **§ 1926.550 Cranes and derricks.**
> (a) *General requirements.*
> . . . .
> (2) Rated load capacities, and recommended operating speeds, special hazard warnings, or instruction, shall be conspicuously posted on all equipment. Instructions or warnings shall be visible to the operator while he is at his control station.

A large portion of the load capacity chart inside the cabin of the crane was torn and missing. In affirming the item, the judge found that the torn away portion contained information essential to the operation of the crane, such as allowable loads on the jibs, the pressure load conversion table, crane service, and recommended hoist tackle loads. The Secretary did not propose a penalty for this alleged violation, and the judge did not assess one.

We agree with the Judge that a violation has been shown. The crane was in service and integral portions of the chart were missing, including information necessary to determine the crane's rated load capacities.[4] For example, one portion missing from the load capacity chart was a table titled "Recommended Hoist Tackle" that detailed how much weight must be deducted from the maximum allowable loads when using different types of hook blocks, hooks and slings.

II. Order

Neither Quinlan nor the Secretary have asked us to disturb the judge's penalty assessments, and the record evidence relating to the four statutory penalty criteria (gravity,

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[4] The compliance officer testified that the missing "without outriggers" portion of the chart was not necessary at the time of the inspection because the crane had its outriggers extended. Quinlan misinterprets this testimony to mean that the crane operator did not require *any* of the missing information, including allowable loads on the jibs, pressure load conversion table, crane service, and recommended hoist tackle loads. This misinterpretation was due to the fact that in the testimony, the term "chart" was used both for the "maximum allowable loads" portion of the load capacity chart as well as for the entire chart.

size, good faith and past history) establishes that they are appropriate. *See* § 17(j) of the Act, 29 U.S.C. § 666(j). Accordingly, we affirm a serious violation of 29 C.F.R. § 1926.550(a)(14)(i) with a penalty of $400, a *de minimis* violation of 29 C.F.R. § 1926.59(e)(4), a serious violation of 29 C.F.R. § 1926.105(a) with a penalty of $2,500, and an other-than-serious violation of 29 C.F.R. § 1926.550(a)(2) with no penalty assessed.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: April 19, 1995

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## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 19, 1995. **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.

April 19, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0756

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SECRETARY OF LABOR
Complainant,
v.
JOHN H. QUINLAN DBA QUINLAN ENTERPRI
Respondent.

OSHRC DOCKET
NO. 92-0756

# 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 March 24, 1993. The decision of the Judge will become a final order of the Commission on April 23, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 13, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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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: March 24, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0756

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For Complainant

Frank L. Kollman, Esquire
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For Respondent

Before: Administrative Law Judge James D. Burroughs

## DECISION AND ORDER

John H. Quinlan, d/b/a Quinlan Enterprises (Quinlan), a steel erector, contests a serious citation alleging violations of (1) § 1926.550(a)(9), for failure to barricade the rear of a rotating superstructure of a crane, (2) § 1926.550(a)(14)(i), for failure to have a fire extinguisher available in the cab of the crane, (3) § 1926.105(a), for failure to provide safety nets for workers when exposed to falls greater than 25 feet, and (4) § 1926.1053(b)(8), for

failure to secure a ladder in an area where it was likely to get displaced. Quinlan also contests an "other" than serious citation which alleges violations of (1) § 1926.59(e)(4), for not having a written hazard communication program available, and (2) § 1926.550(a)(2), for failure to conspicuously post a rated loading capacities chart on the crane.

Quinlan is a sole proprietorship with its principal place of business in Claxton, Georgia. It is owned by John H. Quinlan. He is engaged in steel erection and was so engaged on October 3, 1991, at 220 Eisenhower Drive, Savannah, Georgia. He was responsible for erecting the steel and, along with the general contractors and workers from other trades, was constructing a Circuit City store (Tr. 9, 11-12, 28, 30, 42-43, 68-69, 91, 94-95, 111-112, 128-129).

While returning from lunch on October 3, 1991, Compliance Officer David Baker observed employees working on the roof of a tower of the Circuit City store[1] under construction. The employees were approximately 36 feet high and were provided no fall protection. Baker saw a crane lifting roof deck material to a person on the roof (Exh. C-6; Tr. 18, 29, 60-61). After his observations, Baker informed his supervisor, who promptly assigned him to conduct an inspection (Tr. 8, 17, 27). He arrived at the site around 2:35 p.m. (Tr. 8). He contacted Connie Turner, superintendent of the primary contractor (Tr. 9). He held an opening conference with Mike Reynolds, who held himself out to be a supervisor for Quinlan. Compliance Officer Baker advised Reynolds that he was there to inspect Quinlan due to its lack of providing fall protection. There were two Quinlan employees on the site: (1) Mike Reynolds and (2) Ken Clifton. Upon Baker's request, Reynolds ordered Clifton from the roof. Reynolds accompanied Baker on the walk-around inspection.

Reynolds was a leadman or working foreman (Tr. 111). He had no authority to hire or fire employees. John Quinlan was the only person who could hire or fire employees (Tr. 113).

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[1] The site of the store is near where Baker resides.

## The Inspection Was Consensual

Quinlan contends that Baker exceeded the scope of his referral inspection. Quinlan suspects that the supervisor limited the inspection to fall protection and states that Reynolds did not consent to a full inspection of the site. It is undisputed that Baker had authority to inspect the site. He merely informed Reynolds the condition that led to the inspection. The fact that he saw employees working on a roof tower was a basis for an inspection of the site and was not a limitation on the inspection.

Quinlan does not pursue the issue with vigor. He makes the following statement in his brief: "Reynolds apparently consented to the scope of the inspection as represented to him by the Compliance Officer." Quinlan recognizes that the evidence establishes that the inspection was consensual. At the same time, a footnote to the statement insists that any allegations beyond fall protection were outside the scope of Baker's authorization.

Baker informed Reynolds why he was at the site. No objection was voiced by Reynolds challenging the scope of the inspection. Reynolds accompanied Baker on the walk-around inspection. He never objected or informed Baker that he had to obtain a warrant. The inspection was consensual. *See Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1076, 1987 CCH OSHD ¶ 27,815 (No. 77-3804, 1987).

## The Allegations

### Burden of Proof

In order to establish a violation of the standard, the Secretary has the burden to show by a preponderance of the evidence that (1) the standard applies to the cited conditions, (2) its terms were not met, (3) employees had access to the violative conditions, and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Ormet Corporation*, 14 BNA OSHC 2134, 2135, 1991 CCH OSHD ¶ 29,254 (No. 85-531, 1991).

Item 1 - Alleged Violation of § 1926.550(a)(9)

The Secretary has charged Quinlan with a violation of § 1926.550(a)(9) because the rotating superstructure of the crane was not barricaded. The standard states:

> (9) Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

While the crane was in operation, the accessible area within the swing radius of the rear of the rotating superstructure was not barricaded (Exh. C-2; Tr. 13, 28). Quinlan requests that the allegations be dismissed on the belief that the Secretary failed to prove employee exposure.

Quinlan had two employees at the site. Reynolds was operating the crane, and Clifton was on the roof unloading materials lifted by the crane (Tr. 29-30). The citation and complaint make reference to employees as being exposed to the hazard. Quinlan has construed this as referring to his employees. There was no employee of Quinlan exposed to the hazard.

There were employees of other contractors on the site. Baker, having been unable to show exposure to Quinlan employees, made reference to the fact that other employees were at the site. These workers included masons and persons performing framing operations inside the building. Baker saw the individuals pass the crane to bring materials inside the building (Tr. 42-43).

Quinlan points out that neither the citation nor the complaint makes reference to the fact that employees of other contractors were exposed to the hazard (Tr. 30-31). The citation and complaint make reference to employees without stating whose employees were exposed. Quinlan has construed the description as referring only to his employees. Quinlan argues that there is no evidence to support the conclusion that any employee was exposed. This argument is based on the fact that Baker assumed that the employees were employed by other contractors. There is no merit to Quinlan's argument. Under the circumstances, Baker was correct in assuming that the individuals he observed were employees at the site.

The employees would not be working at the site unless they were employed by one of the contractors. It is highly unlikely they would trespass on the job and perform their services for free.

Quinlan alleges that he has been prejudiced by the reference to employees of other contractors since the citation and complaint never alleged that non-Quinlan employees were exposed to the hazard. He opposes any amendment of the complaint to allege exposure of employees of other contractors. Quinlan has not had an opportunity to interview employees of other contractors which might have been exposed to the rotating superstructure.

The Secretary has simply made the allegation that the employees of the contractors were exposed. The extent and nature of exposure have not been established. Baker did not testify in terms of their distance from the rotating superstructure of the crane. The standard speaks in terms of swing radius of the rear of the crane. Baker does not say that he observed the employees within this area. The standard applies to "accessible areas within the radius." The testimony of Baker merely states that laborers "were passing by and near the crane." He does not state that they were passing the crane within the swing radius of the rear (Tr. 42).

The evidence fails to establish how close the employees were to the crane. It is not possible to make a determination as to whether "other employees" were within the accessible area of the swing radius. The use of nebulous terminology fails to establish the nature of the exposure. Compliance personnel should testify as to distance in terms of feet or inches. The use of such words as "in the vicinity of" or "near" are inadequate to show that an employee was within the accessible area of the swing radius. The issue of exposure must be determined by the Commission on facts as developed by the Secretary. The facts have not been sufficiently developed to make a proper determination.

The allegation is vacated.

Item 2 - Alleged Violation of § 1926.550(a)(14)(i)

The Secretary alleges that Quinlan failed to have a fire extinguisher available in the cab of the crane. Section 1926.550(a)(14)(i) provides as follows:

(14) Fuel tank filler pipe shall be located in such a position, or protected in such manner, as to not allow spill or overflow to run onto the engine, exhaust, or electrical equipment of any machine being fueled.

(i) An accessible fire extinguisher of 5BC rating, or higher, shall be available at all operator stations or cabs of equipment.

When Baker passed by the operator's cab of the crane, he noticed that the load chart was torn. He looked inside and noticed that the fire extinguisher holder was empty (Tr. 29, 45, 48-49). Reynolds stated that there was not a fire extinguisher anywhere on the crane and that the fire extinguisher had been stolen during the night.

Quinlan argues that the evidence presented is too confusing as to what the compliance officer found. If there is any confusion, it exists only in the mind of Quinlan. Baker was clear as to what he observed. Quinlan asserts that it is not clear whether the compliance officer looked for the fire extinguisher or whether it was indeed in the crane. John Quinlan stated that there is evidence that the fire extinguisher was stolen the night before, and this made it impossible for Quinlan to be in compliance with the standard. He asked that the citation be vacated because of this fact. The only evidence is the statement by John Quinlan that the fire extinguisher was stolen.

The standard requires that an accessible fire extinguisher be available at the cab of the crane. Quinlan contends that a fire extinguisher had been in the cab of the crane since the job began (Tr. 124). John Quinlan states that he purchased the fire extinguisher and personally placed it inside the cab (Tr. 124). He contends that the extinguisher had been stolen the day before the inspection and had not been replaced by Reynolds (Tr. 45). Quinlan states that Reynolds had the authority to purchase and replace the extinguisher.

The fire extinguisher was not in the cab. The bracket holding the fire extinguisher was empty. Reynolds informed Baker that there was not an extinguisher on the crane and that it had been stolen during the night. This is an assumption on the part of Reynolds. Quinlan did not establish when the extinguisher was last observed by Reynolds. The standard requires that a fire extinguisher "shall be available." It was not made available to Baker.

The allegation is affirmed.

Item 3 - Alleged Violation of § 1926.105(a)

Quinlan employees were working on the roof. The height of the roof was approximately 36 feet 4 inches above the ground. No form of protection was provided. The Secretary alleges that Quinlan was in violation of § 1926.105(a), which provides:

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

The Secretary states that the standard was violated as a result of the following undisputed facts: None of the safety devices listed in the standard were in use at the workplace; two employees were exposed to falls from a height of more than 36 feet above the ground; such a fall could result in serious injury; and Quinlan had knowledge of the violative condition (Tr. 54, 56). Quinlan argues that (1) § 1926.105(a) is preempted by § 1926.750(b) of the steel erection standards, (2) the roof was a temporary floor, (3) compliance was infeasible, both technically and economically, and (4) compliance would have interfered with the work being performed.

The two Quinlan employees were at the site laying corrugated decking on the roof tower at a height of 36 feet 4 inches (Tr. 56). Baker did not see any catch platforms or safety lines. He did not consider the decking to be a temporary floor. He observed that Reynolds was wearing a safety belt, but the lanyard was hooked onto the belt and had tools hung on it (Exh. C-7; Tr. 59-60). Reynolds and Clifton were not wearing any fall protection. They exited the roof tower by a scaffold onto an I-beam, which they walked across to a ladder. They descended the ladder to the ground.

Quinlan submits that § 1926.105(a) is preempted by § 1926.750(b) of the steel erection standard since its work operation concerns steel erection. The hazard presented by work on the roof involves the possibility of an exterior fall to the ground. In *Bratton Corp.*, 14 BNA OSHC 1893, 1990 CCH OSHD ¶ 29,152 (No. 83-132, 1990), the Commission

rejected such a defense where the hazard involved an exterior fall. In so deciding, it overruled previous Commission decisions. It stated (14 BNA OSHC at 1896):

> We agree with the various appellate court decisions cited above that have drawn a distinction between interior and exterior fall hazards and hold that the steel erection standards in Subpart R do not preempt application of the general construction standards to steel erection work "where general standards provide meaningful protection to employees beyond the protection afforded by the steel erection standards . . . ." *Williams Enterprises, Inc.*, 11 BNA OSHC 1410, 1416, 1983-84 CCH OSHD ¶ 26,542 p. 33,877 (No. 79-843, 1983), *aff'd in pertinent part*, 744 F.2d 170 [11 OSHC 2241] (D. C. Cir. 1984).

Steel erection standards apply to interior falls and not to exterior falls. Since this case involves exterior falls, the steel erection standards do not preclude a citation under § 1926.105(a).

Quinlan seeks dismissal of the allegation based on the decisions of Judge James P. O'Connell in *Nilsen-Smith Roofing and Sheet Metal Co.*, 8 OSHC 1420, 1980 CCH OSHD ¶ 24,242 (No. 77-2735, 1980), and *Nilson-Smith Roofing and Sheet Metal Co.*, 6 BNA OSHC 1435, 1978 CCH OSHD ¶ 22,591 (No. 16142, 1978). In both cases, Judge O'Connell held that § 1926.105(a) does not apply where the employees in question were standing on a partially completed metal deck, including roof deck. He found that the deck constituted a temporary floor within the meaning of § 1926.105(a). Quinlan submits that § 1926.105(a) is inapplicable to the facts of this case because the roof being installed by its employees served as a "temporary floor." Judge O'Connell vacated each citation primarily on the basis that the area where the employees were installing metal decking served as a temporary floor, rendering § 1926.105(a) inapplicable. *Nilson-Smith, supra*. Subsequent to his decision in those cases, Judge O'Connell's opinions were rejected by the Commission.

In *Diamond Roofing Co., Inc.*, 8 BNA OSHC 1080, 1084, 1980 CCH OSHD ¶ 24,274 (No. 76-3653, 1980) ("*Diamond*"), the Commission "rejected the argument that an unguarded temporary floor from which employees are working is one of the alternative safety devices contemplated by § 1926.105(a) and that a violation . . . cannot be found if employees are working from this type of surface." The Commission held in *Diamond* that "[i]f the unguarded perimeter of a temporary floor itself gives rise to a fall hazard, it would

be anomalous to conclude that the temporary floor constitutes an adequate method of fall protection." *Id. See also Universal Roofing & Sheet Metal Co., Inc.*, 8 BNA OSHC 1453, 1980 CCH OSHD ¶ 24,503 (No. 77-1756, 1980); *Midwest Steel Erection, Inc.*, 8 BNA OSHC 1538, 1980 CCH OSHD ¶ 24,525 (No. 76-3880, 1980).

The fifth circuit recently embraced the Commission's reasoning on this issue in *Corbesco, Inc. v. Dole*, 926 F.2d 422 [14 BNA OSHC 2116] (5th Cir. 1991) ("*Corbesco*"). In *Corbesco*, the court wrestled with its previous decision on this issue in *Brennan v. OSHRC*, 488 F.2d 337 [1 BNA OSHC 1429] (5th Cir. 1973) ("*Brennan*"). In *Brennan*, the court held that the term "impractical," as used in § 1926.105(a), was not a precise enough term to put an employer on notice that the use of a temporary floor cannot be considered an acceptable substitute for the use of a safety net. *Id.* at 338.

The court in *Corbesco* did not dispute this finding in *Brennan* with regard to the imprecise nature of the language in § 1926.105(a). 926 F.2d at 428. The court did note that since the *Brennan* decision, several Commission decisions have interpreted § 1926.105(a) to require the use of a safety net in situations where employees are working near the edge of a flat roof that is more than 25 feet above ground; in those cases, the Commission held that the roof cannot serve as a temporary floor and substitute for the use of a safety net. On the basis of these decisions, the court concluded that the employer in *Corbesco* was faced with a different situation than the employer that confronted *Brennan* because, although "the wording of the regulation remains imprecise, the Commission has now elucidated its meaning." Once it was determined that the employer in *Corbesco* had notice of its duties under § 1926.105(a), the court went on to hold that "the purpose of the safety devices listed in the regulation is to provide fall protection, and a roof cannot provide fall protection if workers must operate along the perimeter." *Id. See also Brock v. Williams Enterps. of Ga., Inc.*, 832 F.2d 567 [13 BNA OSHC 1489] (11th Cir. 1987). The logic of this rationale cannot be denied. The tower roof does not constitute a temporary floor for the purposes of § 1926.105(a).

"[T]he Commission has frequently held that the regulation requires an employer to furnish either a safety net or one of the other enumerated safety devices if its employees are

working near the perimeter of a flat roof more than twenty-five feet above the ground . . . ." *Corbesco Corp.*, 926 F.2d at 428 (5th Cir. 1991). Quinlan alleges technical and economic infeasibility as an affirmative defense. Quinlan bears the burden to establish infeasibility of complying with a specific standard. *Cleveland Consolidated, Inc. v. OSHRC*, 649 F.2d 1160, 1165 (5th Cir. 1981); *Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 441 (5th Cir. 1977). It contends that the evidence supports its position that nets could not be erected on the job. In the event nets can be erected, Quinlan expresses the view that employees would be exposed to greater hazards erecting them. It alludes to the fact that it only took two hours to lay the deck but it would take 25 or more hours to erect the nets, assuming it could be done.

James L. Willson[2] testified as an expert witness for Quinlan. He indicated that it was impossible to provide fall protection 100 percent of the time (Tr. 142). Willson expressed the opinion that it was not practical or feasible to tie off while laying roof deck. The basis for this opinion is that employees are, in essence, working from a platform. He argues that cables on the floor will present a tripping hazard. He regards the deck as a secured floor which makes it unnecessary to provide fall protection. In his opinion, it was not feasible to erect nets at the Circuit City jobsite (Tr. 144). There would be more exposure erecting the nets than there would be in installing the roof (Tr. 146). The point is made that it would take approximately two hours to erect the roof deck (Tr. 101), while it would take 25 hours to erect nets (Tr. 146-147). Quinlan testified that safety nets could not be obtained in Savannah (Tr. 132) and that the decking itself was a form of fall protection (Tr. 99, 130, 144).

Willson conceded on cross-examination that it was possible to erect a scaffold around the entire roof tower. He further conceded that it was possible to erect posts around the four corners of the tower to which a perimeter cable could be attached and that he had seen such perimeter cables around similar towers (Tr. 149-150, 168-169). The Secretary's rebuttal expert, G. T. Breezley, testified that during installation of the roof deck, safety lines or safety

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[2] James L. Willson is vice-president of operations of L. R. Willson Co. He is in charge of field and safety operations. L. R. Willson Co. is a large steel erector. James Willson has worked for more than thirty years as a steel erector.

belt systems have been seen on construction sites where brackets or welded brackets and posts are installed close to, or on the outside of the beam. Cables are then installed all the way around. Employees may tie off their lanyards to these cables and protect themselves against falls (Tr. 160-161). Breezley further testified that it was practical to erect a scaffold around the roof tower without any problems (Tr. 166). According to Breezley, the scaffold reflected in Exhibits C-6 to C-10 could have been extended around the perimeter of the roof tower. It would be a continuation of the deck surface from which guardrails on the outside could readily be erected (Tr. 167, 170-171).

Quinlan's argument as to technological infeasibility is rejected. Quinlan makes the following statement concerning economic feasibility: "It costs . . . a mere 75 to 80 dollars in time and materials to erect the roof deck, which protected the employees against falls. It would cost $7,000 or more to erect nets, which is totally out of line with reasonable costs. Adding to that the cost of testing, engineering studies, etc., there can be no other conclusion than that nets are economically infeasible."

In order to establish this defense, Quinlan "must demonstrate both that it is extremely costly for [it] to comply with the Secretary's order and that [it] cannot absorb this cost." *Faultless Div., Bliss & Laughlin Indus., Inc.*, 674 F.2d 1177, 1190 [10 BNA OSHC 1481] (7th Cir. 1982). Quinlan has failed to meet that burden. It has failed to show how these costs might detrimentally affect business and its inability to absorb the costs.

Quinlan sought to show that industry practice does not require safety nets under the conditions observed by Compliance Officer Baker (Tr. 104, 132). The seventh circuit specifically rejected this argument, stating that "industry practice should not be considered when construing the regulation before us because the standard for employer conduct is quite specific and essentially requires no such construction." *Faultless Division, supra*, 674 F.2d 1187.

The allegation is affirmed.

Item 4 - Alleged Violation of § 1926.1053(b)(8)

The 16-foot ladder used by Reynolds and Clifton to gain access to and from the roof tower was unsecured and unbarricaded. Quinlan is charged with a violation of § 1926.1053(b)(8), which provides:

> (8) Ladders placed in any location where they can be displaced by workplace activities or traffic, such as in passageways, doorways, or driveways, shall be secured to prevent accidental displacement, or a barricade shall be used to keep the activities or traffic away from the ladder.

Quinlan does not argue that the ladder was not secured or barricaded. It places emphasis on the words "workplace activities or traffic" and notes that there is no evidence to establish that the area in which the ladder was located was an area of sufficient traffic that mandated that the ladder had to be secured. The evidence established that it was not necessary for any individual to come within 10 feet of the ladder, except Quinlan employees. The ladder was protected from one direction by a leg supporting the roof tower.

The base of the ladder was at ground level. The top of the ladder was leaning against the top I-beam. The location of the ladder was under the tower, which was the main entrance into the store. The dimensions of the tower at ground level and the open space at the front of the store were quite large. The front of the store was open space in which the entrance and exit doors were to be installed (Exhs. C-6, C-11). The ladder was located in an isolated corner of the tower structure which was protected on one side by two steel beams containing cross bars (Exh. C-6). Reynolds and Clifton used the ladder. Baker observed laborers passing through the area to gain access to the building (Tr. 67).

Workers were completing masonry and framing work in the vicinity of the ladder and were carrying aluminum studs and drywall into the building (Tr. 67-69, 91-95). The Secretary finds this fact sufficient to establish that accidental displacement of the ladder was a possibility, which she contends satisfies her burden of proof.

The ladder was in an isolated position. While laborers may have been seen entering the building under the tower roof, it was a large area and there is no evidence that the ladder could be accidentally displaced by workplace activities or traffic. The area was not

constricted. The standard applies when a ladder is in a location that can be displaced by work activities or traffic. The location of the ladder has not been shown to be subject to work activities or traffic. There is no indication that any employees approached within 10 feet of the ladder.

The allegation is vacated.

Classification of Violations

The Secretary submits that the violations were serious within the meaning of section 17(k) of the Act. In order to prove a serious violation, the Secretary must show that there is a substantial probability that death or serious physical harm could result from the condition in question. The Secretary need not prove that an accident is probable. It is sufficient if an accident is possible and the probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Division*, 8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980). The Secretary must also establish that the employer knew or with the exercise of reasonable diligence should have known of the existence of the violation. The knowledge element is directed to the physical conditions which constitute a violation. *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1977-78 CCH OSHD ¶ 21,582 (No. 12174, 1977).

The failure to have a fire extinguisher in the cab, as required by the standard, exposed the operator to burns and possible loss of control of the crane. This situation could lead to fractures, concussions, or even death to workers exposed to the load.

The failure to provide safety nets exposed employees to a fall in excess of 36 feet. A fall from this distance would result in death or serious physical injury. The ladder was 16 feet in height, and employees falling off would have suffered fractures, concussions, or even death. The violations are determined to be serious under the Act.

Citation No. 2

"Other" Than Serious

Item 1 - Alleged Violation of § 1926.59(e)(4)

Quinlan had a hazard communication program (Tr. 115). He failed to produce a copy of the program during the inspection. Allegedly, it had been thrown away due to rain damage (Tr. 71, 80). The Secretary asserts Quinlan was in violation of § 1926.59(e)(4), which provides:

> (4) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 C.F.R. 1910.20(e).[3]

Quinlan argues that no one was denied access to the written hazard communication program. A copy was furnished to the compliance officer by Quinlan upon request subsequent to the inspection. Quinlan argues the fact that a copy of the program not being immediately available is not relevant. It states that the accidental destruction of the copy made compliance impossible. Reynolds and Clifton had received hazard communication training.

The standard requires the employer to have the written hazard communication program available at the site. The program is provided for the convenience of the employees and is of little value if it is located at an office. The standard provides that it will be made available to a representative of the Assistant Secretary upon request. Reynolds was unable to present a copy of the written hazard communication program at the time of the inspection.

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[3] Section 1910.20(e)(1) provides:

> (1) Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the fifteen (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

This violation has been classified by the Secretary as "other" than serious. Under the peculiar facts of this case, the violation is reclassified as *de minimis*. "A violation is properly characterized as *de minimis* where it has only a negligible relationship to safety and health where it is thus inappropriate to require that the violation be abated or to assess a penalty." *National Rolling Mills Company*, 4 BNA OSHC 1719, 1976 CCH OSHD ¶ 21,114 (No. 7987, 1976). There is no dispute Quinlan had a written hazard communication program. The two employees at the site had received hazard communication training. Reynolds was unable to present a copy because his copy had been damaged by rain and destroyed. This was a construction site and exposure to hazardous products was at a minimum.

The violation is affirmed as *de minimis*.

Item 2 - Alleged Violation of § 1926.550(a)(2)

The load capacity chart in the control operator's cab was torn and portions of it were missing (Exh. C-13; Tr. 52-53). The Secretary has charged Quinlan with a violation of § 1926.550(a)(2), which provides:

> (2) Rated load capacities, and recommended operating speeds, special hazard warnings, or instruction, shall be conspicuously posted on all equipment. Instructions or warnings shall be visible to the operator while he is at his control station.

Quinlan contends the allegation should be vacated. It argues:

> Simply put, the load chart was there. It was not pretty, but it was complete and sufficient for the tasks at hand. There is no requirement that the load chart be in pristine condition at all times.

Employer knowledge and employee exposure are based on the fact that leadman Reynolds was the crane operator (Tr. 53). Quinlan seeks to rebut the nonserious citation by arguing that the majority of the load chart contained the rated load capacity (Exh. R-1; Tr. 80-81, 83). A comparison of the load chart observed by Baker, with the load chart offered by Quinlan, discloses the portions partially damaged or missing, concerned allowable loads on the jib, pressure load conversion table, crane service, and recommended hoist tackle

loads (Exhs. C-13, R-1). The damaged and missing portions of the load chart were not visible to the crane operator while he was at the control station.

The condition of the load chart is reflected in Exhibit C-13. The original load chart is reflected in Exhibit R-1. The load chart was torn and portions of it were missing. The chart was torn such as to remove instructions for allowable loads without outriggers on the crane and damage to allowable loads on the jib. Almost all of the pressure load conversion table was also torn away. The absence of instructions and other data, which were torn away, placed the operator in an untenable position in the event the obliterated instructions were necessary for operation of the crane.

The torn away portion of the load chart contains information which is essential to the operation of the crane. The standard refers to load capacities, operating speeds, special hazard warnings, and instructions. It specifies that instructions or warnings are to be visible to the operator when he is at his control station. The load chart which was being utilized did not fulfill these requirements.

The allegation is affirmed.

## The Unpreventable Employee Misconduct Defense Is Rejected

Quinlan argues that if any violations of §§ 1926.550(a)(14)(i), 1926.105(a), 1926.1053(b)(8), and 1926.59(e)(4) occurred, they were caused by employee misconduct and he should not be held accountable for the negligence. He claims to have had a safety program that included specific work rules which address these conditions. According to him, a ladder was required to be secured, the fire extinguisher should have been replaced by Reynolds, employees on the roof should have been wearing safety belts and lanyards, and Quinlan had a written hazardous communication program.

This defense reflects a recognition that it would be unfair to penalize an employer for conditions that were unpreventable. In order to establish the defense, an employer must show (1) that it has established work rules designed to prevent the violation, (2) that it has taken adequate steps to communicate the established work rules to its employees, (3) that

it has taken steps to discover violations, and (4) that it effectively enforced the rules when violations have been discovered. *Jensen Construction Co.*, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (No. 76-1538, 1979). Employees must be properly trained and supervised and made aware of the work rules to be enforced. The employer bears the burden of proving its defense.

Since a determination has been made that a violation of § 1926.550(a)(14)(i) and § 1926.105(a) have been violated, the unpreventable employee misconduct defense must be considered. Quinlan has a safety program. The program consists of "verbal" communication with the men at job box meetings. John Quinlan testified, "We have certain things that we will do and will not do." He stated that it is a rule of his company that safety belts and lanyards are to be worn at all times when employees are off the ground (Tr. 117). He did not testify concerning a specific safety rule for fire extinguishers but indicated that Reynolds should have been aware that he had the authority to obtain a new one. It is difficult to ascertain whether Quinlan communicated these rules to his employees. Even if he had such rules and communicated them to his employees, the program was lacking in enforcement.

John Quinlan conducted safety inspections at the jobsite. He visited the jobs once a week. The evidence is lacking in detail as to how effective enforcement is pursued by Quinlan. There must be someone present on the job at all times to insure that safety is followed. Reynolds and Clifton were the two Quinlan employees working on the site. Reynolds was acting as the lead man or foreman of the job. He was the person responsible for committing the safety violations. A check of the site once a week by John Quinlan is insufficient to insure that enforcement of safety rules is being carried out. An adequate safety program must be able to discover violations and effectively enforce the established safety rules of the employer.

The defense is rejected.

## Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining an appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Quinlan is a small employer in the steel erection business. It has been issued citations in the past. Quinlan has displayed good faith. It has always been cooperative. At the time of the inspection, it employed twelve people.

The violation of § 1926.550(a)(14)(i) was for short duration. Quinlan contends that the violation resulted from the fire extinguisher being stolen from the cab of the crane. John Quinlan stated that the fire extinguisher was stolen the night before the inspection. A penalty of $400 is considered appropriate.

The violation of § 1926.105(a) is considered quite severe. Reynolds and Clifton were working at a height in excess of 36 feet without any type of fall protection. In carrying out their job at that height, both employees were exposed to the perimeter of the roof. A fall from that height would have probably resulted in their death or serious injury. A penalty of $2,500 is considered appropriate.

## FINDINGS OF FACT AND AND CONCLUSIONS OF LAW

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

## ORDER

Based on the foregoing decision, it is

ORDERED: (1) That the violation of §§ 1926.550(a)(9) and 1926.1053(b)(8) and the penalties proposed for the violations are vacated;

(2) That the violation of § 1926.550(a)(14)(i) is affirmed and a penalty of $400 is assessed for the violation;

(3) That the violation of § 1926.105(a) is affirmed and a penalty of $2,500 is assessed for the violation;

(4) That the violation of § 1926.59(e)(4) is affirmed as a *de minimis* violation and no penalty is assessed; and

(5) That the violation of § 1926.550(a)(2) is affirmed.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: March 18, 1993