

SECRETARY OF LABOR,

Complainant,

v.

CB&I CONSTRUCTORS, INC.,

Respondent.

OSHRC Docket No. 01-0279

BEFORE: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

On November 21, 2002, Chairman Railton directed this case for review solely on the issue of whether the judge erred by affirming Citation 1, Item 1 alleging a violation of 29 C.F.R. § 1926.350(a)(9). A briefing notice on this issue was subsequently issued. However, on January 24, 2003, the Secretary filed a Notice of Withdrawal of Citation 1, Item 1 on the grounds that the issue that had been directed for review did not warrant continued litigation. The Commission construes the Secretary's Notice of Withdrawal as a motion to withdraw this item.

On January 29, 2003, Respondent CB&I Constructors, Inc. filed a Motion to Correct Order of Administrative Law Judge Regarding Citation 2, Item 1. In its January 29 motion, the Respondent requests that the Commission correct page 18, paragraph 4 of the Decision and Order of the Administrative Law Judge to reflect that Item 1 of Citation 2 was affirmed by the judge as serious and not willful.

The Commission grants both the Secretary's motion to withdraw and Respondent's motion to correct the judge's order. The Administrative Law Judge's Decision and Order is set aside to the extent that it is inconsistent with the Secretary's motion and this Order. Furthermore, the Administrative Law Judge's Decision and Order is corrected to reflect that Item 1 of Citation 2 was affirmed as serious and not willful.¹

So ordered.

¹ In view of the Secretary's motion, Respondent's Motion for Extension of Time to File its brief is moot.

Date: January 31, 2003

/s/

W. Scott Railton
Chairman

/s/

Thomasina V. Rogers
Commissioner

/s/

James M. Stephens
Commissioner

SECRETARY OF LABOR,

Complainant,

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CB&I CONSTRUCTORS, INC, and its
successors,

Respondent.

OSHRC DOCKET NO. 01-0279

APPEARANCES:

For the Complainant:

Oscar L. Hampton III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Carl B. Carruth, Esq., McNair Law Firm, P.A., Columbia, South Carolina

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, CB&I Constructors, Inc., and its successors (CB&I), at all times relevant to this action maintained a place of business at South Ninth Street & Fifth Avenue, Grand Forks, North Dakota, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 27, 2000, the Occupational Safety and Health Administration (OSHA) conducted an inspection of CB&I’s Grand Forks work site. On January 25, 2001, CB&I was issued “serious” and “willful” citations alleging violations of the Act, together with proposed penalties. By filing a timely notice of contest CB&I brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 10-11, 2002, a hearing was held in Chicago, Illinois. The parties have filed briefs on the issues, and this matter is ready for disposition.

The Work Site

On July 27, 2000, CB&I was engaged in the construction of a water tower. CB&I's towers consist of a bell-shaped base, where a personnel door is located. A shaft, or stem, rises out of the base. The top of the shaft flares out to a "knuckle," which supports the water tank, or ball (Tr. 275-78; Exh. R-13). Two or three manholes in the shaft provide access to "painter's rings" on the outside of the shaft. The painter's rings consist of rails attached to brackets; each rail completely encircles the shaft. The rings provide a suspension point for iron workers during construction, and later for painters who blast and paint the exterior of the structure (Tr. 276-76; Exh. R-13).

When CO Dressler first observed CB&I's work site, the shaft was complete to the knuckle. The steel plate assemblies that would form the lower ball had been assembled on the ground and were being hoisted up, fitted into the knuckle and pinned together prior to welding (Tr. 371-73; Exh. C-1, 10:20:39, 10:20:51).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.350(a)(9): Compressed gas cylinder(s) were not secured in an upright position:

- (a) Employees were exposed to upright unsecured gas cylinders.
- (b) Employees were exposed to an unsecured gas cylinder lying on its side on the ground.

The cited standard provides:

Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

Facts

During his July 27, 2000 inspection of CB&I's work site, CO Enge Dressler observed and videotaped a number of improperly stored compressed gas cylinders. Two acetylene cylinders were standing upright near a port-o-john inside CB&I's fenced off work area; an upright oxygen cylinder stood a short distance to the right (Tr. 115, 149-50; Exh. C-1, 10:17:24 to 10:17:55). CB&I's field superintendent, Mitch Smothers (Tr. 356), told Dressler that the cylinders inside the fence belonged to a subcontractor, and that he thought they were empty (Tr. 150-52). Smothers testified that he cracked the valve on the cylinders and determined that they were empty (Tr. 417-18). Smothers notified the subcontractor and asked that the cylinders be removed (Tr. 150, 419-20). Smothers did not secure the tanks, as he did not believe they were his responsibility (Tr. 152, 419-20).

In addition, one of CB&I's oxygen cylinders had been tested, tagged as "empty," and placed on its side outside the fenced area (Tr. 113-14, 417, 420-21, 428; Exh. C-1, 10:36:02).

CO Dressler testified that if a tank fell over, its valve could break off and the tank could become a

projectile (Tr. 116). An employee struck by the tank could suffer severe injuries, up to and including broken bones and/or death (Tr. 117). Dressler admitted that if there was not enough pressure inside to provide thrust for the tanks, the tanks would not pose a hazard (Tr. 154).

Discussion

CB&I admits that the cited cylinders were improperly stored, and that they were in violation of the cited standard. Respondent maintains, however, that because the cylinders were empty, the violation should be classified as *de minimis*. The Commission has held that a violation is *de minimus* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). However, the 7th Circuit, to whom this case may be appealed, has accepted the Secretary's view "that the Commission cannot label a violation *de minimis* and disregard it; that would transfer the Secretary's prosecutorial discretion to the Commission. If the Secretary issues a citation, the Commission must determine whether the violation occurred and set an appropriate penalty. Trivial violations deserve trivial fines, but the Secretary is entitled to insist on some exaction even for the equivalent of jaywalking." *Caterpillar, Inc. v. Herman*, 131 F.3d 666, 668 (7th Cir. 1997)[citations omitted]. This judge, therefore, may not find the cited violation *de minimis*.

The Complainant, however, has not shown that the cited violation was "serious." Under longstanding Commission precedent, there is a rebuttable presumption that compressed gas cylinders are "wholly or partly full, or contain residual gas, and present a hazard." *Huber, Hunt & Nichols, Inc.*, 4 BNA OSHC 1406, 1409, 1976-77 CCH OSHD ¶20,837, p. 25,012 (No. 6007, 1976) ("Huber"); see also *Williams Enterprises, Inc.*, 7 BNA OSHC 1015, 1018-1019, 1979 CCH OSHD ¶23,279, p. 28,156 (No. 14748, 1979); *Williams Enterprises of Georgia, Inc.*, 7 BNA OSHC 1900, 1903, 1979 CCH OSHD ¶24,003, pp. 29,137-38 (No. 13875, 1979); *Trinity Industries, Inc.* 9 BNA OSHC 1515, 1519-20, 1981 CCH OSHD ¶25, 297, p. 31,323 (No. 77-3909, 1981). In this case, superintendent Smothers testified that, prior to the OSHA inspection, he cracked the valves on the subcontractor's tanks to ascertain that they were empty. CB&I's own tank was tested, marked empty, and placed outside the fenced work area to be picked up. Though Smothers told CO Dressler that all the cited cylinders were empty during the inspection, Dressler did not test any of the tanks himself. Under these circumstances this judge finds that the presumption is rebutted. CO Dressler admitted that the tanks, if empty, were unlikely to become projectiles. The citation is affirmed as an "other than serious" violation.

Penalty

A penalty of \$2,250.00 was proposed for this item. Because the violation is found not to be serious,

a penalty of \$1,250.00 is deemed appropriate.

Serious citation 1, item 2 alleges:

29 CFR 1926.451(e)(1): When scaffold platforms are more than 2 feet above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers, stairway-type ladders, ramps, walkways, integral pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface was not used:

(a) Three employees were unsafely accessing a scaffold at South Ninth Street and Fifth Avenue in Grand Forks, North Dakota.

The cited standard provides:

When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairway/towers) stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used crossbraces shall not be used as a means of access.

Facts

Prior to his entry on the work site, CO Dressler observed and videotaped two CB&I employees climbing over the flanged edge of the water tower's knuckle by boosting themselves up onto their stomachs or seats, then swinging their legs around to the other side before dropping down onto the upper knuckle scaffold on the outside of the shaft (Tr. 59-62, 162, Exh. C-1 at 8:41:06 through 8:41:20, C-2). Dressler also videotaped at least one employee boosting himself up and climbing back into the knuckle, while an employee on the inner knuckle scaffold guided a plate assembly onto the knuckle (Exh. C-1 at 8:47:12 through 8:47:20, 8:49:55). The upper knuckle scaffold was approximately 4-1/2 to 5 feet below the edge of the knuckle, and 87 feet above the ground (Tr. 59-62, 162). The employees wore no fall protection (Tr. 68).

Dave Holman, a steel fitter, or "pusher," with CB&I, admitted that he and Larry Derossett, a welder, did climb over the knuckle to the scaffold (Tr. 439). Holman testified that there was adequate alternative access to the scaffold. Employees could step onto a painter's ring from a hole in the access tube; employees could tie off, and after flipping a board back, they could step up onto the scaffold (Tr. 441). Leo Shanks, a welder with CB&I, testified that he accessed the upper knuckle scaffold by way of the "woodpecker hole" (Tr. 462-64, 470-72). Holman stated that it was easier and quicker to just climb over the knuckle (Tr. 441).

Smothers testified that he did not remember climbing over the knuckle to get to the knuckle scaffold on the morning of July 27, 2000, but admitted that he may have (Tr. 393, 413). The entire knuckle is only 13'8" in diameter (Exh. R-1), and Superintendent Smothers admitted that he was "in the air" the entire time they were hanging the shell on the morning of the inspection (Tr. 413).

Discussion

In order to prove a violation of §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)

CB&I admits that its employees climbed from some point on a scaffold inside the shaft or core, and over the four and ½ foot knuckle to access the cited upper knuckle scaffold. The knuckle wall prevented direct access from the inner knuckle scaffold to the outer knuckle scaffold. No ladder, stair or ramp was used to scale the knuckle. The single seam where the knuckle was welded to the core provided a single foothold for employees climbing the knuckle, but did not provide safe access equivalent to the means prescribed by §1926.451(e)(1). CB&I's superintendent Smothers testified that he might have participated in the cited practice on the day of the inspection. This judge infers from the careful phrasing of Smothers' answer that he engaged in the cited practice himself, although he could not remember whether he actually climbed the knuckle himself that morning. In any event, given the small size of the work area and his proximity to the employees climbing the knuckle, it is clear that Smothers knew of the practice. The evidence clearly demonstrates that CB&I's employees were exposed to the violative conditions, with the knowledge of CB&I's supervisory personnel.

Respondent argues, however, that the Secretary's designation of the top of the knuckle as a "point of access" is arbitrary and capricious, and that CB&I could not have known that §1926.451(e)(1) applied to employees climbing over the knuckle to access the scaffold. Respondent further argues that even if climbing over the knuckle constituted a violation of the Act, it should not have been cited because the practice was not hazardous.

Respondent's arguments are specious at best. The standard is clearly applicable. **WEBSTER'S II New Riverside University Dictionary** defines "access" as "**1. A means of approaching: PASSAGE.**" The top of the knuckle was a "point" along CB&I's employees' means of approaching the knuckle standard. The plain language of 1926.451(e)(1) describes the hazard to be abated as ascending or descending more than two feet from a point of access to a scaffold platform. There is no question that the employees boosting themselves onto the knuckle then had to descend from that point more than two feet to reach the knuckle scaffold. That conclusion is not affected by the fact that the employees had to climb to the top of the knuckle before coming down. A standard is not vague merely because the employer has to exercise some common sense in applying it. *See, e.g., Dravo Corp.*, 7 BNA OSHC 2095, 1980 CCH OSHD ¶24,158 (No. 16317, 1980).

Moreover, it is well settled that when a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978). The testimony of CB&I employees stating that the route was easy is insufficient to rebut that presumption. The likelihood of an accident occurring, and the possible severity of any accident is relevant only to the penalty determination.

Penalty

CO Dressler testified that employees climbing the knuckle could slip and fall from the edge of the knuckle to the scaffold platform (Tr. 65). Dressler testified that an employee could also have slipped between the scaffold boards, which were not flush, and fallen to ground approximately 87 feet below (Tr. 65). Because CO Dressler felt that it was most likely that an employee would fall to the ground, and because the most probable result of such a fall would be death, CO Dressler recommended a gravity-based penalty of \$5,000.00 for this item. Dressler testified that CB&I was automatically entitled to a 10% reduction in the gravity-based penalty because in the last three years it had not received any citations for scaffold violations in the region where this violation occurred (Tr. 134-35).

In determining the gravity of the violation, this judge must consider: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). In this case, the evidence establishes that three out of the four employees working at the knuckle level were accustomed to climbing over the knuckle, and were exposed to the cited hazard. Their exposure was limited to the period of time between completion of the knuckle and the completion of the lower ball, when there would no longer be convenient access to the outside scaffold. Though the probability of an employee falling all the way through the scaffold to the ground appears remote, it is possible. The scaffold boards were not immobile; employees regularly moved them to access the scaffold, or to make a comfortable work space (*See*; Leo Shanks testimony, Tr. 465-67). Gaps in the scaffold surface were apparent (Exh. C-6). Should an employee trip over the unevenly placed scaffold boards and dislodge a plank, said employee could conceivably fall to the ground. According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. The substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989). There can be no doubt that a fall of 87 feet would result in serious physical

harm up to and including death.

This judge finds that the cited violation was “serious” as defined by the Act. The gravity of the violation was somewhat overstated in that it was more probable an employee would fall *to* the scaffold than *through* it. Nonetheless, the possibility of a fatal accident occurring justifies the high penalty. Taking into account the relevant factors, I find that the penalty of \$4,500.00 is appropriate.

Serious citation 1, item 3 alleges:

29 CFR 1926.1051(a): Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided:

(a) Four employees were working on a water tower at South Ninth Street and Fifth Avenue in Grand Forks, North Dakota.

The cited standard provides:

A stairway or ladder shall be provided at all personnel points or access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Facts

Four permanent 20 foot vertical (“vert”) ladders are affixed to the inside of the water tower’s bell to provide access to the bell scaffold at the bottom of the shaft (Tr. 205, 423-24, 426). The bottom rung of the ladders are 64 inches above the ground (Tr. 119; Exh. C-3, C-4). CO Dressler testified that during his inspection there was no adequate access to the bell ladder that he was told was used for employee access to the shaft (Tr. 119-21, 208; Exh. C-3, C-4). According to Mitch Smothers, an eight-foot ladder is normally tied off to the bottom of one or more of the permanent ladders (Tr. 423-24). Smothers testified that the eight-foot ladder was attached to the cited vert ladder when he and his crew climbed up the shaft that morning. Moreover, the ladder was still there when he descended the shaft to meet with Dressler. Smothers stated that while he was outside the bell, the cleaning crew moved the eight-foot ladder to another vert so that they could grind and clean inside of the bell (Tr. 425; *See also*, testimony of CO Dressler, Tr. 207, 209; David Holman, Tr. 461). CO Dressler thought the ladder had been missing for “a little while,” but did not actually know whether any employee used the vert ladder alone to climb down the bell (Tr. 210-13). Smothers testified that a descending employee could simply walk around “the boards” to whichever vert ladder provided access to the ground (Tr. 426-27). Both Holman and Shanks testified that they never used a ladder that did not extend all the way to the ground (Tr. 437, 473-74). According to both Holman and Shanks, if the lower ladder had been moved to another location, they would simply walk around to whichever vert had a ladder reaching the ground (Tr. 437-38, 460, 474-75).

Discussion

The Secretary's evidence establishes only that, at the time of the inspection, there was no adequate means of climbing up to or down from one of the four vert ladders permanently installed inside the bell, all of which provided access to the bell scaffold at the bottom of the shaft. While Complainant showed that employees used the cited ladder to climb up to their work area, Respondent's witnesses unanimously testified that when they used the ladder to go up, a second ladder bridged the 64-inch gap between the end of the vert ladder and the ground. While the parties agree that the second ladder had been moved from the employees' original point of access, it is not clear from this record whether there was an alternative means of reaching the ground at the time of the inspection. Complainant discounted the other three ladders in the bell, but failed to explain why they did not provide an alternative safe means of passage for personnel descending through the bell. Complainant's witnesses unanimously testified that the ladder they climbed down reached all the way to the ground.

Even if this judge were to assume that at the time of the inspection there was no way of climbing down from the bell scaffold without jumping the last 64 inches, Complainant failed to show that CB&I knew or should have known of the violative condition. Superintendent Smothers testified that the missing ladder was there when he came down to meet CO Dressler. After walking the work site with Dressler, they entered the bell, where they found the bridge ladder gone. Given the short lapse of time between Smother's descent and the occurrence of the violation, this judge cannot find that with the exercise of reasonable diligence, Smothers' could have discovered the condition.

Citation 1, item 3 is vacated.

Willful citation 2, item 1 alleges:

29 CFR 1926.105(a): Safety nets were not provided when work places 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) Two employees were working on sections of steel plates that make up the lower ball section of the water tower and were not protected from fall hazards of approximately 105 feet to the ground level below.

The cited standard provides:

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.

Facts

CO Dressler observed and videotaped two CB&I employees, foreman Mitch Smothers and pusher David Holman, working on the upper knuckle scaffold, guiding the steel plates which would form the bottom of the ball into place, and hammering in “bull pins” to hold the key plates assemblies together (Tr. 69-72, 89, 91, 93, 104, 215-16, 357-58, 376; Exh. C-1 at 9:04:35, 9:22:40, 9:31:55 through 9:32:42). Smothers, who testified that he was wearing the darker blue shirt (Tr. 396), was videotaped at the top of the key plate bending down to hammer in the top bull pins while Holman stood nearby. The top edge of the plate assembly extended no higher than either man’s knees (Tr. 217-18; Exh. C-1, 9:04:38 through 9:07:17). In addition, Smothers was videotaped at the top of the knuckle next to the steel plate freeing some rope that appeared to be caught on a clamp at the edge of the plate (Tr. 71). Smothers admitted that he should have been tied off in that area (Tr. 378-79, 384; Exh. C-1, 9:31:55 through 9:32:42). The knuckle was 92 to 94 feet above the ground (Tr. 73, 92). Neither employee wore personal fall protection during the relevant periods (Tr. 72).

Superintendent Smothers admitted that he never put on a harness on July 27, 2000 (Tr. 406). Although he was aware that CB&I requires employees to tie off when exposed to a fall exceeding 6 feet (Exh. R-6), Smothers testified that he did not believe fall protection was necessary, because he would not be within six feet of a fall hazard at any time during the performance of his tasks (Tr. 361, 387, 432; Exh. R-6). According to Smothers, when hammering in the top bull pin he stands approximately 5 feet and 10 inches from the top of the key plate assembly on the third key plate down (Tr. 376-77). Moreover, Smothers argued, should he fall over the top of the key plate assembly, he would hit the outer knuckle scaffold (Tr. 433-35). Smothers testified that he was not wearing a harness and lanyard and did not need any fall protection because he was experienced (Tr. 387). Smothers stated that he never considered tying off at any time on July 27, 2000 (Tr. 386).

Smothers testified that he required his crew members, and specifically Dave Holman, to wear personal fall protection equipment when they were hanging steel without him (Tr. 387-88, 408). Smothers testified that he believed his employees would be exposed to a fall hazard when cutting a clamp loose (Tr. 388-92). However, Smothers did *not* require Holman to wear his harness and lanyard while working with him on July 27, because he determined that Holman would not be exposed to a fall hazard, as he, Smothers, was hanging the steel (Tr. 387). Holman testified that he was wearing a body harness when he first went up on July 27, but removed it, with Smothers’ permission, before installing the plates (Tr. 111, 387, 404, 444; See CB&I’s Post Hearing Brief, p. 22).

Lanyards and body harnesses could have been used; there were anchors on the top edge of each ball plate to which employees could have tied off while performing their work. (Tr. 73, 321).

Discussion

When the Secretary alleges that an employer has failed to comply with §1926.105(a) by failing to require the use of a fall protection device other than a safety net, she has the burden of (1) proving where and how the device could have been used and (2) overcoming the employer's evidence that use of the devices was impractical, including evidence of industry custom and practice. *A.J. McNulty & Co., Inc.*, 19 BNA OSHC 1121, 2000 CCH OSHD ¶32,209 (No. 94-1759, 2000). CB&I does not maintain that safety harnesses and lanyards were impractical on this work site. CB&I welded anchors on its key plates; harnesses and lanyards were provided for the use of its personnel.

CB&I argues that only Mitch Smothers was exposed to a hazard on the date of the OSHA inspection. According to CB&I, Smothers was exposed, briefly, when he walked to the edge of the plate to free a rope. CBI maintains that Smothers' action constituted unpreventable employee misconduct.

The Violation. First, this judge finds Respondent's version of events utterly incredible. The testimony of CB&I's witness, Smothers, was contradicted by the readily apparent violations captured on OSHA's videotape. A six-foot man would not have to bend to hammer in a bull pin if that pin were at shoulder level. Secondly, Smothers' testimony appeared rehearsed. Smothers was hostile and evasive when answering Complainant's counsel's questions. He was unduly hesitant in framing answers to simple questions, except when adopting the answers suggested by Respondent's counsel's leading questions. Finally, Smothers' testimony was internally inconsistent. Though testifying that he insisted less experienced iron hangers, including Mr. Holman, wear fall protection when hanging steel, Smothers made a conscious decision to allow Holman to work beside him without a harness and lanyard. There was no way Mr. Holman could have tied off had he approached an unguarded edge. In short, Smothers was completely unbelievable. Smothers and Holman worked at the top of the key plate assembly, within six feet of the edge, without fall protection, where they were exposed to a fall hazard of approximately 105 feet, as depicted in Complainant's Exh. C-1. Smothers admits working at the edge of the plate at the top of the knuckle, where he was exposed to fall a fall hazard of approximately 90 feet. CB&I's contention that Smothers was protected from falling by the outer knuckle scaffold at least 4-1/2 feet below the knuckle is self-serving speculation at best. The knuckle scaffold projected only a few feet out from the edge of the knuckle. A six-foot man falling from above could easily hit the scaffold's guard rail and continue falling to the ground (Tr. 188).

Unpreventable 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). It is undisputed that CB&I has a specific work rule requiring its employees to wear fall protection when within six feet of an open edge, and that Smothers was well aware of the rule. James Rhudy, CB&I's vice president of health, safety and environmental (Tr. 249), testified that all supervisory personnel received 44 hours of training on accident prevention in 1993 (Tr. 255; Exh. R-4). A training log indicates that Smothers went through the 1993 training and, in addition, completed a second accident prevention program in 1998, which was developed to address "behavior-based" safety (Tr. 255-56; Exh. R-4). According to Rhudy, employees breaking safety rules are disciplined, and after receiving two written citations and an automatic suspension, may be fired (Tr. 256, 262-63). Employees are encouraged to work safely through recognition and cash incentives (Tr. 256-57). Rhudy stated that monthly safety audits are conducted by the safety supervisor, construction manager, or project manager to ensure that employees and supervisors are following the rules (Tr. 257, 263, 352). Supervisors are evaluated based on a review of the audits and of weekly safety questionnaires, which are filled out on site by the supervisor himself and by a "safety leader," who is a designated employee (Tr. 257, 264).

Mr. Rhudy describes what should have been an adequate training program and system of progressive discipline. However, following a 1999 OSHA inspection of a CB&I work site in South Dakota CB&I agreed to retrain its employees in OSHA fall protection requirements (Tr. 131, 143-44). CB&I introduced no evidence that such training was held. Nor did CB&I introduce evidence that any of its employees were ever actually disciplined for infractions of safety rules. No audits or safety questionnaires from Smothers' work sites were put into the record. What *is* in evidence is videotape proving that CB&I's foreman, Smothers, worked within six feet of the top of the key plate assembly without any kind of fall protection. The evidence further shows that Smothers allowed David Holman to work beside him, exposing Holman to a fall hazard of approximately 105 feet. Finally, Smothers admits working at the edge of the plate at the top of the knuckle, where he was exposed to fall a fall hazard of approximately 90 feet. It is well settled that misconduct by a 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, where more than one employee is engaged in the cited misconduct, it suggests ineffective enforcement. *Gem Industrial, Inc.* 17 BNA OSHC 1861, 1865, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996).

Despite CB&I's contention that it had a comprehensive safety program, this judge finds that the program was inadequate to impress upon either its supervisory or its hourly personnel the importance of complying with OSHA fall prevention regulations. CB&I failed to make out its affirmative defense, and the violation has been established.

Willful

The Commission has defined a willful violation as 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). Under Commission precedent, it is not enough for the Secretary to show that an employer was, or should have been aware of the conduct or conditions that constitute the alleged violation; such evidence is already necessary to establish any violation. 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, or was plainly indifferent to the safety of its employees. The Commission has held that a violation is only “willful” if the Secretary shows that the employer was actually aware, at the time of the violative act, that the violative conduct or condition was unlawful, or that it possessed a state of mind such that if it were informed of the unlawful nature of the conduct, it would not care. *Propellex Corporation (Propellex)*, 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999); *Johnson Controls*, 16 BNA OSHC 1048,1051, 1993-95 CCH OSHD ¶30,018, p. 41,142 (No. 90-2179, 1993).

On July 27, 2000, superintendent Mitch Smothers demonstrated his plain indifference to Dave Holman’s safety when he determined that not only he, but Holman, need not wear fall protection while hanging the lower ball plates. From Smothers’ cavalier attitude towards fall protection, demonstrated not only on July 27, 2000 but during his testimony during the July 10, 2002 hearing, this judge infers that Smothers so routinely failed to use fall protection while hanging iron, and so routinely allowed his crew to work without it, that on July 27, 2000 he never considered tying off, or requiring that Holman tie off when they were within six feet of the steel’s edge. Rather Smothers relied on Holman to ensure his own safety, by ignoring Smothers directions if necessary, if he felt that fall protection was required. *See*, Smothers’ testimony at the hearing “If [an employee] felt that he needed a belt, he could call the office and say, hey he [Smothers] is working unsafe and we need to go over this.” (Tr. 404). Smothers’ behavior was “willful” as that term is defined by the Commission.

Nonetheless, the willful conduct of supervisory personnel is not imputable to his employer if the employer can show that it made good faith efforts to comply with the standard. *See, Chesapeake Operating Company*, 10 BNA OSHC 1795, 1982 CCH OSHD ¶26,142 (No. 78-1353, 1982). As noted above, CB&I has a specific work rule requiring its employees to wear fall protection when within six feet of an open edge, and made its employees aware of the rule. Though the superintendent on site is responsible for safety on his job site, monthly safety audits are supposed to be conducted by the safety supervisor, construction manager, or project manager (Tr. 254 257, 263, 352). William Cox, CB&I’s district safety manager, testified that he had inspected Mitch Smothers work sites before (Tr. 335). According to Cox, his office attempted to conduct safety audits of Smothers’ job site at least quarterly (Tr.

341). In addition, Cox reviewed safety questionnaires completed by Smothers and the designated safety leader, and reports from traveling welding supervisors who visited the site (Tr. 341, 347). According to Cox, Smothers was “good” at enforcing and complying with CB&I’s safety rules (Tr. 336). Cox testified that neither he nor any of CB&I’s other auditors ever found Smothers in violation of the six- foot tie-off requirements during his audits (Tr. 337, 353).

A fall hazard cited at CB&I’s work site in South Dakota in 1999 involved an employee climbing a ladder built into the boom of a “gin pole” (Tr. 94-96, 129, 137-138). In that case, the employees were wearing harnesses and lanyards (Tr. 139). One employee was improperly tied off, in that his lanyard had no “grabber,” a device intended to slide up, but not down, the cable (Tr. 139). CB&I and the Secretary entered into a settlement agreement disposing of the citations issued as a result of the 1999 inspection (Tr. 131, 143). The settlement followed CB&I’s agreement to retrain their personnel in fall protection and scaffolding requirements (Tr. 131, 143-44). Neither Complainant nor Respondent introduced evidence showing whether the required retraining was conducted, but Mitch Smothers’ training log does not suggest that he received any training after 1998 (Exh. R-4). CB&I admitted that it did not increase the number of audits it conducted in response to the 1999 OSHA inspection; however, following CB&I’s receipt of the citation at bar, Cox’s office has increased the number of audits to one per month, per foreman (Tr. 350-51).

According to CO Dressler, CB&I has had 14 accidents since October 1987. Their job sites have been inspected 92 times since 1990; 29 inspections resulted in citations (Tr. 227, 245). CB&I personnel have suffered falls resulting in death. An employee fatality was reported on April 16, 1990, on a Texas work site (Tr. 241); another on September 14, 1989, in Illinois (Tr. 225, 241). On July 29, 1996, an employee fell on a Minnesota job site, and was found at the bottom of the bell (Tr. 221-22, 241). CO Dressler was unable to testify as to whether any of the three fatalities were the result of fall hazards created by CB&I (Tr. 242-44).

According to Rhudy, CB&I’s lost workday rate, *i.e.*, lost days per 200,000 man hours, was 0.4 in 2000, while the average lost workday rate in the construction industry was 4.3 (Tr. 258).

Discussion

The record establishes that CB&I had a safety program, which provided for the training, supervision and discipline of supervisory personnel. Its safety program has reduced its nationwide injury rates to less than the industry average. None of CB&I’s audits uncovered problems with Mitch Smothers’ training or supervision. As discussed above, the record discloses inadequacies in CB&I’s training and oversight of its supervisory personnel. Clearly, in this case, CB&I’s program failed to uncover either the serious deficiencies in Smothers’ supervision of his crews, or his disregard for CB&I’s and OSHA’s fall protection

requirements. The record, however, does not demonstrate that CB&I had a heightened awareness of Smothers' indifferent attitude towards safety, nor can this judge conclude, that had CB&I been aware of Smothers' behavior, it would not have cared. The cited violation, therefore, cannot be affirmed as a "willful" violation. CB&I, however, should regard this incident as notice of Smothers' cavalier attitude towards fall protection and take appropriate action.

Penalty

In her complaint, the Secretary cited the violation 1926.105(a) as "serious" in the alternative, and it is affirmed as such. The maximum penalty available, \$7,000.00, is deemed appropriate in this case, where the employees were exposed to a probable fall of 105 feet.

Willful citation 2, item 2 alleges:

29 CFR 1926.451(b)(1)(i): Each platform unit was not installed so that the space between adjacent units and the space between the platform and the uprights was no more than 1 inch wide.

(a) Three employees were working on a scaffold at South Ninth Street and Fifth Avenue in Grand Forks, North Dakota.

The cited standard provides:

Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

Facts

The upper knuckle scaffold consisted of two 12-inch planks placed on 30-inch brackets projecting from the knuckle (Tr. 467; Exh. R-1, R-2). CB&I laid a third plank over the bracket adapters to cover the void spaces between the knuckle and the work platform (Tr. 163-64, 395, Exh. R-1, R-2, C-6). CO Dressler testified that the planks comprising the upper knuckle scaffold's work platform were up to 10 inches apart in places, in violation of the cited standard (Tr. 65, 124-126; Exh. C-1 at 9:56:16 through 9:56:50, C-6). Dressler did not measure the gap in the planks, but compared their size to the size of adjacent objects (Tr. 126).

Dressler observed and videotaped welders working from the cited scaffold (Tr. 125). Two welders, Leo Shanks and Larry Derossett, sat on the work platform with their legs dangling between the two outer planks of the work platform and the inner plank (Tr. 125, 235, 464; Exh. C-1 at 9:57:40 through 10:00:52). Mr. Shanks testified that he deliberately pulled the boards apart, moving the inner platform plank closer to the seam to make welding from a seated position easier (Tr. 465). Shanks did not believe that moving the planks created a hazard, as the other welder, Derossett, was working on the other side of the knuckle, and Smothers and Holman were working inside the knuckle (Tr. 467). However, Shanks admitted, with his welding mask down he could not tell whether anyone else was on the scaffold with him (Tr. 482). Shanks further admitted that he did not replace the boards in their original position after finishing welding, leaving gaps between the planks that would have been plainly visible to anyone looking up from the ground (Tr. 481). Shanks was tied off to a painter's ring as he worked; Mr. Derossett was not (Tr. 126-27, 469-70, 475).

CO Dressler videotaped other CB&I employees walking on the platforms while the planks were out of place (Tr. 129; Exh. C-1, 9:58:01 through 9:58:12, 10:01:22, 10:04:27). Dressler identified those

employees as Mitch Smothers and David Holman (Tr. 127, 235-36; Exh. C-1 at 8:41:07 to 8:42:14). Dressler identified Smothers from his dress, and his build (Tr. 231).

Smothers did not remember being on the knuckle scaffold on the morning of July 27, 2000, and denied knowing that the scaffold boards were spread further than 1" apart (Tr. 393-94). However, Smothers also testified that if he had known of the condition of the scaffold, he would have left the boards as they were so long as there were men working in the area. Once work was finished in the area, he would have pulled the boards back together (Tr. 394). Smothers testified that he was unaware of the requirements of §1926.451(b)(1)(i) at the time of the inspection (Tr. 394).

Dennis Hardiman is a traveling construction manager (Tr. 281, 303). Hardiman is responsible, in part, for training and safety (Tr. 281). While Hardiman is in a position of authority over the field supervisors, including Mitch Smothers, Hardiman stated that the supervisors do not report to him directly (Tr. 304). Nonetheless, Hardiman has the authority to direct employees to correct safety violations he observes (Tr. 326-27). Hardiman testified that he did not notice any obvious gaps in the scaffold boards on the day of the inspection, but after seeing Complainant's photographs he agreed that the outside knuckle scaffold was "in disarray" (Tr. 306, 328).

CO Dressler testified that during his 1999 inspection of a CB&I work site in South Dakota, he found gaps between scaffold boards exceeding the 1" limit (Tr. 94-96, 129, 130, 137-138). The scaffold violation included one instance where an employee had moved a scaffold board to gain access to the scaffold, and neglected to replace the board (Tr. 145).

Bill Cox was in charge of safety for both the South Dakota and the Grand Forks sites, though he was not actually present at either inspection (Tr. 97, 138). Cox testified that were he to discover a scaffold in the condition of the outer knuckle scaffold on July 27, 2000, he would have written it up. Cox admitted that the scaffold complied with neither CB&I rules nor OSHA regulations (Tr. 338, 346). Cox also admitted that the gaps between the planks on the outer knuckle scaffolding were similar to those found at CB&I's work site in South Dakota in 1999 (Tr. 348).

Discussion

There is no dispute as to the existence of the violative condition. CB&I argues, however, that its supervisory personnel had no knowledge either of the existence of the cited condition or of the applicable OSHA requirements.

It is well settled that ignorance of the standards does not excuse noncompliance. An employer has a duty to inquire into the requirements of the law. *Peterson Brothers Steel Erection Company*, 16 BNA OSHC 1196, 1991-93 CCH OSHD ¶130,052 (No. 90-2304, 1993), *aff'd*. 26 F.3d 573 (5th Cir. 1994). The employer's lack of knowledge is a defense to an established violation only when the employer was unaware

of the conditions in their workplace. *Ormet*, 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). A prima facie case of actual or constructive knowledge is made out where established violations are in plain view. *Williams Enterprises, Inc.*, 10 BNA OSHC 1260, 1981 CCH OSHD ¶25,830 (No. 16184, 1981). Respondent's argument that management was not aware of the violation is disingenuous at best. The work area was less than 14 feet in diameter, and the violation was in plain view. Hardiman could easily have seen and identified the hazard had he only looked up. Smothers testified that he was "in the air" the entire time they were hanging the shell on the morning of the inspection. He was working near and on the scaffold in question. He was not surprised that the welders had moved the boards, and indicated that for them to do so was fairly commonplace. I find it more likely than not that Smothers had actual knowledge of the cited violation. Alternatively, it is clear that either Smothers or Hardiman should, with the exercise of reasonable diligence, have known of the cited conditions. In any event, CB&I's knowledge of the violative condition is established, and the violation is affirmed.

Willful

As noted above, superintendent Smothers exhibited such disregard for his employees' safety and for the requirements of the Act this judge can only conclude that even if he had known of the OSHA regulation requiring no more than 1" between scaffold boards, he would not have taken action to correct the condition. In regard to this item, moreover, CB&I has not shown why it should not be held responsible for Smothers' behavior. It is uncontested that CB&I was cited for the identical standard in 1999, and that the citation was settled when CB&I's agreed to retrain its personnel in OSHA's scaffold requirements. Respondent introduced no evidence that such training was ever provided. Smothers' training records do not show that he received any additional training since 1999. Most tellingly, Smothers claimed to be completely unaware of the cited rule.

Under these circumstances, where Respondent received an earlier citation for the identical violation, promised to train employees in order to settle the matter, and then failed to do so, I find that Respondent had the requisite heightened awareness of the illegality of the cited conduct. The cited violation was "willful."

Penalty

CO Dressler testified that he calculated the the gravity based penalty for this item as \$70,000.00. Dressler believed that the probability of an accident occurring was high, and that an employee falling through the planks comprising the work platform would likely fall to the ground and be killed (Tr. 106). Dressler testified that the proposed penalty of \$63,000.00 included a reduction for history, based on CB&I's clean record with OSHA in the South Dakota area in the last three years (Tr. 106). Leo Shanks testified that the holes in the planks were wide enough that a hand or a foot and ankle would probably fit through them. Because the planks were not secured, it is possible, but not probable, that an employee could fall completely through the planking. Considering the actual spacing of the planks I find that OSHA overstated the gravity of the violation. A penalty of \$50,000.00 is deemed appropriate.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.350(a)(9) is AFFIRMED, and a penalty of \$1,250.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.451(e)(1) is AFFIRMED, and a penalty of \$4,500.00 is ASSESSED.
3. Serious citation 1, item 3, alleging violation of §1926.1051(a) is VACATED.
4. Willful citation 2, item 1, alleging violation of §1926.105(a) is AFFIRMED, and a penalty of \$7,000.00 is ASSESSED.
5. Willful citation 2, item 2, alleging violation of §1926.451(b)(1)(i) is AFFIRMED, and a penalty of \$50,000.00 is ASSESSED.

/s/

James H. Barkley
Judge, OSHRC

Dated: October 17, 2002

