United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 97-0263
	:	
WILLIAMS & SONS ERECTORS, LLC,	:	
	:	
Respondent.	:	

APPEARANCES:

Luis A. Micheli, Esquire
New York, New York
For the Complainant.

Gregory Mason, Esquire
Mineola, New York
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a construction site in Bay Shore, New York, on December 20, 1996, where Respondent Williams & Sons Erectors ("W&S") was engaged in steel erection; as a result, W&S was issued a serious citation alleging violations of 29 C.F.R. 1926.21(b)(2), which requires employee instruction in job hazards, and 29 C.F.R. 1926.105(a), which requires nets or other protection when employees are exposed to falls of over 25 feet. W&S contested the citation, this matter was designated an E-Z Trial case pursuant to Commission Rule 203(a), and a hearing was held on July 8, 1997.

Citation 1 - Item 2 - 29 C.F.R. 1926.105(a)

Norman Sebbesse, the OSHA compliance officer ("CO") who inspected the site, testified that upon arrival he observed a three-story building with two levels erected, some decking down, and the third level, or roof area, in the process of being erected; he also observed an ironworker sitting and

welding on a beam on the second level on the building's west side in an area with no decking below. The CO videoed the scene from his car and then went onto the site and met with the general contractor, who summoned the foreman of W&S and told the CO that the height between each floor, based on the site plans, was 20 feet. As the CO waited for the foreman, he saw another ironworker climb a roof-level column on the building's west side; the ironworker then sat on top of the column with his back to the building's exterior and waited for an incoming beam. The CO also videoed this scene, and noted that this ironworker and the first one he had seen were exposed to exterior falls of 60 and 40 feet, respectively, and that neither wore a safety belt or had any other fall protection. He further noted that other activities he saw, such as the second ironworker's climbing the column and walking on beams, were not cited as they were done on the building's interior side in areas with decking below; any falls in those areas would have been 20 feet, and OSHA policy was to cite for exposures to interior falls of over 30 feet and exterior falls of over 25 feet. (Tr. 4-17; 21-29; 34-42).

CO Sebbesse also testified that after meeting Matthew Williams, the foreman of W&S, he and Williams went to the second-level deck, where the CO pointed out the first ironworker, who was still welding on the same beam; Williams called the worker over, introduced him to the CO as Al Rodriguez, and directed him to go get a safety belt. The CO and Williams next discussed Dave Smith, the second ironworker, who by then had bolted the beam into place with another worker, as shown in C-1, a photo made from C-2, the CO's video; Smith then released the beam from the crane and walked along the beam towards the building's interior. When the CO questioned Williams about Smith's climbing up the column and sitting on it, Williams asked how else he could have gotten up there; the CO told him that Smith could have placed a ladder against the column and used it to climb up from the deck to the top of the column, like the other worker who helped to bolt the beam had done, and Williams essentially agreed with the CO. The CO specifically stated at the hearing that Smith was working directly above them when he and Williams were on the deck and that he could see that Smith was not wearing a safety belt; he also stated that even if he had been there was nothing he could have attached a lanyard to when sitting on top of the column, but that other methods, such as working from a ladder, having a net below or stringing cabling between the columns for the workers to tie onto, could have been used. (Tr. 7-17; 22; 25; 28-32; 35-41; 45-46).

Matthew Williams testified he had been in steel erection for 15 years and that his job at the site included safety. He said that safety cable was put around the perimeter of each floor once the decking was down, that safety nets were placed over any holes on the first level, and that employees wore safety belts and tied off when required; he also said that the floors were just over 13 feet apart, rather than 20, that he knew this was the case due to the project plans and the height of the crane as compared with the building, as shown in C-2, and that the finished building would be only 40 to 43 feet high. Williams stated that both of the cited employees were tied off. He explained that all of the ironworkers on the job wore tool belts that were safety belts as well, that C-2 showed that Rodriguez and Smith had belts on, and that while it could not be determined from the video if they were actually tied off, they were as far as he was concerned because he constantly told employees to do so; he also explained that Rodriguez could have tied off by hooking his lanyard to the top flange of the beam he was sitting on or by wrapping the lanyard around the beam, and that Smith could have tied off by means of the holes in the lugs on top of the column. Williams denied having seen whether Rodriguez and Smith were tied off when he was on the deck with the CO, indicating they were too far away, and further denied that the CO brought up the issue. He also indicated that although Smith could have done his work at the top of the column from a ladder this would have been more dangerous; the ladder would have been unstable due to not being tied off and Smith could have fallen, or the incoming beam could have knocked Smith off the ladder. (Tr. 48-81).

29 C.F.R. 1926.105(a), the subject standard, states as follows:

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

Commission precedent holds that a violation of the standard is established where the Secretary has shown that employees were exposed to falls of 25 feet or more and that none of the safety devices enumerated in the standard were utilized. *See Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1198 (No. 90-2304, 1993), and cases cited therein. The CO in this case testified that Rodriguez and Smith were exposed to exterior falls of 40 and 60 feet, respectively, and that neither was tied off or had any other fall protection. Williams, on the other hand, testified that the employees were tied off and that the distances to the ground were much less than those stated by the CO. For the reasons that follow, the testimony of the CO is credited over that of Williams.

First, I note that the CO has been with OSHA for seven years, that he has performed over 400 inspections, 60 to 70 percent involving construction, and that his prior experience includes high-rise construction as a union worker. (Tr. 4-5). Second, I found the CO's testimony as a whole to be consistent and convincing, and I note in particular that it was the general contractor who told the CO that the floors were 20 feet apart. (Tr. 31-32). Third, I note Williams' self-interest in this matter, and certain inconsistencies in his testimony; for example, he stated the finished building would be 40 to 43 feet high, but then said that the columns used, like the one Smith sat on, were 30 feet high. (Tr. 52). Fourth, in light of the CO's testimony, much of Williams' testimony was simply unpersuasive, including his testimony that the floors were 13 feet apart, that could not tell while on the deck if the employees were tied off and that the CO did not mention this matter, that the tool belts were also safety belts, and that Smith could have tied off to the top of the column. Based on the record, I find that Rodriguez and Smith were exposed to the cited fall hazards and that they did not have on safety belts and were not tied off. I also find that Rodriguez could have tied off to the beam he was sitting on and that W&S could have devised a fall protection means for Smith to use, such as cabling between the columns or working from a ladder. This item is affirmed as a serious violation.[1]

The Secretary has proposed a penalty of $1,500.00 for this item. In assessing penalties, the Commission is to give due consideration to the employer's size, history and good faith, and to the gravity of the violation. The record in this case shows that OSHA reduced the initial penalty of $5,000.00 by 70 percent due to the employer's small size and lack of history of previous violations, but that no further reductions were given because the company did not produce a written safety or fall protection plan and the gravity of the violation was high. (Tr. 22-24). In light of these factors, the proposed penalty of $1,500.00 is appropriate and it is therefore assessed.

Citation 1 - Item 1 - 29 C.F.R. 1926.21(b)

The CO testified that when asked if he had a safety or fall protection plan, Williams said he did and that he would send it; however, the CO never received it. The CO further testified that Williams told him he had not trained the employees at the site because they were all union-trained ironworkers; Williams also told him the general contractor held safety meetings at the site but that

[1]In affirming the violation, I have relied primarily on the testimony of the witnesses and not on the OSHA video, because, as both parties agreed, its quality was less than ideal. (Tr. 13; 33-34).

he himself had no documentation of the meetings. (Tr. 17-18; 42-45). Williams, on the other hand, testified that he held a safety meeting every morning as everyone was having coffee, that he noted any concerns the employees brought up and had the union steward on the job take care of them, and that the steward was responsible for monitoring the site for safety problems; he also testified that he and all of the employees on the job were union ironworkers who had had the same three-year apprenticeship, that the last year of the training included a class devoted to safety issues, and that W&S had a safety and fall protection plan which he implemented on all of his jobs. (Tr. 67-71).

29 C.F.R. 1926.21(b)(2), the cited standard, provides as follows:

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

An employer complies with the above standard by informing employees of safety hazards which would be known to a reasonably prudent employer or which are addressed by specific OSHA regulations; however, evidence that employees were not aware of safety requirements due to a lack of specific instructions demonstrates a violation. *See R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390 (No. 88-282, 1991), and cases cited therein. The discussion with respect to 29 C.F.R. 1926.105(a), *supra*, establishes that two W&S employees were exposed to exterior falls of over 25 feet without being tied off or otherwise protected. Further, there was no evidence the workers were ever instructed to tie off when exposed to exterior falls of more than 25 feet, other than Williams' assertion that he "constantly" told them to tie off, and although Williams testified that W&S had a fall protection plan he divulged none of its specifics and conceded he never sent OSHA a copy. (Tr. 54; 70-71; 77). Finally, while it is undisputed that the employees were union-trained ironworkers, the Commission has noted that "an employer that places too much trust in the quality of experience and training an employee has already acquired elsewhere runs the risk of violating the standard." *Ford Develop. Corp.*, 15 BNA OSHC 2003, 2009 (No. 90-1505, 1992). On the basis of the record, W&S did not comply with the cited standard, and this item is affirmed as a serious violation. The initial penalty for this item, $2,500.00, was given the same reductions as noted above, resulting in the Secretary's proposed penalty of $750.00. (Tr. 18-20). I conclude that the proposed penalty of $750.00 is appropriate, and it is accordingly assessed.

Conclusions of Law

1. Respondent Williams & Sons Erectors, LLC, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.21(b)(2) and 1926.105(a).

Order

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

1. Items 1 and 2 of citation 1 are AFFIRMED as serious violations, and penalties of $750.00 and $1,500.00, respectively, are assessed.

Irving Sommer
Chief Judge

Date: