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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>N&N CONTRACTORS, INC.,<br>Respondent. | OSHRC Docket No. 96-0606 |

***DECISION***

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

Following a fatal injury to an employee of N&N Contractors, Inc. ("N&N") at a construction site, Occupational Safety and Health Administration compliance officer ("CO") Joseph A. Sancomb inspected the site, and OSHA issued two citations alleging violations of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (the "Act"). N&N contested Citation 1, Item 1a, which alleges that N&N willfully failed to protect its employees from fall hazards in violation of 29 C.F.R. § 1926.501(b)(1) and Citation 1, Item 1b, which alleges that N&N willfully failed to train its employees to recognize fall hazards in violation of 29 C.F.R. § 1926.503(a)(1). After a hearing, Administrative Law Judge Covette Rooney affirmed both items as serious violations. We affirm the judge's decision in part and reverse in part.[1]

## I. Background

Respondent N&N is a construction firm with its headquarters in Upper Marlboro, Maryland. Around October 1995, N&N began work as a subcontractor of Clark

[1]While the merits of these two items are contested, the judge's characterization of them as non-willful is not at issue on review.

Construction, Inc. ("Clark") on the unfinished International Finance Corporation ("IFC") building in Washington, D.C. There were seven to fourteen N&N employees working on the IFC project, supervised by two foremen.

During the time in question, the building's floors were in place, supported by a number of columns on each floor; however, in many areas of the building, there were no exterior walls or window structures in place. N&N was installing concrete ("precast") panels on the exterior frame of the twelve-story building.

Clark had installed two horizontal cables ("perimeter cables") near the perimeter of each story of the IFC building, at heights of 21 inches and 42 inches from the floor. These perimeter cables were approximately 2 feet from the unguarded edges of the floors in most areas of the building, but in certain areas of the building, sections of the floor that formed the floors of balconies extended 6-8 feet or more beyond the perimeter cables.[2] The nature of the precast erection work required N&N's employees to perform tasks at the unguarded edges of the building's floors, beyond any perimeter cables. As a result, the employees wore harnesses and lanyards, which they generally attached to nylon slings that were "choked" around interior columns on the floor on which they worked. When not using slings, the employees would at times hook their lanyards to vertical cables ("vertical lifelines" or "ropes") that were attached to columns on the floor above the areas in which they worked and draped over the side of the building. In areas of the building where the floor extended

[2]The judge found that approximately 5-10 percent of the job site had 8-10 feet of space between the perimeter cables and the edge, and the remaining 90-95 percent had 2-3 feet of space between the cables and the edge. She credited Michael Olive, Clark's safety manager at the beginning of the IFC project, and his successor Anthony Picconi over N&N's lead foreman Kirk Kisner, who testified that approximately 40 percent of the worksite had 8-10 feet of space between the cables and the edge, and the remaining 60 percent had approximately 2-3 feet of space.

6 feet or more beyond the perimeter cables, an employee might have to go beyond the perimeter cables to reach a vertical lifeline dangling at the edge of a floor extension.[3]

On March 18, 1996, Krzysztos Radzicki was working on the eleventh story of the IFC building. In his work area, there was a single horizontal cable ("horizontal lifeline") that was available for use as an anchorage point for "tying off."[4] The floor extended approximately 2 feet 9 inches beyond this horizontal lifeline, stepped down 1 foot 4 inches, and extended another 3 feet 4 inches to the edge. There were no vertical lifelines in this area, but there were slings attached to columns on that floor. It is undisputed that Radzicki was wearing a safety belt and lanyard, but had not attached them to a sling or tied off to the horizontal lifeline. Radzicki and two other N&N employees had "landed" a precast panel on the exterior frame of the building, but it was not properly aligned. In an effort to move toward the exterior of the building and adjust the precast panel, Radzicki bent over and crossed underneath the horizontal lifeline. As Radzicki stood up on the outer side of the horizontal lifeline, he stumbled, lost his balance, and fell more than 115 feet to his death.

## II. Citation 1, Item 1a: Fall Protection

The Secretary issued Citation 1, Item 1a, which alleges that an "[e]mployee was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems, and was exposed to a fall hazard of 115 [feet] 4 [inches]," in violation of

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[3]It was possible for the employees to use cane-like objects to assist them in reaching the vertical lifelines; however, it is not clear whether the use of a cane would have prevented an employee from having to go beyond the perimeter cables to reach a vertical lifeline, and the evidence does not show whether the employees regularly used canes. Moreover, Picconi testified that the anchorage point for a vertical lifeline might be "set out from the edge of the building." Thus, an employee might have to reach *beyond* the edge of the building to reach a vertical lifeline.

[4]The horizontal lifeline was used only in this area of the building. Lead foreman Kisner estimated that this horizontal lifeline constituted only one percent of the building's entire perimeter cable system.

section 1926.501(b)(1).[5] The judge affirmed the item. At issue before the Commission are the correct interpretation of the standard, whether exposure was shown, and whether N&N had knowledge of the violative condition.[6]

The standard provides that "each employee on a walking/working surface . . . with an unprotected side or edge shall *be protected* from falling . . . . " 29 C.F.R. § 1926.501(b)(1) (emphasis added). When Radzicki approached the floor edge to align a precast panel, he was not protected from falling. He was also clearly in the zone of danger.[7] *See Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997) (exposure exists whenever it is reasonably predictable that employees are or will be in the zone of danger). Moreover, the company does not contend that it would have been infeasible for Radzicki to have been tied off.

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[5]The cited standard provides:

> **§ 1926.501 Duty to have fall protection.**
> * * *
> (b)(1) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical 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.

[6]The parties stipulated that the standard applies. *See Union Boiler Co.*, 11 BNA OSHC 1241, 1244, 1983-84 CCH OSHD ¶ 26,453, p. 33,605 (No. 79-232, 1983) (Secretary has the burden to prove by a preponderance of the evidence that the cited standard applies, the terms of the standard were not met, employees had access to the violative condition, and the cited employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition), *aff'd without published opinion*, 732 F.2d 151 (4th Cir. 1984).

[7]We do not need to decide whether the horizontal lifeline constituted a "guardrail system" in compliance with the standard since Radzicki was outside the horizontal lifeline and not tied off at the time he fell.

The parties have generally focused on whether the standard requires an employee who must work at the edge to tie off before or after moving past the perimeter cables and/or the

horizontal lifeline. The standard, however, is written in "performance-oriented language" that requires that employees be protected from falling by guardrail, safety net, or personal fall arrest system, whenever the employee is exposed to the hazard of falling, even for a short duration.[8]

The final element of a violation is employer knowledge. To meet her burden of establishing employer knowledge, the Secretary must show that the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). Reasonable diligence requires the formulation and implementation of adequate work rules and training programs to ensure that work is safe, as well as adequate supervision of employees. *Pride*, 15 BNA OSHC at 1814, 1991-93 CCH OSHD at p. 40,584; *Mosser Constr.*, 15 BNA OSHC 1408, 1414, 1991-93-93 CCH OSHD ¶ 29,546, p. 39,905 (No. 89-1027, 1991). Reasonable diligence also requires an employer to inspect the work area, anticipate hazards to which

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[8]Commissioner Visscher notes that cases interpreting the predecessor fall protection standard, 29 C.F.R. § 1926.105(a), have recognized that an employer would not be required to provide the continuous fall protection of safety nets if other means of fall protection were provided for a "substantial portion of the workday." *L.R. Willson & Sons v. Donovan*, 685 F.2d 664, 675 (D.C. Cir. 1982); *see also Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1388 (D.C. Cir. 1985); *American Bridge/Lashcon v. Reich*, 70 F.3d 131, 134 (D.C. Cir. 1995). The preamble to the new fall protection standard appears to concede a similar practical exception to *continuous* fall protection by stating that employers may use either personal fall protection systems *or* safety nets in order to comply with the standard. 59 Fed. Reg. 40,683 (1994). However, N&N does not argue that Radzicki's exposure fell under such an exception, only that the standard does not require Radzicki to be tied off until after he was outside the lifeline.

employees may be exposed, and take measures to prevent the occurrence of violations. *Pride*, 15 BNA OSHC at 1814, 1991-93 CCH OSHD at p. 40,584. The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer. *Tampa Shipyards*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992) (consolidated) (citing *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223 (No. 85-369, 1991)).

We agree with the judge's determination that N&N did not have actual knowledge of Radzicki's exposure. The record shows that on the day of the accident, Radzicki's foreman Eddie Wilkinson left the crew's immediate work area before Radzicki stepped near the unprotected edge and fell. There is no evidence that Wilkinson or any other N&N supervisor observed Radzicki's conduct.[9]

As to constructive knowledge, the judge found that "N&N knew or should have known that its employees had a tendency to ignore the use of fall protection while working on unprotected sides and edges of walking/working surfaces." She noted that Clark's safety managers had observed N&N employees outside of the perimeter cables without fall protection on several occasions during the IFC project. She also noted that two of N&N's foremen, Eddie Wilkinson and Earl Green, were involved in violative conduct and that Clark had notified N&N twice that its employees were involved in violative conduct. She found that foreman Wilkinson failed to exercise reasonable diligence on the day of the accident by

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[9]In his statement to the police after the accident, Wilkinson stated that he permitted Radzicki to take "charge of the crew" on the day of the accident because Radzicki was the lead crew member. The Secretary argues that "[t]o the extent Radzicki was acting as a supervisor of the crew [on the day of the accident], his violation also constitutes a violation by a supervisor." We decline to find that Radzicki was acting as a supervisor because of the lack of specific evidence regarding the substance of any alleged delegation of authority. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).

failing to ensure that his crew utilized fall protection when working near the edge of the building.

N&N argues that it could not have known that Radzicki would engage in violative conduct. It points out, *inter alia,* that it had very few fall protection violations during the IFC project and that on each of the few occasions on which it was made aware of fall protection violations by its employees, it promptly imposed discipline.

The record partially bears out N&N's claim. It contains descriptions of at least two specific incidents during the IFC project for which N&N disciplined employees after learning that they were exposed to fall hazards without being protected. On November 14, 1995, Kirk Kisner, N&N's lead foreman, and Michael Olive, Clark's safety manager at the beginning of the IFC project, observed N&N employee Dave Burkhart standing within 14 inches of the edge without fall protection equipment, exposed to a fall hazard of three floors. Kisner verbally disciplined Burkhart. Olive gave Kisner a safety violation notice which Kisner then gave to the head of the precast division. On November 30, 1995, Kisner and Olive observed that N&N foreman Earl Green and two N&N employees appeared to be beyond the perimeter cables on the fourth floor without any fall protection. After Kisner communicated with the employees via radio, Olive approached the area and observed the two employees tied off to a portable, wheeled welding machine, in violation of safety requirements. Kisner testified that he told Green "[t]hat's not the proper way of doing things. You know better than that. You've got all the equipment here. All you had to do was tie off to a column. You've got plenty of them right there." Olive issued a safety violation notice to N&N, which he either handed to Kisner or placed in his box. Olive discussed this incident with Kisner and with N&N's president.[10] Green was replaced as

[10]Kisner testified that he never observed whether the employees had failed to tie off, and assumed that they had merely tied off "to the wrong thing." Both Kisner and Robert DePaulo, N&N's safety coordinator, denied seeing this safety violation notice prior to these (continued...)

second foreman on the IFC project, approximately one month after this incident, "due to his inability to conform to the company safety policy."[11] Thus, N&N rebutted the evidence of these specific incidents involving Burkhart and Green.

However, we conclude that there is enough other evidence that employees were exposed to falls in violation of the standard to establish that N&N did not exercise reasonable diligence and must be charged with constructive knowledge of the violation. As found by the judge, Clark safety manager Picconi had observed Wilkinson, Radzicki's foreman on the day of the accident, engaged in horseplay with Radzicki at a location within 6-8 feet of the unprotected edge, outside the perimeter cables, without using any fall protection. Additionally, lead foreman Kisner testified that N&N employees "frequently" and "routinely" went to the edge without being protected from fall hazards in order to reach vertical lifelines dangling several feet beyond the perimeter cables,[12] or to tie off to precast panels.[13] The evidence clearly establishes that N&N knew that its employees regularly passed under the cables without having first tied off, and N&N does not contend otherwise.

Testimony from Clark's safety personnel concerning the exposure of N&N's

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[10](...continued)
proceedings. The box is an "open slot" and Olive admitted on cross-examination that he could not be completely certain that Kisner had actually received the notice.

[11]Initially, Wilkinson was second foreman on the IFC project, but he was injured and had to stop working. He was replaced by Green. Green was reprimanded for this violative conduct in December 1995. When Wilkinson returned to N&N in January 1996, he replaced Green.

[12]After observing such conduct at a particular area of the building in January or February 1996, Kisner and DePaulo subsequently arranged for the use of a horizontal lifeline in that area.

[13]The precast panels were approximately 2 feet 5 inches high. There was no evidence that they were placed in such a way to create a wall 39 inches or higher that would have protected the edge of the floor within the meaning of the relevant standard. *See* 29 C.F.R. § 1926.500(b).

employees to fall hazards is consistent with the practices described by Kisner. Clark's former safety manager Olive testified that during the IFC project, he observed N&N employees either working beyond or attempting to move beyond perimeter cables without being tied off on five or six occasions. He did not document these violations in writing or otherwise inform N&N; rather, he secured the individuals and identified the hazard to which they were exposed. Anthony Picconi, Olive's successor as Clark's safety manager during the latter portion of the IFC project, testified that he observed N&N employees beyond the perimeter cables without fall protection once or twice per week during the IFC project. He also asked the employees to tie off or move inside of the cables but did not issue written violation notices or otherwise notify N&N. That N&N was not made aware of these incidents does not require a different result. We merely note that they are consistent with Kisner's description of the practices of N&N's employees. *See Ormet Corp.*, 14 BNA OSHC 2134, 2137, 1991-93 CCH OSHD ¶ 29,254, p. 39,201 (No. 85-531, 1991); *Cleveland Consol.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, p. 36,429 (No. 84-696, 1987).

Our finding of knowledge is not changed by N&N's claim that it "was never advised by anyone - OSHA or Clark - that workers are prohibited from passing under a perimeter cable and then immediately tying off." Putting aside N&N's mischaracterization of the standard's requirements, it is clear that proof of the knowledge element of a violation does not require a showing that the employer was actually aware that it was violating an OSHA standard; it simply requires a showing that the employer knew or should have known of the conditions constituting the violation. *Peterson Bros.*, 16 BNA OSHC 1196, 1199, 1993-95 CCH OSHD ¶ 30,052, p. 41,299 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994). OSHA's earlier inspection of this work site may have focused on N&N's adherence to fall protection requirements, among other things, but the fact that the inspection did not result in any citations or a specific instruction about tying off does not support an inference that there were no violations, then or now, or that OSHA observed the exact same conditions.

*Seibel Modern Manuf. & Welding Corp.*, 15 BNA OSHC 1218, 1223-24, 1991-93 CCH OSHD ¶ 29,442, pp. 39,679-681 (No. 88-821, 1991), and cases cited therein. N&N's suggestion that it had less than full responsibility for its failure to protect because it was not advised of its duty is completely without merit. Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known. *Carlisle Equipment Co.*, 24 F.3d 790, 794 (6th Cir. 1994). In any event, there was no evidence that N&N actually relied on the earlier inspection. *See Cedar Constr.*, 587 F.2d 1303, 1306 (D.C. Cir. 1978).

N&N argues in the alternative that Radzicki's failure to tie off constituted unpreventable employee misconduct. Establishing the defense requires that N&N had: (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered.[14] *Precast Servs.*, 17 BNA OSHC 1454, 1455, 1995-97 CCH OSHD ¶ 30,910, p. 43,035 (No. 93-2971, 1995), *aff'd without opinion*, 106 F.3d 401 (6th Cir. 1997); *Marson Corp.*, 10 BNA OSHC 1660, 1662, 1982 CCH OSHD ¶ 26,075, p. 32,804 (No. 78-3491, 1982); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979).

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[14]Because N&N is headquartered in Maryland, the Commission's decision will be appealable to the Fourth Circuit as well as the D.C. Circuit. *See* 29 U.S.C. § 660(a). We note that in *L.R. Willson & Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1240, 1241 (4th Cir. 1998) (citing *Ocean Electric Corp. v. Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979)), *cert. denied, Herman v. L.R. Willson & Sons*, 119 S. Ct. 404 (1998), the Fourth Circuit held that despite violations by a supervisory employee, the Secretary still bears the burden of proving that the cited supervisor's conduct was foreseeable or preventable. Thus, under the Fourth Circuit's test, the Secretary effectively has the same burden of proving knowledge whether or not a supervisory employee is involved. *See L.R. Willson & Sons, Inc.*, 18 BNA OSHC 1698, 1999 CCH OSHD ¶ 31,796, p. 46,621 (No. 94-1546, 1999) (on remand). Here, even if Radzicki were a supervisor, we find that in establishing N&N's constructive knowledge, the Secretary has met that burden.

The judge concluded that N&N had an "ineffectively implemented safety program," as evidenced by its employees' continued violative conduct. Specifically, she found that N&N did not have a work rule designed to prevent the cited conduct and had not taken adequate steps to discover the violative conduct that occurred on March 18, 1996. On review, N&N asserts that "[t]he record shows the existence of Respondent's safety plan, the substantial time and effort Respondent invested to train its employees and oversee adherence to the plan" and that each time it was made aware of fall protection violations, it promptly disciplined its employees.

There were some positive aspects to N&N's safety program. It had a safety handbook that provides in relevant part that "whenever an employee is exposed to a fall in excess of ten feet, a standard safety belt and lanyard will be used." The fall protection standards were discussed at a number of special meetings and training sessions and on the job. Employees were given lanyards and safety belts, and there were a number of ways to tie off on each floor. Lead foreman Kisner testified that the employees were instructed that where the edge was only 2-3 feet beyond the cables and no precast panel was attached, they were supposed to tie off before going beyond the perimeter cables. Moreover, N&N's safety coordinator Robert DePaulo, who was charged with "oversee[ing] the safe operation of different projects," testified that he spent half of his time "visiting" each of N&N's job sites once or twice per week, and Kisner monitored the employees at least occasionally. N&N's safety handbook calls for "disciplinary action, including termination" for rule infractions, and Kisner testified that an employee would receive an oral warning for his first violation and "written time off" for his second. As noted, the record shows that employee Burkhart was verbally reprimanded when Olive and Kisner observed him working at the edge without fall protection and that Green was eventually demoted from his position as foreman after Olive and Kisner observed him and his crew in violation of safety rules. In addition, N&N once terminated an employee for failing to tie off in 1991, although it occurred under unusual circumstances: after an inspection, as part of a settlement agreement with OSHA.

However, we agree with the judge that the safety program was poorly implemented. The handbook was received by only "some" of N&N's employees, and there was no proof that any of the employees were required to read it. *See Nooter Constr. Co.*, 16 BNA OSHC 1572, 1577, 1993-95 CCH OSHD ¶ 30,345, p. 41,840 (No. 91-0237, 1994) (work rule not communicated where handbook was used only by supervisors and not generally given to employees).

Although, as noted, N&N did take steps when notified of violations, N&N's foremen did not ensure that employees followed the rule. Although lead foreman Kisner was aware of the existence of fall hazards and the importance of tying off, the record shows that he knew that employees had walked to the building's unguarded edges without being protected. A few weeks before the accident, Clark safety manager Picconi observed Radzicki and foreman Wilkinson engaged in "horseplay," near the edge of the seventh or eighth floor of the IFC building without fall protection. Additionally, as noted, foreman Green permitted his crew to be exposed to a fall hazard without proper fall protection. That Kisner, Wilkinson, and Green, all foremen, were either involved in or regularly condoned violative conduct suggests that N&N's safety program was lax. *Cf. CECO Corp.*, 17 BNA OSHC 1173, 1176, 1993-95 CCH OSHD ¶ 30,742, p. 42,703 (No. 91-3235, 1995) (citing *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982)) (supervisor's involvement in cited violation was strong evidence that the employer's safety program was lax); *Archer-Western Contracs.*, 15 BNA OSHC 1013, 1017, 1991-93 CCH OSHD ¶ 29,317, p. 39,378 (No. 87-1067, 1991) (unpreventable employee misconduct was not shown where the employer "failed to implement a safety program that emphasized the importance and priority of safety"), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992).

The evidence also shows that N&N took few steps to discover the numerous incidents of violative conduct that occurred during the course of the IFC project. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087, 1995-97 CCH OSHD ¶ 31,451, p. 44,486 (No. 91-2494,

1997) (*"AMSCO")* ("[e]ffective program implementation requires a diligent effort to discover and discourage violations of safety rules by employees"). As noted, Olive and Picconi observed numerous instances of violative conduct by N&N's employees, including Radzicki. Picconi testified that he once observed Radzicki beyond the perimeter cables on the roof of the IFC building, more than 130 feet above the ground, without fall protection. Picconi stated that he immediately confronted Radzicki and attached his lanyard for him. Then, on February 27, 1996, Picconi and Clark's mid-Atlantic supervisor J. B. Diamond observed and photographed an N&N employee working beyond the perimeter cables on the fourth floor of the IFC building without being tied off. When Picconi and Diamond proceeded to the area where the employee stood, they observed a second N&N employee who was not tied off. At the hearing, Kisner identified the employee in the photograph as Burkhart and testified that if he had seen Burkhart commit this second violation, Burkhart would have had a week off without pay. The fact that Clark personnel observed a number of instances of violative conduct and that Radzicki and Burkhart were each involved in more than one violative incident suggests that N&N's safety program was ineffective to influence employees' behavior and prevent them from violating the work rules. *Cf. AMSCO,* 18 BNA OSHC at 1088, 1995-97 CCH OSHD at p. 44,486 (rejecting defense where employer's efforts to determine employee compliance with safety rules were inadequate); *Daniel Constr. Co.,* 10 BNA OSHC at 1552, 1982 CCH OSHD at p. 32,672 (instances of employees failing to tie off were too numerous to conclude that safety rule was effectively enforced); *Falcon Steel Co.,* 16 BNA OSHC 1179, 1194, 1993 CCH OSHD ¶ 30,059, p. 41,343 (No. 89-2883, 1993) (defense was rejected because the occurrence of four incidents during the month-long inspection involving seven out of thirty employees was representative of a "pattern of disregard" for the employer's work rule).

In summary, we find that the violation was not the result of unpreventable employee misconduct.

## III. Citation 1, Item 1b: Fall Protection Training

Item 1b alleges that N&N failed to train its employees to recognize the hazards of falling and to train its employees in the procedures to be followed to minimize fall hazards, in violation of 29 C.F.R. § 1926.503(a)(1).[15] The judge affirmed the violation. She highlighted evidence in the record that N&N provided for fall protection training and conducted safety meetings on numerous occasions. However, she concluded that the employees "were not trained to recognize the hazards of falling and procedures to be followed to minimize these hazards," based on several observations of N&N employees' violative conduct by Clark's safety personnel and on Radzicki's actions on March 18, 1996. For reasons that will be discussed below, we reverse the judge and vacate this item.

To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *See Archer-Western,* 15 BNA OSHC at 1019-20, 1991-93 CCH OSHD at p. 39,381; *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-95 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106, 1993). If the employer rebuts the allegation of a training violation "by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *AMSCO*, 18 BNA OSHC at 1086, 1995-97 CCH OSHD at p. 44,484; *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2176-77, 1993-95 CCH OSHD ¶ 30,636, p. 42,493-494 (No. 90-1747, 1994).

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[15]The cited standard provides:

> **§ 1926.503 Training requirements.**
> The following training provisions supplement and clarify the requirements of § 1926.21 regarding the hazards addressed in subpart M of this part.
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> (a) *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

We conclude that the Secretary has failed to prove a violation of section 1926.503(a)(1). As discussed above, N&N has a written work rule requiring the use of safety belts and lanyards "whenever an employee is exposed to a fall in excess of 10 feet."[16] The record also shows that N&N employees assigned to the IFC project received fall protection training at N&N's corporate office and at the site. The foremen discussed safety, including the fall protection standards, at monthly meetings. In December 1995, Olive, Clark's safety manager at the time, conducted a special fall protection training session for N&N's foremen and crew members, at N&N's request. On March 14, 1996, DePaulo, N&N's safety coordinator, held a meeting with N&N's foremen to "reinforce" company safety policy, and the following day, the foremen held "toolbox talks" at which they addressed fall protection with their crews. The record also shows that the working surface of the unguarded floors in this building provided numerous places for N&N's employees to tie off. There were nylon slings fastened around interior columns and vertical lifelines anchored above the work areas and draped over the side of the building to which the employees could tie off. In the area where Radzicki worked, there was a horizontal lifeline approximately 6 feet from the edge that was available for use as an anchorage point for tying off.

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[16]We note that N&N's written rule requires fall protection when employees are exposed to a fall in excess of 10 feet, but the relevant standard provides that employees must be protected when they are exposed to fall hazards of *six* feet or more. 29 C.F.R. § 1926.501(b)(1). This evidence alone, however, does not sustain the training violation. CO Sancomb testified that representatives of N&N's management admitted to him during the investigation that they were aware of the "6-foot rule" and aware that the safety handbook needed to be revised. Additionally, Olive, Clark's safety manager who conducted a fall protection training session for N&N's employees, stated that employees were supposed to be tied off "[a]ny time you're exposed to a fall 6 feet or greater." The evidence is thus unclear as to whether N&N's employees were trained with regard to the standard's 6-foot requirement or to N&N's 10-foot rule. Accordingly, we decline to find a violation on this basis.

The Secretary argues that Respondent's training was deficient because it failed to address what employees should do in areas where the cables were 6 feet from the edge, such as the area where Radzicki worked, and because it "incorrectly instructed its workers that they did not have to tie-off before crossing perimeter cables 8 to 10 feet from the edge."

We disagree. N&N made its employees aware that fall protection was required. Its employees, who were equipped with lanyards and safety belts, were working in an area where there were numerous places to tie off. The Secretary suggests that N&N needed to go further than this and provide detailed instructions as to what precautions to take 6 feet from the edge. However, the command of N&N's instructions certainly encompassed employees working 6 feet from the edge. An employer's training program is not necessarily deficient just because it allowed employees discretion as to how to proceed. *El Paso Crane*, 16 BNA OSHC at 1426, 1993-95 CCH OSHD at p. 41,622.

Additionally, testimony of Kisner and Olive about N&N's employees failing to tie off before crossing perimeter cables 8-10 feet from the edge is evidence of Respondent's practices, not training. Kisner stated that without tying off the employees went to the edge to reach vertical lifelines where the edge was 8-10 feet beyond the cables; his testimony describes the *practices* of N&N's employees. Similarly, Olive's statement that he used "an average man's height" as a rule of thumb for determining whether employees were exposed to an unprotected side or edge was made in reference to his general *practice* on the IFC project. There is nothing in the record to connect these practices to employee training.[17]

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[17]In evaluating whether N&N complied with the standard, Commissioner Visscher would also emphasize that neither the training standard, § 1926.503(a)(1), nor the fall protection standard, § 1926.501(b)(1), specify a distance from the edge at which fall protection must be used. He notes that the language of § 1926.503(a)(1) merely requires that the employer train his or her employees to "recognize the hazards of falling and . . . the procedures to be followed in order to minimize these hazards." The record indicates that N & N instructed its employees to tie off whenever they were exposed to a fall. N & N also apparently used 6 feet (or the height of a man) from the edge as a "rule of thumb" for its employees as to

(continued...)

The failure to enforce compliance with work rules on the job does not establish a failure to train or instruct, and we cannot infer on the basis of these practices that the training was deficient. *Cf. Dravo Engrs. and Constructors,* 11 BNA OSHC 2010, 2012, 1984-85 CCH OSHD ¶ 26,930, p. 34,507 (No. 81-748, 1984) (evidence of failure to enforce a safety rule does not prove a training violation).

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[17](...continued)
when they were considered exposed, and specifically instructed employees to tie off before going beyond the cables where, as was the most common situation on that construction site, the cables were 2-3 feet from the edge. *Cf. R&R Builders, Inc.*, 15 BNA OSHC 1383, 1390, 1991-93 CCH OSHD ¶ 29,531, p. 39,863 (No. 88-282, 1991) (affirming a safety program violation where the employer's "general rule . . . did not provide an adequate guideline as to when protection is needed"). In light of the fact that N&N trained its employees to use fall protection whenever they were exposed to falls and the fact that the standard does not specify a distance from the edge at which employees must be instructed to use fall protection, he would not find that N&N's fall protection training violated the standard.

He further observes that the holding in this case is consistent with previous decisions in which the Commission found that a training standard was not violated where the standard was broadly worded, and the employer's training generally tracked the underlying substantive standard's requirements. *See, e.g., El Paso Crane,* 16 BNA OSHC at 1426, 1993 CCH OSHD at pp. 41,621-22 ("[a]n employer's instructions are not necessarily deficient just because they allow the employees discretion as to how to proceed, particularly where the working circumstances are such that no one form of protection is capable of being used every time"); *see also Archer-Western Contracs.*, 15 BNA OSHC 1013, 1020, 1991 CCH OSHD ¶ 29,317, p. 39,381 (No. 87-1067, 1991) (training found adequate where employees properly performed crane rigging and signaling after some instruction in safety meetings), *aff'd without published opinion,* 978 F.2d 744 (D.C. Cir. 1992); *H.C. Nutting Co. v. OSHRC,* 615 F.2d 1360 (6th Cir. 1980) (unpublished) (section 1926.21(b)(2) "does not outline any particular requirements for a safety program" but does require "that an employer inform employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations"). This case is distinguishable from *O'Brien Concrete Pumping,* 18 BNA OSHC 2059, 2061, 1999 CCH OSHD ¶ 32,026, p. 47,848 (No. 98-0471, 2000), in which the Commission affirmed a violation of a training standard that incorporated by reference the very specific requirements of a machine guarding standard.

Critical to the Secretary's failure to meet her burden here is the absence of direct testimony from N&N's foremen, safety officials, or employees to demonstrate that its employees did not receive the training required here. *See O'Brien Concrete Pumping*, 18 BNA OSHC 2059, 2061, 1999 CCH OSHD ¶ 32,025, p. 47,849 (No. 98-0471, 2000) (affirming training violation where, *inter alia*, five employees testified that they did not receive training on the specific subject at issue); *cf. Gary Concrete*, 15 BNA OSHC at 1054-55, 1991-93 CCH OSHD at pp. 39,451-52 (testimony of supervisors explicitly demonstrated specific defects in safety program). CO Sancomb based his opinion that N&N violated the training standard on the fact that "employees were routinely allowed to go under barrier protection without first tieing [sic] off . . . . [a]nd the fact that the employer continually allowed this to happen." His conclusory testimony does not even establish that he specifically questioned N&N's employees about the training and instruction they received on the use of fall protection equipment. *See Atlantic Battery*, 16 BNA OSHC at 2176, 1995 CCH OSHD at p. 42,493 (vacating a training violation where, *inter alia*, there was insufficient evidence in the record to support the industrial hygienist's conclusion that employees had not been trained).

In summary, we find that the Secretary failed to meet her burden to show that the training N&N provided for its employees who might be exposed to fall hazards was deficient. We therefore vacate the item alleging a violation of section 1926.503(a)(1).

## IV. Motions

Also at issue on review is whether the judge erred in vacating the employer's motions for summary judgment and sanctions. For the following reasons, we affirm the judge's decisions.

### A. Pre-Hearing Motion for Summary Judgment

Respondent made a prehearing motion for summary judgment, which the judge denied without opinion. Summary judgment is granted only where there is no dispute as to material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P.

56(c); *see Trico Technologies Corp.*, 17 BNA OSHC 1497, 1500-01, 1995-97 CCH OSHD ¶ 31,009, p. 43,223 (No. 91-0110, 1996); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2159 & n.2, 1987-90 CCH OSHD ¶ 28,504, p. 37,780 & n.2 (No. 87-214, 1989) (consolidated). As we have seen in resolving the merits of this case and will discuss in more detail below, there were numerous facts in dispute. We therefore find that the judge properly denied N&N's motion.[18]

Respondent's argument that one of the items must be vacated because they are both based on the accident and are therefore "duplicative" and "impermissible" is without merit. It is true that the accident led to the inspection and that, as N&N notes correctly, evidence of alleged violative conduct by Respondent's employees is not sufficient to prove a violation of a training standard. *See Dravo*, 11 BNA OSHC at 2012, 1984-85 CCH OSHD at p. 34,507. However, the Secretary also offered evidence regarding the language of N&N's work rule, as well as evidence of the ways in which N&N's foremen implemented the rule. This evidence raised genuine issues of material fact about the adequacy of N&N's training program sufficient to withstand summary judgment. Moreover, the fall protection and the training citations at issue here do not involve "substantially the same violative conduct." *Flint Engineering & Constr. Co.*, 15 BNA OSHC 2052, 2056-57, 1991-93 CCH OSHD ¶ 29,923, p. 40,855 (No. 90-2873, 1992) (defining duplicativeness). An alleged failure to instruct employees is separate and distinct from an alleged failure to actually protect them from fall hazards. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964, p. 41,027 (No. 87-2059, 1993) (a standard requiring safety programs and one requiring installation and maintenance of proper fall protection are not duplicative); *H.H. Hall Constr.*, Co. 10 BNA OSHC 1042, 1049, 1981 CCH OSHD ¶ 25,712, p. 32,058 (No. 76-4765, 1981) (citation for failure to instruct is separate and distinct from a trenching violation).

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[18]We will only consider evidence that was in the record at the time this motion was made.

We also reject Respondent's argument that the cited fall protection standard does not provide adequate notice of its requirements. The judge found "that the common sense meaning of the standard provides notice that one must be tied off where there is a danger of falling off the side of the walk/work surface." We agree. The language of the standard provides that "each employee on a walking/working surface . . . with an unprotected side or edge . . . shall *be protected* . . . ." 29 C.F.R. 1926.501(b)(1) (emphasis added). The Commission evaluates an unconstitutional vagueness claim not from the face of the standard, but from its application to the facts of the case. *Ormet,* 14 BNA OSHC at 2135, 1991-93 CCH OSHD at p. 39,200; *see Dravo Corp.,* 7 BNA OSHC 2095, 2098, 1980 CCH OSHD ¶ 24,158, p. 29,367 (No. 16317, 1980) (a standard is not vague merely because it requires the exercise of judgment). Here, the standard provides adequate notice that when Radzicki stood near an unprotected edge on the eleventh floor of the IFC building, he should have been protected. *Cf. J.A. Jones,* 15 BNA OSHC at 2205, 1991-93 CCH OSHC at pp. 41,024-025. Moreover, contrary to N&N's argument, CO Sancomb's deposition testimony is consistent with such a reading of the standard. The judge properly denied N&N's motion.

**B. Post-Hearing Motion for Sanctions**

The judge denied N&N's motion for sanctions for "[i]ncomplete and [i]naccurate [d]iscovery [r]esponses" after concluding that the Secretary had no obligation to supplement her discovery responses and did not engage in any sanctionable conduct. We affirm the judge's decision. Here, the judge's authority to impose sanctions was discretionary, 29 C.F.R. §§ 2200.41(a), 2200.52(e); *cf. Sealtite Corp.*, 15 BNA OSHC 1130, 1134, 1991-93 CCH OSHD ¶ 29,398, p. 39,582 (No. 88-1431, 1991); *Pittsburgh Forgings,* 10 BNA OSHC 1512, 1514, 1982 CCH OSHD ¶ 25,974, p. 32,569 (No. 78-1361, 1982), and for the reasons stated below, we find that the judge did not abuse her discretion.

The thrust of N&N's arguments turns on its claims that CO Sancomb's deposition responses were materially incomplete or incorrect and that the Secretary's case was limited to Sancomb's view of it at the time he issued the citations. Under the Commission's rules

of procedure, a discovery response must be amended if: (1) it was materially incorrect when made, or (2) although correct when made, it is no longer true and failure to amend it constitutes a "knowing concealment." 29 C.F.R. § 2200.52(h)(2). Here, N&N selectively relies on statements in Sancomb's deposition that seem inconsistent with his hearing testimony; however, we find that in the few areas even relevant to this proceeding, the statements at issue are not representative of Sancomb's complete responses in context. We conclude that the Secretary was under no obligation to supplement these deposition responses.[19]

Moreover, the judge was not under any obligation to exclude: (1) any evidence that the CO did not have in mind when he issued the citations, and (2) any information that the Secretary learned about and disclosed after issuing the citation. The Secretary need only have a *belief* that an employer has violated a requirement of the Act to issue a citation after an inspection. 29 U.S.C. §658(a). If the employer contests the citation, the Secretary must prove by a *preponderance of the evidence* that the employer violated the Act. *Armor Elevator Co.*, 1 BNA OSHC 1409, 1411, 1973-74 CCH OSHD ¶ 16,958, p. 21,642 (No. 425, 1973) (consolidated). The very fact that the employer has contested the citation demands that the Secretary come forward with evidence sufficient to sustain this higher burden of proof. *See N.L. Indus.*, 11 BNA OSHC 2156, 2160, 1984-85 CCH OSHD ¶

[19]In its brief on review, Respondent also argues that by forwarding OSHA's investigative file to N&N in response to an interrogatory, the Secretary did not "answer[] the question." To the extent that N&N objects to the *form* of the Secretary's response to its request, its objection is without merit. The Commission's rules do not restrict the form an interrogatory response may take. 29 C.F.R. § 2200.55(b); *see generally N.L. Indus.*, 11 BNA OSHC 2156, 1984-85 CCH OSHD ¶ 26,997 (setting aside judge's order for sanctions where employer responded to Secretary's extensive interrogatories by providing an index to a massive collection of documents). Additionally, the Federal Rules of Civil Procedure, which govern Commission proceedings in the absence of specific provisions in the Commission's rules, specifically authorize this form of response. 29 C.F.R. § 2200.2(b); Fed. R. Civ. P. 33(d).

26,997, p. 34,729 (No. 78-5204, 1984) (Cleary, Commissioner, dissenting). It is not inappropriate, therefore, for the Secretary to introduce evidence at the hearing that the compliance officer may not have actually "relied on" in issuing the citation. *See Tampa Shipyards*, 15 BNA OSHC at 1538 n.9, 1991-93 CCH OSHD at p. 40,100 n.9. This is especially true where, as the judge found here, all of the information that Respondent alleges was incorrect or incomplete was made known to it during the course of discovery. Moreover, the sanctions N&N seeks here - preclusion and/or dismissal - are not justified because N&N failed to show that it was prejudiced in the preparation of its defense. *Power Fuels, Inc.*, 14 BNA OSHC 2209, 2215, 1991-93 CCH OSHD ¶ 29,304, p. 39,348 (No. 85-166, 1991) (declining to disregard evidence introduced at the hearing where consideration of allegedly conflicting discovery responses would not have changed the outcome of the case); *Perini Corp.*, 5 BNA OSHC 1596, 1600, 1977-78 CCH OSHD ¶ 21,967, p. 26,473 (No. 11007, 1977); *cf. ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1991-93 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992). The judge properly denied N&N's motion.

## V. Penalty

The Act requires that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The Secretary proposed a single penalty of $49,000 for the grouped fall protection and training items, which she alleged to be willful. The judge affirmed the fall protection item as a serious violation and assessed a penalty of $4,900 for that item.[20]

[20]The parties did not address the classification of the fall protection item on review. We find that the record clearly supports the judge's determination that it is serious. *See E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2052, 1993-95 CCH OSHD ¶ 30,580, p. 42,343 (No. 92-35, 1994).

The judge found the gravity of this violation to be high, noting that "the severity of injury expected was fatal, and the probability that a fatal injury would occur as a result of [the] violation was high, *i.e.*, occurred." She did not accord any credit for good faith because of the high gravity and the fact that "Respondent's written safety and health program contained an error that Respondent acknowledged needed to be changed." In regard to size, the judge reduced the penalty by 20 percent, based on the CO's recommendation. She also
reduced the penalty by 10 percent for history, based on the CO's recommendation.

We agree with the judge's findings that the gravity of the violation was high and that there should be no reduction for good faith. Based on these factors and the judge's determinations regarding size and history, which N&N has not contested on review, we conclude that a penalty of $4,900 is appropriate. Accordingly, we affirm the judge's penalty assessment of $4,900 for Item 1a.

## VI. Order

For the reasons set forth above, we affirm Citation 1, Item 1a as a serious violation of 29 C.F.R. § 1926.501(b)(1) for which we assess a penalty of $4,900. We vacate Citation 1, Item 1b.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Date: May 18, 2000

WEISBERG, Commissioner concurring:

I join in my colleagues' decision affirming a violation of the cited fall protection standard. Although I also agree with my colleagues' decision to vacate the alleged fall protection training violation, I do so for somewhat different reasons.

N&N's employees were engaged in precast concrete erection at the perimeter of a twelve-story building where they regularly worked within several feet of the building's edge, high above ground level. The perimeter cabling installed by the general contractor ran along the inside edge of the building's columns. In most areas of the building, that inside column edge was located 2-3 feet from the outside edge of the building. In areas where a balcony extended out from the building floor, the inside column edge was 8-10 feet from the edge of the balcony.

The accident site involved a unique situation. The perimeter cable there consisted of a horizontal lifeline located 2 feet 9.5 inches from the original building edge, *i.e.*, there was no balcony. A precast panel had already been set, however, which extended the distance to the building edge by another 3 feet 4 inches. It was this incorrectly positioned panel that employee Krzysztos Radzicki was preparing to work on when he tripped and fell.

It is undisputed that N&N provided general fall protection training to its employees. In addition, N&N lead foreman Kisner testified that he instructed employees that they must tie-off before crossing the perimeter cable located 2-3 feet from the building edge. With respect to work in the balcony areas where the cable was located 8-10 feet from the edge, Kisner testified that employees crossed the cable in order to reach the tie-off ropes.[21] Kisner did not know what fall protection method employees were instructed to use at the accident site because foreman Wilkinson supervised that crew and Kisner was not present on the jobsite that day. Wilkinson did not testify, but in his post-accident interview with the local

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[21]Kisner indicated that in those areas employees used a "cane method" to pull in the ropes that were too far out (there is no evidence as to the length of the canes). He then added that "most of the time they [the ropes] were right there at the edge, and we would stand and get the ropes and tie off."

police he stated that company policy provides that "anytime that you are outside of the perimeter you are to be tied on at all times." He also stated that "[y]ou should hook off, prior to going on the other side of the cable[,] [b]ut sometimes when you do that and bend down under the cable, the lanyard causes a loop affect and catches your leg, causing you to trip up."

The Secretary alleges that N&N violated 29 C.F.R. § 1926.503(a)(1),[22] in that it failed to properly train its employees by "incorrectly instruct[ing] its workers that they did not have to tie-off before crossing perimeter cables 8 to 10 feet from the edge" and by "fail[ing] to address what was required of them in areas where the perimeter cable fell between the three and eight foot rules -- such as the cable at the accident site." Although I would find that specific training regarding the particular hazards presented by this worksite was required,[23]

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[22]That section states:

> (a) *Training Program.* (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

[23]*See El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 n.7, 1993-95 CCH OSHD ¶ 30,231, p. 41,621 n.7 (No. 90-1106, 1993) (finding training adequate in particular circumstances presented, Commission noted that "[i]n general, employers must make their rules specific enough to advise employees of the hazards associated with their work and the ways to avoid them"); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH OSHD ¶ 29,344 (No. 86-1087, 1991) (training violation affirmed where employer instructed employee to use dunnage to stack materials without specifying *how* to do so safely); *Daniel Int'l Corp.*, 9 BNA OSHC 2027, 2031, 1981 CCH OSHC ¶ 25,813, p. 32,265 (No. 76-181, 1981) (rejecting judge's finding of proper instruction where employees told to tie-off and be careful, Commission noted prior holding "that general safety instructions are inadequate to inform employees of hazards peculiar to the job being performed"); *Martin Painting and Coating Co.*, 5 BNA OSHC 1946, 1946-47, 1977 CCH OSHD ¶ 22,239 (No. 15923, 1977) (instruction inadequate where employees told at periodic safety meetings to stay at least 10 feet from power lines but exposed employee working unsupervised "not specifically instructed as to minimum safe clearance"), *aff'd*, 629 F.2d 437 (6th Cir. 1980); *Enfield's Tree Serv.*, 5 BNA OSHC 1142, 1144, 1977 CCH OSHD ¶ 21,607, p. 25,935 (No. 9118,

(continued...)

I agree with my colleagues that the evidence presented by the Secretary at the hearing in this case is insufficient to establish that N&N's training was deficient.

The Secretary has defined the accident site as an area "where the perimeter cable fell between the three and eight foot rules" and, on that basis, she alleges that there was a void in N&N's fall protection training. My review of the record here indicates, however, that the accident site was a "non-balcony" area where the horizontal lifeline extended between the columns at the usual distance of 2-3 feet from the original edge of the building. The additional distance appears to have been an extension of the building edge created by the recent landing of a precast panel. The record also establishes that because the horizontal lifeline in this area was adequate to support a tie-off, there was no need for employees to cross under it prior to tying-off, as they did in the balcony areas. In these circumstances, N&N's "3-foot rule" arguably would apply, and the Secretary has introduced no evidence to establish that it did not.

With respect to the balcony areas I agree, for the reasons stated by my colleagues, that the evidence is insufficient to establish a violation. In this regard, I would emphasize that the Secretary has provided no direct evidence that N&N's employees were told that they should cross the perimeter cables before tying-off. Although the record indicates that employees routinely did so in the balcony areas, I agree that this *conduct* does not establish a failure to properly *instruct*, especially in light of N&N's general rule requiring that fall protection be used. *Cf. Dravo Engrs. & Construc.*, 11 BNA OSHC 2010, 2012, 1984-85 CCH OSHD ¶ 26,930, p. 34,507 (No. 81-748, 1984) (failure to enforce safety rule does not establish training violation).[24] In these circumstances, the Secretary has failed to carry her

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[23](...continued)
1977) ("[s]pecific safety instructions and workrules addressing hazards peculiar to the job being performed are essential foundations of an adequate safety program").

[24]I note that my colleagues in several instances cite to *Archer-Western Contracs.*, 15 BNA (continued...)

burden to show that there was a deficiency in the fall protection training that N&N provided. *See Atlantic Battery Co.*, 16 BNA OSHC 2131, 2177, 1993-95 CCH OSHD ¶ 30,636, p. 42,494 (No. 90-1747, 1994) (vacating alleged training violation where record did not establish what questions employees were asked about training and instructions concerning specific hazardous substances on which Secretary based deficiency allegation, Commission noted that "[i]n view of this lack of evidence, we cannot determine whether t[he] training was inadequate under the standard"). Accordingly, I concur with the decision to vacate the alleged training violation.

/s/
Stuart E. Weisberg
Commissioner

Dated: May 18, 2000

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[24](...continued)
OSHC 1013, 1991-93 CCH OSHD ¶ 29,317 (No. 87-1067, 1991), *aff'd without published opinion*, 978 F.2d 744 (D.C. Cir. 1992). Under Commission precedent, evidence of safety violations by employees is not sufficient to prove a lack of training. However, in *Archer-Western*, the Commission vacated a training violation based on evidence that the employer's crane signalmen and riggers properly carried out their jobs. 15 BNA OSHC at 1019-20, 1991-93 CCH OSHD at p. 39,381. There is a fundamental inconsistency in holding that evidence of safety violations by employees does not establish a failure to train, but that adequate job performance by employees is sufficient to show compliance with a training standard. In *Archer-Western*, the evidence of a training deficiency consisted of safety meeting minutes indicating that little attention was paid to crane signaling and rigging. In addition, the person who conducted the safety meetings "had minimal safety qualifications in general and virtually none regarding cranes." Discrediting the corroborative testimony of an attendee at those meetings, the Commission concluded that "although the minutes did not show that Respondent's employees received significant training, the performance of those employees establishes that they were trained in rigging and signaling." To the extent that the Commission's decision in *Archer-Western* suggests that adequate job performance establishes that employees were trained or rebuts direct evidence of a failure to train, I would not follow that precedent.

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>N & N CONTRACTORS, INC.,<br>Respondent. | OSHRC DOCKET NO. 96-0606 |

Appearances:

Howard K. Agran, Esquire
Office of the Solicitor
U.S. Department of Labor
For Complainant

Frank L. Kollman, Esquire
Kollman & Sheehan, P.A.
Baltimore, MD
For Respondent

Before: Administrative Law Judge Covette Rooney

## *DECISION AND ORDER*

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, N & N Contractors, Inc. ("N & N"), at all times relevant to this action maintained at a workplace at 2121 Pennsylvania Ave., N.W., Washington, D.C., where it was engaged in precast erection activities. N & N admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

From March 18, 1996 to March 27, 1996, Compliance Safety and Health Officer ("CO") Joseph A. Sancomb conducted an accident investigation of the aforementioned worksite. As a result of this investigation, on April 16, 1996, N & N was issued two citations alleging willful and other-than-serious violations with a proposed total penalty in the amount of $49,000.00. By timely Notice of Contest, N & N brought this proceeding before the Review Commission. A hearing was held before the undersigned on December 3 - 4, 1996. During the course of the hearing on December 4, 1996, counsel for N & N withdrew his Notice of Contest with respect to Citation 2, alleging an other-than-serious violation of 29 C.F.R. §1926.503(b)(1) (Tr. 282). Accordingly, Citation 1 alleging willful violations of 29 C.F.R.§§ 1926.501(b)(1) and 1926.503(a)(1) remain before the undersigned. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

**BACKGROUND**

Clark Construction Company ("Clark") was the general contractor on the subject workplace - a twelve-story building under construction. The record reveals that N & N had been subcontracted by the precast fabricator on the jobsite to install the exterior precast concrete, i.e., the facade of the building (Tr. 469-470). By the time N & N started work, Clark had installed wire rope guardrails around the perimeter of each floor of the building at two heights - 21 inches and 42 inches (Tr. 52). The cable had been wrapped around the outside columns of the building, making it approximately 2 feet from the edge of the majority of the building. Because of the configuration of the rounded portions of the building there were areas - the rotunda and turret areas - where the cable was placed further back from the edge of the building. In some of these areas -approximately 5 to 10 percent of the jobsite - the cable was as far back as 8 feet back from the edge of the building (Tr. 50- 54, 159).[25] The work which N & N performed at the jobsite required its employees to work outside this perimeter cable at the edge of the building. Fall protection was a requirement for the performance of job related tasks (Tr. 31-32, 471; Exh. C-18). On every floor of the jobsite there were columns from which employees could wrap rope around to create wire rope slings from which harnesses and lanyards could be tied (Tr. 32, 473).

On March 18, 1996, Krzysztos Radzicki, an employee of N & N was performing precast work near the edge of the 11th floor of the subject jobsite. While preparing to set and level a precast column on the 11th floor, Mr. Radzicki stepped outside the perimeter cable without having first tied off. Although the perimeter cable was not designed for use as a lifeline for fall protection purposes, at this location the cable also could have been used for the purpose of tying off (Tr. 162, 474). As he turned around he stumbled, lost his balance, and fell to his death (Tr. 15-16; Exh. C-2 & C-3). Mr. Radzicki was wearing a safety harness and his safety line was hooked onto his belt at the time of the fall (Exh. C-2).

The record reveals that the 11th floor had columns spaced 8 feet apart. There was a metal cable wire which ran between the columns, which had been installed approximately 6 feet 5 1 /2 inches from the edge of the building (Tr. 236; Exh. C-12). Just on the other side of the perimeter cable (4 inches away), the columns were set on a concrete platform which had been raised 8 inches above the floor and extended approximately 2 feet 9 ½ inches to the edge. Beyond this platform, there was another platform which was lower and extended 3 feet 4 inches outward to the edge of the building (Exh. C-1, C-10, C-12; Tr. 227-235).

**RESPONDENT'S MOTION FOR SANCTIONS FOR VIOLATION OF DISCOVERY RULES**

On January 9, 1997, Respondent filed a Motion for Sanctions for Violation of Discovery Rules alleging that Complainant did not properly reveal information during discovery with regard to Complainant's basis for issuance of the citations. Respondent accuses the Complainant of having

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[25] Respondent's witness, Mr. Kisner testified that the barrier cable was 2 to 3 feet from the edge on approximately 50 to 60 percent of the building, and 8 to 10 feet from the edge on approximately 40 percent of the building. In light of the fact that Clark installed the cable, the undersigned finds that the 90 and 5 percent proportions set forth by the Complainant's witnesses are more credible (Tr. 50-54, 159).

failed to supplement and correct incomplete answers and inaccuracies provided in Complainant's Response to Respondent's Interrogatories, and in the deposition of CO Sancomb. The Respondent asserts that it has been denied due process, and thus, was not able to meaningfully defend against the Secretary's case. The Respondent also asserts that the Secretary's failure to identify specific facts in support of the citation and failure to reveal that the compliance officer's deposition testimony was "materially inaccurate and incomplete" constituted a flagrant abuse of the discovery rules. Respondent has requested that the undersigned either dismiss the citation or exclude from evidence the information which was allegedly not properly disclosed. On January 24, 1997, the Secretary filed a response to Respondent's Motion for Sanctions.

During CO Sancomb's trial testimony, he stated that some of the information which he provided at his deposition was incomplete and inaccurate (Tr. 332-365). This information related to the support of his recommendations of the subject citations. CO Sancomb conceded that he never made any attempt to supplement his deposition responses and that he talked to his attorney about his deposition testimony. He also testified that it was his belief that the interrogatories in this matter were complete (Tr.333).

The Federal Rules of Evidence at Rules 401-403 define the scope of evidence which is to be admitted at trial. Rule 401 sets forth that "relevant evidence" is evidence which possesses logical probative value toward some fact that is legally of consequence to the case. Rule 402 establishes that all relevant evidence is admissible unless it is excluded by another rule or law. Rule 403 provides, inter alia, that the court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice[26]. In evaluating the Respondent's motion, the undersigned is guided by these rules as well as Review Commission precedent. In *Power Fuels Inc.*, 14 BNA OSHC 2209, 2214, the Review Commission held that "[e]ven where answers to interrogatories are introduced in evidence, they generally have no binding effect if they are contradicted by evidence at the hearing. *E.g., Freed v. Erie Lackawanna Ry. Co.,* 445 F.2d 619, 621 (6th Cir. , 1971), *cert. denied,* 404 U.S. 1017, 92 S.Ct. 678 (1972), and cases cited therein." In a footnote in the matter of *Tampa Shipyards Inc.,* 15 BNA OSHC 1533, 1538 n. 9 (Nos. 86-360 and 86-469, 1992), the Review Commission citing *Power Fuels* stated that "[t]he mere fact that certain evidence submitted by the Secretary at the hearing varied from her answers to interrogatories [was] no basis for failing to consider the evidence, or for failing to give it appropriate weight." *See also In re Department of Energy Stripper Well Exemption Litigation,* 520 F. Supp. 1232 (D. Kan. 1981), *rev'd on other grounds,* 690 F.2d 1375 (Temp. Emer. Ct. App.1982), *cert. denied,* 459 U.S. 1127, 103 S. Ct. 763, 74 L. Ed. 2d 978 (1983)(parties are not bound by their answers to interrogatories and are permitted to present contrary evidence at trial.) "When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in

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[26]Rule 403. *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.*

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict." *Freed* at 621.

Respondent's motion cites six areas of what it views as contradictory testimony with regard to deposition and trial testimony. Respondent sets forth that at his deposition, CO Sancomb testified that Radzicki's fall was the sole fact on which he relied in recommending the issuance of Item 1a - §1926.501(b)(1) (Dep. Tr. 15-16; 54-56)[27]. However, at trial, his response to this question included the allegation that it was a routine practice for employees to go under the barrier without first tying off (Tr. 277-278). The undersigned finds that a review of the record reveals that this additional information had been provided to Respondent throughout the course of litigation, and thus, this response was not a was not a "surprise" to Respondent at trial. For example, Respondent was put on notice that this alleged "routine practice" was at issue, when during the same deposition, Respondent's counsel referred to the portion of CO Sancomb's notes which reflected that a foreman informed him that "employees routinely crawled under the perimeter cable" (Dep. Tr. 40- 41). When questioned further during the deposition about the employer's knowledge of the alleged violation, CO Sancomb again referred to the foreman's statement (Dep. Tr. 49-50). Additionally, a review of the Secretary's responses to Respondent's Interrogatories reveals that in response to the questions seeking all facts relied upon in issuing Item 1a, the Secretary's response included this " common practice" as a pertinent fact (Respondent's Motion for Sanctions - Exh. 3: Complainant's Response to Respondent's Interrogatories, p. 2 & 3). Respondent also asserts that CO Sancomb's response to Respondent's counsel's questions regarding the "routine practice of an employee crawling under cable and reaching up for a vertical lifeline" established that this was not prohibitive conduct when the floor edge was ten feet away from the cable. During his deposition, CO Sancomb testified that this practice "probably would be acceptable"(Dep. Tr. 39-40). However, at trial he explained that his deposition testimony was incorrect, and what he intended was that such a scenario would only reduce the probability of a fall (Tr. 383-384). Respondent claims that this trial testimony was a "complete surprise." The undersigned finds that CO Sancomb's clarification of his previous testimony to counsel's inquiry was not prejudicial to Respondent's preparation of its defense. Furthermore, the facts in the instant case did not involve a ten foot scenario.

Respondent also asserts that CO Sancomb's alleged expansion of his reason for finding "employer knowledge" at trial was also improper. The undersigned notes that the deposition testimony that Respondent relied upon in support of this argument, contains two responses to questions regarding "employer knowledge". Initially, CO Sancomb stated that Kisner's statement regarding routine practice and the fact that N & N had been written up by the general contractor for being outside the cable, were the factors he considered in determining employer knowledge (Dep. Tr. 50). The undersigned's review of the deposition testimony reveals that it was only in response to counsel's narrowly framed additional question regarding the circumstances present on the day of the fatal accident that CO Sancomb agreed with counsel's statement that "employer knowledge [was] strictly Mr. Kisner's statement" (Dep. Tr. 51). Accordingly, CO Sancomb's trial testimony that he also relied upon two written notices from the general contractor again was not a surprise to Respondent.

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[27]The deposition transcript of CO Sancomb is attached Respondent's Memorandum in support of the subject motion as Exhibit 1.

Respondent further asserts that CO Sancomb's testimony regarding employee Warren Wiedmaier's statement to police - Exh. C-2[28] - which provided further evidence of employee knowledge was information that was revealed for the first time during the course of trial. A review of the record reveals that this statement was provided to Respondent's counsel at CO Sancomb's deposition (Dep. Tr. 67). Furthermore, within Respondent's November 11, 1996, prehearing exchange, this statement was listed as an exhibit and Mr. Wiedmaier was listed as a witness who would provide testimony "concerning the accident and the Respondent's policies."

The Respondent also maintains that CO Sancomb's trial testimony expanded the scope of the responses provided during discovery with regard to the classification of the subject citation items. In response to Respondent's Interrogatory No.12, the Complainant set forth that all of the information concerning the willful nature of the violation was contained within the non-privileged portions of the OSHA investigative file, and three factors were specifically identified: (1) prior OSHA citations; (2) warnings received from the general contractor; and (3) the "continued practice" of N & N employees tying off after crossing the perimeter protection (Tr. 309-310). During his deposition, CO Sancomb answered in the negative in response to the query concerning whether there were any other factors considered (Dep.Tr. 25-26). Nevertheless, at trial he offered two additional factors: (1) the training session which Clark provided to N & N in regards to fall protection, and (2) the N & N company policy covered fall protection (Tr. 278). The undersigned's review of the record reveals that this was information which Respondent provided Complainant during the course of the investigation. As set forth in the Complainant's response to the instant motion, the investigative file which was supplied to Respondent during discovery, contained a worksheet for Willful Item 1(a) which referenced the training session; and Respondent's Safety and Health Policy Program Manual contained the company's policy on fall protection (Complainant's Response in Opposition to Respondent's Motion, pp.12-13).

Respondent also argues that the testimony presented by Anthony Picconi regarding his observation of Eddie Wilkinson and Mr. Radzicki standing at the edge of the building without fall protection should be stricken because it was evidence elicited for the first time at trial. The undersigned finds that Respondent's characterization of this testimony as having been presented for the first time at trial is without merit. A review of the deposition indicates that CO Sancomb stated that Tony [Mr. Picconi] identified this incident as one where N & N employees were given an oral warning. He explained that this incident was not documented in his file, however, it was in his mind at the time he put the file together (Dep. Tr. 46-48). Accordingly, Respondent was certainly put on notice of this incident - which is certainly relevant evidence in this case - at the time of the deposition. Furthermore, Complainant's November 4, 1996, prehearing statement put Respondent on notice that Mr. Picconi was a witness who would testify concerning "his observations of Respondent's employees exposure to fall hazards and warnings he provided to Respondent's foreman about these exposures to fall hazards."

The undersigned also finds that the Secretary has not engaged in any sanctionable conduct. Respondent cites Rule 26(e)(2) of the Federal Rules of Civil Procedure[29] in support of its argument

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[28]The weight which the undersigned accords this document will be discussed *infra*.

[29] **(e) Supplementation of Disclosures and Responses.**... (2) A party is under a duty (continued...)

that the complainant had an obligation to supplement or correct its interrogatories, and CO Sancomb's deposition testimony. The undersigned finds that all of the information which the Respondent alleges was incorrect or incomplete had been made otherwise known to Respondent during the course of discovery, via the OSHA investigative file. Accordingly, the Complainant had no obligation to supplement its responses. Furthermore, the undersigned finds that this rule does not contain any reference to deposition testimony. As set forth in the *Advisory Committee Notes: 1993 Amendments,* "[t]he revision also clarifies that the obligation to supplement responses to formal discovery request applies to interrogatories, request for production, and requests for admissions, but not ordinarily to deposition testimony."

In view of the foregoing, the undersigned HEREBY ORDERS that Respondent's Motion for Sanctions IS DENIED.

The Complainant on January 24, 1997, filed a Cross Motion for Sanctions Against Respondent alleging that Respondent should be sanctioned for filing its motion which had no proper factual or legal basis. The undersigned has considered this motion and the Respondent's response, and finds that Respondent's actions do not merit sanctions pursuant to Rule 104(c) of the Review Commission Rules of Procedure, 29 C.F.R. §2200.104(c), and thus, the Secretary's motion is HEREBY DENIED.

**SECRETARY'S BURDEN OF PROOF**

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

**Citation 1, Item 1a: Alleged Violation of 29 C.F.R. §1926.501(b)(1)**

> The standard provides:
>
> (b)(1) "Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical 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 Secretary's citation sets forth:

> a) 11th Floor, Between Column Lines A-14 and A-15 - Employee was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems, and was exposed to a fall hazard of 115' 4".

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[29](...continued)
seasonably to amend a prior response to an interrogatory, request for production, or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

On or about 3/18/96, an employee fell 115'4" to his death due to improper fall protective means.

The record reveals that the Respondent does not dispute the applicability of the cited standard. During the trial, the parties reached a stipulation which set forth that "during the construction of the IFC project, N & N was aware of the language of 29 C.F.R. 1926.501(b)(1) and 29 C.F.R. 1926.503(a)(1), and their applicability to its operations" (Tr. 408-409).

The Respondent, however, disputes the Secretary's finding of noncompliance with the cited standard. The cited standard, in pertinent part, provides that each employee on a working surface with an unprotected side six feet or more above a lower level shall be protected by guardrail systems, safety net systems, or personal fall arrest systems. The record reveals that when the employee in the instant matter stepped outside of the wire rope barrier on the 11th floor, he had not employed any of these required protections. The Complainant maintains that once the employee stepped outside the wire barrier protection without first tying off, he was exposed to a fall hazard in violation of §1926.501(b)(1), and as a result of not being tied off he fell 115 '4" to his death. Respondent asserts that Subpart M does not prohibit an employee from stepping past perimeter cable and immediately tying off. When the employee stepped to the other side of the wire rope barrier, "he did not move beyond the protection of any fall protection system that had been provided him -- he was still in a position to tie off" (Respondent's Post-Trial Brief, p. 7). The Respondent also maintains that Subpart M does not provide adequate notice that crossing a horizontal lifeline and tying off immediately violates §1926.501(b)(1). The Respondent asserts that the standard does not clearly provide notice of what practice or condition is prohibited, because it does not set forth how close to the edge of the working surface a guardrail system or personal fall protection must be implemented. In support of this argument Respondent pointed to testimony provided by the Secretary's witnesses, elicited during cross examination, that it was "okay" or "acceptable" to tie off immediately after passing a wire rope perimeter cable (Tr. 99- Olive; Tr. 179- Picconi)[30].

The plain language of the standard provides that when employees are subject to falling six feet or more, fall protection must be provided. The regulation very specifically sets forth specific work areas which require fall protection. "Unprotected sides and edges" six feet or more above a lower level are specific work areas where the standard mandates that where an employee must walk or work, the employee must be protected from falling by installing guardrail systems, safety nets, or personal fall arrest systems. "Unprotected sides and edges" are defined within Subpart M as a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail at least 39 inches high. 29 C.F.R. §1926.500(b) *Definitions*.

The undersigned finds that the common sense meaning of the standard provides notice that one must be tied off where there is a danger of falling off the side of the walk/work surface. In the instant matter, the record reveals that the work which N & N performed, required its employees to walk/work at the edge of the building. The precast pieces were forming the facade of the building,

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[30]The undersigned notes that Mr. Picconi also testified that he told N & N employees to "[t]ie before you expose yourself to a fall. Tie before you get out there and get on the edge"(Tr. 154). Mr. Olive also testified that he reminded N & N employees that they should not be passing perimeter until they were secured (Tr. 60).

and they were brought up to the edge of the building, via a crane. N & N employees would pull them in, and "level and plumb" each piece (Tr. 470-471). As described by Kurt Kisner, a foreman for Respondent, where the edge of the building was 8 to 10 feet from the perimeter cable, employees would frequently go beyond the perimeter cable to get their ropes and tie off. They used a cane method to pull them in when the ropes were out too far. He stated that most of the time they were right there at the edge, and they could stand and get the ropes and tie off (Tr. 476). The undersigned finds that whenever one was on the other side of this perimeter cable, unless some type of barrier was present, one was exposed to an unguarded walking/working area. The standard is designed to prevent an employee from having to make a judgment call as to whether or not there is sufficient clearance to the unprotected edge to allow one to expose him or herself before tying off. Certainly in the instance matter, 6 feet 5 ½ inches from the edge was insufficient. The employee should have never been in the position to make such a determination. The undersigned finds that the standard clearly sets forth that employees are to be protected by some means of fall protection - in this case tied off - before they are exposed to fall hazards.[31] Accordingly, the Complainant has established noncompliance with the cited standard.

Employee exposure was established by the fact that Mr. Radzicki climbed under the perimeter cable without employing any means of fall protection, thereby he exposing himself to the hazard the cited standard was promulgated to prevent. This exposure led to his fatal fall.

To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). The actual or constructive knowledge of an employer's foreman can be imputed to the employer. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). The record reveals that Respondent did not have actual knowledge that Mr. Radzicki had traveled to the other side of the perimeter cable without having employed any fall protection on March 18, 1996. However, the undersigned finds that the record reveals that at least since November 1995, N & N knew or should have known that its employees had a tendency to ignore the use of fall protection while working on unprotected sides and edges of walking/working surfaces. Employees of N & N had been observed by Clark's safety managers working outside the perimeter cable without fall protection on several occasions during this time frame. This conduct was not only bought to the attention of N & N supervisory personnel, but two foreman had been involved in this violative conduct.

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[31] The Respondent also alleges that the Complainant was not able to specify how close to the edge a worker may approach without fall protection before violating the standards. The Respondent attempted to bolster this argument in its brief by referring to its cross examination of the Secretary's witnesses who provided varying responses to his inquiries with respect to at what distance from the edge an individual have to be in order to violate Subpart M. (Respondent's Post Trail Brief, pp. 7-11). The undersigned finds that such responses are immaterial as to whether or not a violation occurred because the standard clearly prohibits any activity involving fall exposure no matter how brief; and again, the distance which Mr. Radzicki was from the edge was clearly not far enough.

The record reveals that Mr. Radzicki's foreman on the day of the accident was Eddie Wilkinson. On a previous occasion, Mr. Wilkinson had been observed by Anthony Picconi, safety manager for Clark, engaged in horseplay with Mr. Radzicki outside the perimeter cable - six to eight feet from the edge - without fall protection (Tr. 141, 147). Mr. Picconi immediately spoke to Messrs. Radzicki and Wilkinson about their lack of fall protection. Based upon his personal involvement in that incident, Mr. Wilkinson had constructive knowledge of employees going beyond the perimeter cables without fall protection. In a statement given to police on the day of the fatal fall, Mr. Wilkinson stated that he was the foreman for the crew on the 11th floor, and that he had given Mr. Radzicki instructions to prepare for panels. He left Mr. Radzicki "kind of in charge of the crew as he reviewed blueprints." (Exh. C-3). The undersigned finds that in light of his past conduct, if he had exercised reasonable diligence, he would have known and eliminated the cited hazard. As the foreman of the crew he had an obligation to make sure employees utilized fall protection when engaged in work at the edge of the building. In *Pride Oil Well Service,* 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co*., 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

*Id.* at 1814. The record is void of evidence indicative of said factors on the part of Mr. Wilkinson. In his position as foreman, his knowledge is imputed to the Respondent. *See also Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 [16 BNA OSHC 1889](6th Cir. 1994)(constructive knowledge found where a supervisory employee was in close proximity to readily apparent violation, even though he had just come into the area).

Furthermore, testimony presented by the Secretary's witnesses revealed that the Respondent was well aware of past misconduct involving fall protection by its employees. Michael Olive of Clark Construction was a safety manager at the subject jobsite in 1995. On November 14, 1995, he observed an employee of N & N, Dave Burkhart, standing outside the perimeter protection approximately 12 to 14 inches from the edge of the south side of the building with no fall protection employed to protect him from a three-floor fall hazard (Tr. 36, 37-38; Exh. C-4). As a result of this observation, Mr. Olive prepared a written safety violation notice and gave it to the foreman, Kirk Kisner, who was with him at the time he made this observation (Tr. 481; Exh. C-4). He testified that Mr. Kisner told him that there was fall protection available and this employee should have been tied off (Tr. 49). Mr. Kisner testified at trial that in accordance with the employer's disciplinary policy, Mr. Burkhart was verbally reprimanded the employee at that time.

Mr. Olive further testified that on a subsequent occasion, he observed three N & N employees who appeared to have been standing at the edge of the building - 3 or 4 floors high - without any type of fall protection. He subsequently learned that they had been tied off but not to the appropriate equipment (Tr. 59-61). Two employees were tied together to a wire rope sling, the other employee's wire rope sling was wrapped around a portable welding machine (Tr. 61-62). This was unacceptable

because it would not support 10,000 pounds required for two men (Tr. 62). Their foreman, Earl Green, was also present. Mr. Olive testified that he told Earl Green that this practice was not acceptable and to go home if that was the best he could do (Tr. 63). Mr. Olive prepared a written safety violation notice, dated November 30, 1995, documenting this incident (Exh. C-5).[32] He testified that he also talked to Tom Nicholson, President of N & N about this incident (Tr. 66).

The aforementioned evidence demonstrates that the Complainant has met her burden of demonstrating constructive knowledge on the part of N & N supervisory personnel. Accordingly, the undersigned finds that a prima facie case of a violation of §1926.501(b)(1) has been established.

**Citation 1 Item 1b: Alleged Violation of §1926.503(a)(1)**

The standard provides:

> (a) "Training Program." (1) The employer shall provide a training program for each employee who might be exposed to fall hazards. The program shall enable each employee to recognize the hazards of falling and shall train each employee in the procedures to be followed in order to minimize these hazards.

The Secretary's citation sets forth:

> a) 11th Floor, Between Column Lines A-14 and A-15 - The employer's fall protection training program was inadequate in that employee(s) were not properly trained to recognize the hazards of falling, nor of the proper procedures to follow in order minimize the hazard.
>
> On or about 3/18/96, an employee fell 115'4" to his death. Proper safety procedures regarding the use and operation of personal fall arrest systems were not followed.

As previously stated, the Respondent does not dispute the applicability of the cited standard. The Respondent, however, disputes the Secretary's finding of noncompliance with the cited standard. The Complainant argues that N & N trained its employees to routinely pass outside of the perimeter barrier protection without first tying off, thus, failing to train its employees to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. The Complainant also argues that Warren Wiedmaier's statement to police which sets forth his understanding of the company's safety policy, is indicative of Respondent's employees' understanding that they need not tie off before passing outside a perimeter cable. In response to an inquiry from the police, Mr. Wiedmaier replied that the safety policy " [said] once you go over to the other side of the cable you are suppose to hook on to it." (Exh. C-3). Complainant further argues that despite this understanding that Messrs. Olive and Picconi saw "an alarming number of instances when N & N workers did not tie off at all" (Secretary's Post-Trial Brief, p. 12).

The undersigned finds that Mr. Wiedmaier's statement does not unequivocally prove the "routine practice" which the Complainant alleges had been established at Respondent's workplace. Without further corroboration, the statement may or may not be supportive of the Secretary's position. Both the Complainant and Respondent listed Mr. Wiedmaier as a witness, however, neither

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[32] During the trial that Mr. Kisner acknowledged that Exh. C-8, a photograph taken in support of this violation, depicts N & N employee, Dave Burkhart. However, he denied having ever received a copy of Exh. C-5 (Tr. 485).

party called him as a witness. The police officer who took this statement, Officer McDonald was called to testify, however, his testimony did not include an explanation with regard to the meaning of his question or the response to it. The undersigned finds that the statement alone is subject to any number of interpretations, i.e., employees should tie off before going to the other side, employees should be tied off by the time they reach the other side, etc. Accordingly, the undersigned accords little weight to Complainant's interpretation of this statement.

However, the undersigned finds that the violative conduct observed by Clark employees, of the N & N employees and foremen, indicates that the employees were not trained to recognize the hazards of falling and procedures to be followed to minimize these hazards. The previously discussed testimony of the witnesses from Clark, as well as Mr. Kisner's corroboration of these events, establishes a failure to properly train employees (Tr. 481, 484-486). The record also establishes that Mr. Olive provided fall protection training to N & N employees in December 1995 (Tr.68, 73, 440). A part of that training involved the discussion of when a worker had to be tied off, which he instructed was "[a]ny time you're exposed to a fall six feet or greater." (Tr. 69). He testified that several times out on the project, they discussed what it meant to be outside of a perimeter barrier (Tr. 69). However, in spite of this training the record reveals a continuation of the violative conduct observed prior to said training. For example, Anthony Picconi, who took over from Mr. Olive the job of safety supervisor, testified that on February 27, 1996, he and his supervisor observed an N & N employee was outside the perimeter cable, within a foot of the edge of the 4th floor, doing what appeared to be welding (Tr. 126, 140). The employee was wearing a safety harness but was not tied off (Tr. 187). As Mr. Picconi and his supervisor approached this employee, they observed a second employee on the back side of the column who had no fall protection. Both employees were instructed to come in and tie off (Tr. 128).[33] He also testified that he had observed N & N employees on 5-6 occasions working without fall protection while working outside perimeter protection (Tr. 141).

Furthermore, Michael DePaulo, N & N safety coordinator for the subject jobsite, testified that fall protection training had been done at the corporate office, on the jobsite, and by Clark (Tr. 439-440). He further testified that on March 14, 1996, a company-wide safety meeting was held and that both Messrs. Kisner and Wilkinson were present (Tr. 450). He testified that it was his understanding that Mr. Wilkinson discussed fall protection the very next day at his tool box meeting and Mr. Radzicki was on his crew at that time (Tr. 451). Mr. Kisner corroborated the fact that he had attended the March 14, 1996 meeting, and that both he and Mr. Wilkinson held safety meetings the next day. He also testified that employees were aware of the disciplinary consequences of violating the safety program (Tr. 489-490).

In spite of the aforementioned training and knowledge of the consequences of violating the safety program, Mr. Radzicki stepped beyond the perimeter cable and exposed himself to a fall

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[33] During Mr. Kisner testimony, he identified the employed depicted in Exh. C-8 as Dave Burkhart, the same employee who had been the subject of a verbal reprimand for lack of fall protection on November 14, 1995. He testified that if he had known of this incident at the time of its occurrence, Mr. Burkhart would have been given a week off without pay because that would have been his second violation (Tr. 486).

hazard in March 1996. This action was a continuation of the previously observed violative conduct, in spite of the recent training and tool box talks. The undersigned finds that this conduct is indicative of the fact that the training which employees received did not properly train employees to recognize the hazards of falling and the procedures to be followed to minimize the hazard. The undersigned finds that the Complainant has met her burden of proving noncompliance with the cited standard and employee exposure.

For the reasons previously discussed and incorporated herein, the undersigned finds that the Respondent had constructive knowledge of the cited hazardous condition. (*See* discussion at pp. 8-10). A review of Mr. Wilkinson's statement provided to police, which provided a description of the events leading up to the fatal fall, illustrates this finding (Exh. C-3)[34]. The undersigned finds that his statement lacks any suggestion of any attempt by him as foreman to have anticipated any hazard which an employee may have been exposed or measures taken to prevent the occurrence of such a hazard. Mr. Radzicki also apparently lacked a clear understanding of the hazards of falling and the procedures to be followed in order to minimize these hazards. The undersigned also finds Respondent presented no evidence that its recently conducted training or tool box meetings contained adequate instruction which would have prevented the occurrence of the cited exposure.

In view of these findings, the Complainant has established a prima facie case of a violation of the cited standard.

**Affirmative Defenses**

The Respondent has pleaded a number of affirmative defenses in its Answer. The undersigned finds that Respondent's evidence falls short of having establishing any of them. The Respondent did not show that compliance would have resulted in a greater hazard, or was impossible or infeasible. At best, the Respondent attempted to establish employee misconduct.[35] The record

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[34] The undersigned notes that his statement sets forth that one should tie off "prior to going to the other side". However, he further stated that sometimes when you do that and bend down under the cable, the lanyard causes a loop effect and catches your leg, causing you to trip." The undersigned finds that this latter portion of the statement suggests a problem in the training procedures.

[35] Once the Secretary has made a prima facie case showing a violation the employer can rebut that showing by establishing an affirmative defense of employee misconduct. The party claiming an affirmative defense has the burden of proving it. *Capform Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994). The proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program. In *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994), the Review Commission stated:

> In order to establish the affirmative defense of unpreventable employee misconduct under Commission case law, an employer bears the burden of proving: (1) that it has established work rules designed to prevent the

(continued...)

indicates that Dave Burkhart received an oral reprimand for his violative conduct observed on November 14, 1995, and Earl Green received a written reprimand followed by removal as a foreman following his November 30, 1995 violative conduct. Mr. Kisner testified that employees were aware of the disciplinary consequences of violative conduct. The undersigned finds that in spite of the aforementioned, the record reveals that the conduct of employees was not curtailed or influenced with respect to fall protection. This was indicative of an ineffectively implemented safety program. In view of the above, the record reveals that Respondent did not take adequate steps to establish a work rule designed to prevent the cited conduct, and had not taken adequate steps to discover the violative conduct which occurred on March 18, 1996.

**Willful Classification**

The Complainant has asserted that the willful nature of these violations was demonstrated by Respondent's stipulated knowledge of the fall protection and training standards, the warnings it received from Clark that employees were not tied off when working at unprotected edges, and Respondent's continued practice of permitting employees to cross under safety barriers without firs tying off. A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Trinity Industries, Inc.*, 15 BNA OSHC 1597, 1586 (Nos. 88-1545 and 88-1547, 1992), citing *Williams Enterp.,Inc.,* 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). "It is differentiated from other types of violations by a heightened awareness - of the illegality of the conduct or conditions - and by a state of mind - conscious disregard or plain indifference." *Calang Corp.,* 14 BNA OSHC 1789, 1791 (No. 85-319, 1990). There must be evidence that an employer knew of an applicable standard prohibiting the conduct or condition and consciously disregarded the standard." *Trinity* at 1586, citing *Williams* at 1257. A finding of willfulness is not justified "if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete." *Id.* The Review Commission has held that "[t]he employer is responsible for the willful nature of its supervisor's actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360 and 86-469, 1992).

The undersigned finds that the record does not indicate that the Respondent's conduct was willful in nature. N & N had rejected a recommendation by the general contractor to use a "controlled access zone" as a means of fall protection and opted for personal fall protection for its employees on this project (Tr. 446-448). N & N's employees were provided safety harnesses and lanyards, and vertical lifelines, which were tied off to interior columns before stepping outside the

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[35](...continued)

violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

"The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees." *Precast Services Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995).

perimeter cables when performing work (Tr. 55, 473). N & N had requested fall protection training for its employees in December 1995, and held a safety meetings where the issue of all protection was discussed (Tr. 96, 490). N & N also had disciplined employees for fall protection violations (Tr. 113, 437-438, 482; Exhs. R-2 , R-3, R-6a & R-6b). Although these efforts did not effectively curtail the cited hazards, these efforts show that Respondent did not knowingly and consciously disregard its obligation to provide fall protection.

CO Sancomb relied upon a statement allegedly made by Mr. Kisner to him during the investigation to support his finding of willfulness. He testified that Mr. Kisner told him that it was "a routine practice for employees to travel under barrier protection before tying off "
(Tr.476). He believed that Mr. Wiedmaier's statement to police corroborated this statement (Exh. C- 2). As previously discussed, the undersigned has not assigned much weight to Mr. Wiedmaier's statement. *See* discussion p.11. Mr. Kisner attempted to clarify his statement during the hearing. He testified that he did not use the word "routine" but told CO Sancomb that they "did go under the cables frequently." He explained that there were areas on the building where their cables were 8 to 10 feet out from the perimeter cables and they would go under the cable to get their ropes. They used "sort of a cane method to pull them in where they were out too far, and most of the time they were right there at the edge, and [they] would stand and get the ropes and tie off." (Tr. 476). He testified that the only other circumstance in which employees were permitted to cross the perimeter cable and then tie off, was when they had a panel directly in front of them already erected which offered barrier protection. The employees would then tie off, after going under the cable (Tr. 477). He also stated that where the edge was two to three feet from the barrier cable, employees were told to tie off before they crossed, and where a panel was present they would routinely go out if they had work past the perimeter cable and immediately tie off (Tr. 480-481). The undersigned observed Mr. Kisner's demeanor as he provided this testimony and finds that his testimony was forthright and credible. CO Sancomb was equally credible, however, his recommendations were based upon his recollection of Mr. Kisner's conversation with him, and Mr. Wiedmaier's signed statement, from an interview at which he had not been present. The Complainant never produced any evidence clarifying the meaning of the signed statement. Furthermore, Mr. Kisner provided an unrebutted explanation of his previous statement to CO Sancomb at trial.

The undersigned finds that a preponderance of the evidence does establish serious violations. 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. 29 U.S.C.§ 666(k). In the instant matter, it is clear that a fatal accident occurred as a result of the Respondent's noncompliance with the cited regulations. The evidence shows that death or serious physical harm could result from the exposure to unprotected sides and edges, and the failure to provide training to employees which would enable them to recognize the hazards of falling and the procedures to be followed in order to minimize these hazards. The fatal fall certainly proved the serious nature of the cited violations. Accordingly, the Complainant properly classified this violation as serious.

**Penalty**

Once a contested case is before the Review Commission, the amount of the penalties proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration"

must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones, supra.*

The undersigned finds that in order to achieve the necessary deterrent effect in this matter, it is appropriate to assess each of the cited violations a separate penalty. The gravity of each violation was high - the severity of injury expected was fatal, and the probability that a fatal injury would occur as a result of each violation was high, i.e., occurred. Accordingly, a gravity-based penalty for each violation is assessed at $7,000.00. The undersigned finds that a penalty adjustment for good faith is not appropriate because of the high gravity of the violations and Respondent's written health and safety program contained an error that Respondent acknowledged needed to be changed - the fall protection provision provided that fall protection was necessary whenever an employee was exposed to a fall hazard of ten feet as opposed to six feet required by OSHA (Tr. 244-246; Exh. C-16).[36] The undersigned finds that the penalty adjustments which OSHA credited for history (10%) and size (20%) are appropriate. The record contains no evidence that the Respondent nor its predecessors had not been cited for any serious, willful or repeated violations in the three years prior to the issuance of the subject citation. The record contains unrebutted evidence of Respondent's small size - 75 employees (Complaint, Paragraph III).

After considering the above factors and the gravity of each violation, a penalty of $4,900.00 for each violation is appropriate to ensure prospective compliance with the Act.

**FINDINGS OF FACT 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 upon the foregoing decision, it is ORDERED that, the Citation 1, Item 1a alleging a violation of 29 C.F.R. §1926.501(b)(1) is affirmed as SERIOUS, and a penalty of $4,900.00 is hereby assessed; Citation 1, Item 1b alleging a violation of 29 C.F.R. §1926.503 (a)(1) is affirmed as SERIOUS, and a penalty of $4,900.00 is hereby assessed.

[36] On cross examination, Mr. Kollman brought out that this safety manual also contained a proviso that at opened sided floors six or more feet above the next level shall be guarded with a standard guardrail. The undersigned finds that this proviso does not negate the error found in the manual with respect to personal protective equipment.

Covette Rooney
Judge, OSHRC

Dated:

Washington., D.C.