SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 02-0564
FRANK LILL & SON, INC.,	
Respondent.	

APPEARANCES:

James L. Polianites, Jr., Esq.
U. S. Department of Labor
Boston, Massachusetts
For the Complainant

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Syracuse, New York
For the Respondent

BEFORE: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C.§ 651 *et seq.* ("the Act"). From January 24 to February 22, 2002, the Occupational Safety and Health Administration ("OSHA") inspected a work site in Newington, New Hampshire, where employees of Frank Lill & Son Inc. ("Frank Lill"), were engaged in constructing two heat recovery steam generators ("HRSGs"). After the inspection, OSHA issued to Frank Lill a "willful" citation alleging a violation of 29 C.F.R. § 1926.501(b)(1). Frank Lill contested the citation, and a hearing was held on August 28, 2002. Both parties have submitted post-hearing briefs.

Background

______The inspection which resulted in the issuance of the citation was part of a general industry inspection program, but it also followed an incident complaint. (Tr. 5-10).[1] During the inspection, Compliance Officer ("CO") Stephen Rook observed three Frank Lill employees working on narrow platforms, or catwalks, on HRSG # 2. The catwalks on HRSG # 2 were between approximately 12 and 13 feet wide, with the highest being more than 152 feet from the ground. Two of the employees

[1] The complaint did not involve Frank Lill. (Tr.127).

were observed on an 85 foot high catwalk, and one was observed on a 75 foot high catwalk. None of the three was tied off or protected from falling by a guardrail or safety net, even though two were observed within 3 feet of an unprotected edge. The CO photographed the employees, but not until they had moved away from the edges. (Tr. 18-26, 138-140, Exhs. C-1, C-2, & R-2).[2]

At the time of the inspection, Frank Lill was in the process of preparing the HRSGs for a hydrostatic test. Permanent handrails for the catwalks were not yet built, but tie-lines were provided and employees were directed to wear safety harnesses and lanyards. (Tr. 132-133, 221). There was evidence, however, that Frank Lill employees did not always attach themselves to the tie-lines when walking along the catwalks or when the employees felt that there was no hazard, such as when they were not within a few feet of an edge. (Tr. 140, 179-180, 274). The CO continued his on-site inspection on January 25, 2002 and conducted the closing conference on February 22, 2002. (Tr. 43, 65)

"Willful" Citation 1, Item 1

This item alleges a violation of 29 C.F.R. §1926.501(b)(1),which provides that "(e)ach employee on a walking/working surface ... with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." The evidence showed that Frank Lill employees ascended the HRSGs to catwalks which were more than 6 feet over a lower level, and that at least three employees were so observed by the CO on January 24, 2002. The standard accordingly applies. I also find that its terms were violated, as none of the three employees was protected from falling by a guardrail system, safety net or personal arrest system. (Tr.18-24).

The evidence also demonstrates that Frank Lill employees were exposed to the hazard, as Frank Lill employees Kevin Gross and Real Savoy were observed within three feet of an inadequately guarded edge located 85 feet above a lower level, and neither was tied off. (Tr. 21).[3]

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[2] While the worker in exhibit C-2 is depicted with his back only two feet from an edge, the Secretary failed to rebut Frank Lill's proof that that particular edge was only 4 feet above a lower level. (Tr. 33-34, 165-166, Exh. C-2).

[3] I am not persuaded by Respondent's argument that, because the CO was unsure about whether two of the employees he observed near the edge were working or simply standing, the only logical conclusion is that they were working, and they were therefore not near the edge. (Respondent's Post-hearing brief, p.20). The CO's testimony that he observed the workers within

Moreover, despite a company rule to the contrary, there was ample evidence that Frank Lill employees in fact walked and worked on the 12 or 13 feet wide catwalks without attaching their lanyards to a tie-line when they were six feet or more from the edge. (Tr.140, 146-147, 179-180, 220-221, 274). I find that it is reasonably predictable that such employees will come precariously close to the unprotected edge so as to be in the zone of danger, if not by virtue of their work, at least inadvertently, while walking to and from their work areas or because of stumbling or tripping. In fact, approximately one week before the inspection, an unprotected Frank Lill employee tripped and fell over a metal pipe and landed within three feet of the edge. Further, one of the photographs taken by the CO shows tripping hazards, such as a metal pipe, wires and other material, near where a Frank Lill employee who had not tied off was working. (Tr. 31-33, 190, 221, Exh. C-1).[4]

The Secretary also established that Frank Lill had knowledge of the violation.[5] Actual knowledge was established as Ron Tanguay, the Frank Lill foreman for the top crew for HRSG #2, told the CO that management knew that there were instances when employees were not tied off, and this was confirmed by Savoy, Gross and admitted by Respondent's field superintendent. Further, Frank Lill's site manager admitted that he would not tie off if he were simply traversing a catwalk. (Tr. 18-29, 146-147, 179-180).

I am also persuaded that Frank Lill had constructive knowledge of the violation. According to two management level employees - the corporate safety manager and the field supervisor - there

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three feet of the edge was not unclear, and the worker's precise activities while there are irrelevant. (Tr. 20-21, Exh. C-1). Moreover, Respondent did not convince me that these two particular employees worked only on the boiler, and therefore, had no work near the edge. Finally, as indicated, *supra*, these employees were at risk even if they were not immediately at the edge.

[4] The Secretary may establish that employees had access to a hazard by showing that is reasonably predictable that, "employees, either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be are or have been in a zone of danger." *Gilles & Cotting,* 3 BNA OSHC 2002, 2003 (No. 504, 1976); *see also*, *Fabricated Metal Products, Inc.,* 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

[5] The Commission's test for knowledge is whether the employer knew, or with the exercise of reasonable diligence could have known, of the violation. *Halmar Corp.,* 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997).

was a safety rule that employees on the HRSGs must tie off.[6] It is apparent, however, that this rule was neither adequately communicated nor enforced as there was ample evidence that employees, including the site manager, did not tie-off while on the catwalks. Also, the field superintendent appeared not to know the rule, as he testified that employees were permitted to traverse the 12 foot wide catwalks without tying off. Finally, on-site signs directing employees to wear safety harnesses did not also indicate when the employees were required to tie-off. (Tr. 112, 140, 179-180, 189-190, 221, 274). This citation item is accordingly affirmed.

Frank Lill argues, first, that the citation item should not be affirmed because any violation was the result of unpreventable employee misconduct.[7] I am not persuaded by this argument because Frank Lill did not adequately communicate its purported tie-off rule to its employees, as is evidenced by the field superintendent's confusion concerning what the rule required. Further, while the company showed that it disciplined employees for fall-related safety violations, (Tr. 140-145, 233, 278-279), it presented no proof that it endeavored to enforce its tie-off rule to employees who were not right at the edge. *See, Southwestern Bell Telephone Co.,* 19 BNA OSHC 1097 (No. 98-1758, 2000).

Frank Lill argues, second, that the citation should be vacated because the CO did not give the company an opportunity to accompany him during the inspection, in violation of section 8(e) of the Act.[8] This argument is also rejected. While there is no proof that the CO explicitly told Respondent of its accompaniment right, two Frank Lill foremen were present and met with the CO

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[6] Specifically, the field supervisor testified that there was only one area on the HRSGs that did not require the use of a lanyard, and the corporate safety manager testified that employees on top of the HRSGs should be tied off "100%" of the time. (Tr. 189-190, 220-221).

[7] An employer wishing to establish a defense of unpreventable employee misconduct must prove that (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *See Cerro Metal Products Div.* 12 BNA OSHC 1821 (No. 78-5159, 1986).

[8] Section 8(e) of the Act provides in pertinent part that, "a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace." In order to succeed on this defense, Frank Lill would have to show that the CO failed to substantially comply with the sections' requirements and that this failure prejudiced the company from preparing or presenting its defense. *See, A.J.McNulty & Co., Inc.,* 19 BNA OSHC 1121 (No. 94-1758, 2000).

during the course of the walk-around, and, by the afternoon of the inspection, Frank Lill's field safety inspector had joined the CO on-site. Further, prior to the inspection, Frank Lill was contacted by the general contractor and told to send representatives to the opening conference.(Tr.18-19, 28-29, 39-41,188-189, 223-224). In my opinion, this establishes substantial compliance with the Act's requirements. Moreover, Frank Lill did not demonstrate how it was prejudiced. Even if, as Respondent argues, the CO were "confused" about the work progress, the two foremen and the field safety inspector who were present the first day of the inspection afforded the company ample opportunity to clarify any misunderstandings the CO may have had.[9]

Classification and penalty

The Secretary has classified this citation item as willful. In order to demonstrate that a violation is properly classified as willful, the Secretary must prove that the employer acted with intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Brock v Morello Bros. Constr.,* 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.,* 14 BNA OSHC 2055, 2063 (No. 87-1220, 1991). As is shown above, it is clear that Frank Lill knew or should have known that employees who were not within six feet of the edge had a practice of not tying off, and I have already found that the company should have taken more steps to prevent this from occurring. While the evidence may demonstrate carelessness, in my opinion, it does not establish that Respondent was indifferent to employee safety or that it consciously disregarded its duties under the Act. *See, Dec-Tam Corp.,* 15 BNA OSHC 2072, 2076 (No.88-523, 1993). Rather, there was evidence that Frank Lill otherwise undertook adequate efforts to ensure the safety of its employees, such as requiring that its supervisors undergo safety orientation and an OSHA 10 hour course, conducting daily inspections, holding daily safety meetings, providing more than enough harnesses and lanyards for its employees, and disciplining employees who were actually within the zone of danger but had failed to tie off. (Tr. 143-145, 149, 202, 213-216). Also, it cannot be ignored that there was no evidence that Frank Lill had received any prior OSHA citations, or that there were only five very minor injuries reported for this project, even though there were upwards of 200 employees assigned to the site, and the job took over 286,000 man hours to complete. (Tr. 214-215,

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[9] Frank Lill also argues that the CO's behavior was in contradiction to the Secretary's own Field Inspection Reference Manual. However, this manual is an internal document for OSHA and accords employers no substantive rights. *See, Del Monte Corp.*, 9 BNA OSHC 2136 (No. 11865, 1981).

276).[10] For all of the above reasons, I conclude that the Secretary failed to prove that this violation is properly classified as willful.

Ordinarily, where the Secretary alleges but fails to prove willfulness, an other-than- serious violation will be affirmed, and the Secretary here presented no other argument regarding the classification of the violation, and did not seek to amend the citation to allege that the violation was serious. However, where the seriousness of the violation was evident, or where the parties have impliedly consented to try that issue, a serious classification may be appropriate. *See, Caterpillar, Inc.*, 15 BNA OSHC 2153, 2176 (No. 87-0922, 1993). The seriousness of the hazard was evident here, as employees exposed to falls of 75 and 85 feet faced the risk of death or serious, permanent and disabling injury. I also find that the issue was impliedly tried, as Respondent's own witnesses raised the issue of whether employees who were not within 6 feet of the edge are exposed to a fall from off the side of an HRSG to the ground. (Tr. 146-147, 179-180). Accordingly, I find that this violation is properly classified as serious. Also, in order to more accurately conform the pleadings to the proof, I amend the Secretary's citation to allege that the violation was serious in nature. *See,* Fed. R. Civ. P. 15(b).

After considering the gravity of the violation, the likelihood that an accident would result in a serious injury, the evidence relating to Respondent's efforts to ensure the safety of its employees, and Respondent's history, good faith and size, I find that a penalty of $5,000.00 is appropriate for this citation item and I assess same.

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[10] In support his proposed classification, the CO relied largely on statements made by, (1) representatives of Fluor Constructors, the general contractor, and (2) Respondent's employees. With respect to (1), Fluor's oral statements were not offered for their truth, and cannot support a finding of willful intent, as no representative of the GC testified. *See,* Fed. R. Evid. 802. (Tr. 17, 67-73). While admitted into evidence, the written statements lack credibility, especially in light of Frank Lill's unrebutted evidence that a hostile business relationship had developed between it and Fluor. (Exhs. C-6-8, Tr. 206-207, 253-256). Notably, Flour's safety audit sheet identifies only a few fall-related issues which it attributed to Frank Lill, and does not indicate any problems relating to tie-off violations. (Exh.C-5). With respect to (2), it is my opinion that, while these statements may show knowledge, they do not establish the greater culpability required to prove willfulness, as they involved situations where employees were not actually and immediately in the zone of danger and Respondent, although incorrectly, perceived no hazard. *See, Atlantic Battery Co.,* 16 BNA OSHC 2131, (No. 90-1747, 1994), citing *Hackney, Inc.*, 15 BNA OSHC 1520, 1524, (No. 88-391, 1992).

Conclusions of Law

1. Respondent, Frank Lill, is an employer engaged in interstate commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation 29 C.F.R. §1926.501(b)(1)

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1.Citation 1, Item 1 is AMENDED to allege it is a serious violation;

2. Citation 1, Item1 is AFFIRMED as a serious violation, and Respondent is assessed a penalty of $5,000.00

/s/
IRVING SOMMER
Chief Judge

Date: January 6, 2003
Washington, DC