Secretary of Labor, Complainant, v. CWJ Contracting, Inc., Respondent.	OSHRC Docket No. 03-0927 (EZ)

Appearances:

Dane L. Steffenson, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Mr. Hal Morrow, PSC
Morrow & Associates
Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

CWJ Contracting, Inc. (CWJ), as the framing contractor, was constructing three-story garden apartments in Lawrenceville, Georgia, when the site was inspected by the Occupational Safety and Health Administration (OSHA) on March 12, 2003. As a result of the OSHA inspection, CWJ received a repeat citation on April 24, 2003. CWJ timely contested the citation.

The repeat citation alleges that CWJ violated 29 C.F.R. § 1926.501(b)(13) by a superintendent's failure to utilize fall protection while standing on a second floor undecked balcony. The repeat violation proposes a penalty of $4,000. The classification of a "repeat" citation is based on a serious citation issued to CWJ on April 29, 2002, for violation of 29 C.F.R. § 1926.501(b)(1), which was informally settled by the parties.

The case was designated to proceed under the Review Commission's E-Z Trial proceedings at 29 C.F.R. § 2200.200, *et seq*. A hearing was held in Atlanta, Georgia, on July 21, 2003. The parties stipulated coverage and jurisdiction (Tr. 5). CWJ was represented by its outside safety consultant.

CWJ denies the alleged violation of § 1926.501(b)(13) and the repeat classification. It asserts that its supervisor was within its controlled access zone in accordance with OSHA's STD 3.0-1A. CWJ claims a greater hazard defense. If a violation is found, CWJ also asserts unpreventable employee misconduct by its supervisor.

For the reasons discussed, OSHA's STD did not apply to the job being performed at the time of the supervisor's exposure, and the use of conventional fall protection was not shown to create a greater hazard. Also, CWJ's unpreventable employee misconduct defense is rejected. The repeat citation is affirmed and a total penalty of $3,000 is assessed.

Background

As a framing contractor, CWJ is responsible for erecting the wooden shell of a building consisting of the walls, floors, and roof. CWJ's work is primarily residential construction, including multi-family apartment buildings. CWJ has nine employees who supervise the work on various projects and employs subcontractors to perform the actual construction work. CWJ is owned by Curtis Wilson, Jr., who resides in Alabama (Tr. 88, 122-123, 183, 185).

In 2002, PRS Construction, general contractor, contracted CWJ to perform the wood framing work for a new garden apartment complex in Lawrenceville, Georgia, referred to as "Herrington Mills." The complex consists of eight 3-story garden apartment buildings with one, two and three bedroom apartments. The exterior of the buildings is brick. Each building has approximately 32 units and each floor is approximately 8,000 square feet (Tr. 59, 183, 187-188, 207, 213).

CWJ started the wood framing work for Herrington Mills in December 2002. James Lane was CWJ's superintendent of the project and its only employee on the site. He has been a CWJ

superintendent for three years. As superintendent, Lane's responsibilities included laying out the work, supervising the work of subcontractors' employees, scheduling, materials, quality control and safety. Lane supervised two subcontractors with approximately 15 employees. Lane's safety responsibilities extended to the safety of the subcontractor's employees. For fall protection on the project, CWJ relied, in part, on a controlled access zone (CAZ) program (Exh. R-1; Tr. 121-123, 184, 186). CWJ designated an area a CAZ by placing signs in the breezeways (Tr. 130-131). Lane was also CWJ's competent person for the project designated in its CAZ plan (Exh. R-1; Tr. 129).

On March 12, 2003, OSHA safety compliance officer Robin Bennett initiated a planned inspection of the Herrington Mills project (Tr. 16, 84). Upon arriving on the site at approximately 9:30 a.m., Bennett observed CWJ superintendent Lane standing on a second floor balcony in Building #7[1], which was unguarded and undecked, meaning the floor joists were installed but there was no plywood decking (Exh. C-1; Tr. 18, 21-22). It is undisputed that Lane was not utilizing a fall arrest system and was not protected from falling by guardrails or safety nets (Tr. 23, 141-142). CWJ was responsible for constructing the balconies (Tr. 132, 194). Another employee, Action Masonry Construction's job supervisor, Jason Meyer, was standing in the apartment doorway's entrance to the balcony[2] (Tr. 21).

The second floor balcony was approximately 10 feet above a concrete patio on the first floor (Tr. 22, 141, 159). The balcony was approximately 8 feet wide and 10 to 12 feet long (Tr. 140). It was not decked (Tr. 22, 132). It consisted of 2- x 10-inch floor joists set on 16-inch centers with an approximate 14-inch space between the joists (Tr. 137). Lane was standing on the joists by the storage room door accessed from the balcony (Tr. 140). He was approximately 5 feet from the balcony's edge which was unguarded (Tr. 22, 69, 140-141). Lane had requested brick mason Meyer to meet at the balcony to discuss an ongoing problem with the placement of bricks below the storage

---

[1] Based on her understanding, Bennett identified the building as #2 (Tr. 58). Superintendent Lane referred to the building as Building # 7 (Tr. 124). The parties stipulated that Building #7 and Building #2 are the same (Tr. 187). For the purposes of this decision, it will be referred to as Building #7.

[2] Action Masonry Construction was also cited for lack of fall protection under § 1926.501(b)(13) (Tr. 216).

room door's threshold.[3] Enough space needed to be left between the threshold and the brick exterior for CWJ to install the balcony decking and flashing (Tr. 135, 213). According to Lane, the elevation of the brick was interfering with the installation of the deck (Tr. 135, 189-191).[4] When standing on the joists, Lane measured the space below the threshold and discussed the problem with Meyer, who remained in the apartment's doorway (Tr. 210, 217). Lane stood on the joists for approximately two minutes before leaving the balcony (Tr. 192, 217).

As a result of Bennett's observation, CWJ received a repeat citation for violation of § 1926.501(b)(13) because of Lane's exposure to a fall hazard of 10 feet while standing on the joists. CWJ's work at the Herrington Mills apartments were completed in June 2003 (Tr. 185).

Discussion

> The Secretary has the burden of proving a violation.
>
> 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 (*i.e.,* 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).

There is no dispute that the Part 1926 construction standards apply to CWJ's framing activities at the project. Also, the parties stipulate that CWJ's framing work on the garden apartments was "residential construction" within the meaning of § 1926.501(b)(13) (Tr. 7). The project involved the construction of multi-family apartment buildings.

---

[3] According to Meyer, there was also a problem with the area leaking under the storage room door (Tr. 208-209). This was also Bennett's understanding why Lane was on the balcony (Tr. 32).

[4] Lane described this as a "unique situation" required by the county (Tr. 156). Normally, the decking is installed on the balcony as soon as the joists are placed.

Alleged Violation of §1926.501(b)(13)

The citation alleges that CWJ's superintendent failed to utilize conventional fall protection while standing on a second floor undecked balcony. Section 1926.501(b)(13) provides:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.
>
> Note: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with 1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

The essential facts are undisputed. Lane was standing on the 2-inch side of joists approximately 10 feet above a concrete patio (Exh. C-1). The joists were in excess of 14 inches apart. Lane was also standing less than 5 feet from the balcony's unguarded edge. Lane was not protected from a fall hazard by guardrails, safety nets, or personal fall arrest protection. While Lane was on the balcony, there were no decking materials or decking work being performed on the balcony. Lane was on the balcony to discuss a problem with the brick mason about the space below the storage room door's threshold. He also measured the space below the threshold. Lane stood on the undecked balcony for approximately two minutes.

CWJ argues that the balcony was a CAZ, and under its plan conventional fall protection was not required based on OSHA's CPL 3-0.1A issued June 18, 1999 (Exhs. R-1, R-2). CWJ's plan permits the use of a CAZ instead of conventional fall protection on the Herrington Mills project when installing roof trusses and rafters, performing roof sheathing operations, erecting exterior walls, and installing joists and floor sheathing when involved in leading edge

construction[5] (Exh. R-1, p. 13). Lane testified that the balcony was a leading edge (Tr. 143, 159). He considered his job on the balcony as part of his quality control responsibilities (Tr. 135, 143).

CWJ's argument that the balcony was a CAZ is rejected. At the time Lane was standing on the balcony, CWJ was not engaged in installing joists or decking on the balcony. He was not engaged in any of the activities encompassed by CWJ's CAZ plan or OSHA's STD. OSHA's STD 3.1 issued December 8, 1995, and as rewritten STD 3-0.1A, issued June 18, 1999, permits employers such as framing contractors engaged in certain residential construction activities, including the installation of floor joists and floor sheathing when less than 48 feet above ground level to use alternative procedures instead of conventional fall protection. The alternative procedures include employee training, supervision, and the use of CAZs (Exh. R-2).

During the installation of floor joists and floor sheathing, the STD provides that "while this work is taking place, workers not directly assisting in it shall not be permitted within six (6) feet of the leading edge" (Exh. R-2, p. 9). Lane was not "directly assisting" in the leading edge work by standing on the balcony and discussing a problem regarding the installation of the brick facie with the brick mason. CWJ's installation of the decking was not to have taken place until after the brick masons completed bricking the exterior (Tr. 193). Lane was performing no work to which the STD applied.

It is also noted that Lane was not complying with CWJ's CAZ plan. Lane agreed that no safety monitor was present and that the second floor was no longer a CAZ (Tr. 132, 141, 143). Also, he testified that he should have "put a piece of temporary flooring down over the joists" (Tr. 159). However, CWJ's plan provides that the first floor joist or the first row of sheathing was to be installed from ladders or the ground. The successive joists or sheathing was to be installed from plywood laid over the previously secured joists or from the established deck.

---

[5] The Secretary defines "leading edge" as:

> . . . the edge of a floor, roof, or formwork for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or formwork sections are placed, formed, or constructed. A leading is considered to be an "unprotected side and edge" during periods when it is not actively and continuously under construction.

Lane was not engaged in leading edge work. According to Lane, the building was 99 percent completed (Tr. 194). CWJ needed only to complete the balconies, install some siding, and complete the "punch out" work (Tr. 194). Lane testified that the second floor was no longer a CAZ (Tr. 132). At the time of OSHA's inspection, Lane's discussions involving the brick elevation was CWJ's only work being performed on Building #7 (Tr. 196). There was no decking material on the balcony (Tr. 165). Also, no decking was being installed on the balcony (Exh. C-1; Tr. 24, 63). Lane's discussions with the brick mason, although within Lane's quality control responsibilities,[6] were not "directly assisting" leading edge work as contemplated by the STD or CWJ's CAZ plan (Exhs. R-1, R-2). CWJ's plan recognizes that employees not engaged in the leading edge work such as those cutting the decking for the installers are not permitted within 6 feet of the edge (Exh. R-1).

Since STD 3-0.1A does not apply, Lane's activities are governed by the terms of § 1926.501(b)(13). There is no dispute that Lane was not utilizing personal fall arrest protection, and he was not protected by guardrails or safety net systems (Tr. 141-142). He was exposed to a fall of 10 feet to a cement patio (Tr. 141).

The record, therefore, establishes CWJ's noncompliance with the terms of § 1926.501(b)(13), and employee exposure to a fall hazard in excess of 6 feet without fall protection. Employee exposure is based on superintendent Lane's two minute exposure on the unprotected joists. Even a brief exposure to hazardous conditions such as a fall hazard does not negate a violation or its seriousness. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2056 (No. 90-2873, 1992).

The record also establishes the employer's knowledge of the condition based on the

---

[6] Although not argued by CWJ, it is noted that § 1926.500(a) provides that "the provisions of this subpart do not apply when employees are making an inspection, investigation, or assessment of workplace conditions prior to the actual start of construction work or after all construction work has been completed." As an exception to the standards application, such exception is narrowly construed. A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995). Exemptions under remedial legislation are to be narrowly construed. Lane described his job on the balcony as part of his quality control duties. Also, Lane's exposure occurred while construction was ongoing. CWJ still had to install the balcony decking. CWJ's construction work had started in December 2002 and was not completed until June 2003 (Tr. 184-185).

imputed knowledge of its superintendent. When a supervisory employee such as Lane has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer. *Dover Elevator Co*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984).

Lane, in addition to being the exposed employee, was CWJ's superintendent and competent person for the Herrington Mills project (Tr. 121, 133). He was the only CWJ employee on the site (Tr. 123). His responsibilities included supervising the work of subcontractors and safety training (Tr.122-123, 203). As the exposed employee, CWJ's only employee on the site, and its employee delegated with full supervisory authority, Lane's knowledge of the unsafe condition is imputed to CWJ.

A violation of § 1926.501(b)(13) is found unless CWJ can demonstrate infeasibility or a greater hazard. In this case, CWJ does not assert, and the record does not support, a finding of infeasibility. The standard presumes the feasibility of conventional fall protection. CWJ did not argue or make any showing that if it was necessary for Lane to stand on the undecked joists, personal fall arrest protection, including a body harness and lanyard, was not feasible. The photograph of the site shows a number of potential anchor points for personal fall arrest systems including the joists on the balcony above (Exh. C-1).

Greater Hazard Defense

Section 1926.501(b)(13) requires the use of conventional fall protection when employees are exposed to a fall hazard in excess of 6 feet unless the employer can demonstrate that it creates a greater hazard to use these systems. To establish a greater hazard defense, the employer must show by a preponderance of the evidence that (1) the hazards of compliance with the standard are greater than the hazards of noncompliance; (2) other methods of protecting employees from the hazards are not available; and (3) a variance is not available or its application is inappropriate.

Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1224-1225 (No. 88-821, 1991).

Section 1926.501(b)(13) presumes that conventional fall protection does not create a greater hazard. The mere assertion of the greater hazard defense is insufficient. The burden placed on the employer is "to establish the worksite-specific circumstances that precludes reliance on conventional fall protection to protect employees from fall hazards." 59 Fed. Reg. 40,672, 40,684-40,685 (August 9, 1994). The employer's burden is to demonstrate a greater hazard "under the particular circumstances" of the case. *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149, 1155 (11th Cir. 1994).

CWJ's CAZ plan does not address the fall protection measures required by an employee performing quality control or inspection activities such as Lane was performing while standing on the balcony. Also, the CAZ designation had been removed from the second floor.

Further, the record does not show any reason, other than measuring the space below the door's threshold, for Lane to be standing on the joists (Tr. 210, 217). According to brick mason Meyer, their discussions could have been conducted below the balcony or inside the apartment behind the guardrail, which Lane had removed to access the balcony (Tr. 141, 169, 209-210, 217). Also, Meyer agreed that Lane's measurement could have been taken from underneath the balcony from a ladder or standing on sawhorses (Tr. 210-211).

Lane's argument that the slight slope (1/8- to 1/4-inch per foot) in the concrete patio was a hazard to the placement of a ladder or sawhorse is rejected (Tr. 162, 201-202). The slope was minimal and could be taken into account in placing the ladder or sawhorse. Also, the use of a ladder or sawhorse would not expose the employee to a fall hazard in excess of 6 feet. Lane agreed that it was possible to work from a ladder or sawhorse (Tr. 161-162).

The Subpart M "Fall Protection" requirements direct employers to first consider the elimination of fall hazards on each worksite. Lane agreed that he could have placed sheathing temporarily over the joists (Tr. 146, 159).

> In situations where conventional systems are not used, OSHA does not encourage employers to elect the safety monitoring system as a first choice. Rather, the Agency will permit it to be used in those circumstances when no other alternative, more protective measures can be implemented. Examples of such protective measures include having employees work from scaffolds, ladders, or vehicle mounted

> work platforms to provide a safer working surface and thereby reduce the hazard of falling. . . .Accordingly, OSHA has determined that the employer must do what it can to minimize exposure to fall hazards, before turning to the use of safety monitoring systems (29 C.F.R. 502(h)) under a fall protection plan. (59 Fed. Reg. at 40,719-40,720).

Also, the greater hazard defense under § 1926.501(b)(13) applies to the use of conventional fall protection such as personal fall arrest systems to reduce an employee's exposure to a fall hazard. The use of conventional fall protection systems such as a personal fall arrest system by Lane while standing on the joists was not addressed by the parties. CWJ, who has the burden of establishing the greater hazard defense, failed to offer any evidence that such systems could not have been utilized in protecting Lane or that the use of conventional fall protection would have created a greater hazard to Lane. CWJ has the conventional fall protection equipment, including safety harnesses and lanyards, and the record shows that such equipment could have been adequately anchored and utilized (Exh. C-1; Tr. 222). It is noted that in installing the brick facie, scaffolding was placed on the concrete patio for the brick masons to brick around the balcony (Tr. 213-214). Also, there is no evidence that CWJ applied for a variance (Tr. 158).

CWJ's greater hazard defense is rejected. Noncompliance with the requirements of § 1926.501(b)(13) is established.

Employee Misconduct Defense

If noncompliance with the standard is found, CWJ asserts unpreventable employee misconduct on the part of Lane, its superintendent. In order to establish the affirmative defense of employee misconduct, an employer must show that it has (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 are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

However, "[w]hen the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). The Review Commission has noted that "where a supervisory

employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision." *Id.* at 1017. Also, the "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." *Id.* at 1017.

CWJ's Work Rule

The essential element of the employee misconduct defense is a showing that the employer has an established work rule designed to prevent the violation. *Pride Oil Well Serv*ice, 15 BNA OSHC 1809, 1816 (No. 87-692, 1992). A work rule is defined as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J. K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977) (employer's warning to employees to avoid unsafe areas was "too general to be an effective work rule").

CWJ failed to show an established safety rule which addressed the activities engaged into by Lane while on the balcony. Also, as discussed, CWJ"s fall protection plan for the Herrington Mills project prohibited from the CAZ "workers not assisting in leading edge construction while leading edges still exist (e.g., cutting the decking for installers)" (Exh. R-1, p. 13). There was no specific safety rule prohibiting an employee from standing on undecked joists. However, the plan did provide that while installing floor joists and sheathing, the first joist or row of sheathing was to be installed from the ground, ladders or sawhorse scaffolds (Exh. R-1, p. 13). As discussed, floor sheathing was not being installed.

Lane testified that he was performing his quality control responsibility in measuring the distance below the door's threshold, and such work was assisting the leading edge construction (Tr. 135, 182). Lane also testified that he was not acting in compliance with CWJ's safety program (Tr. 143). He should have laid "some kind of sheathing down" (Tr. 146). However, he believed that his activities were within OSHA standards for leading edge work (Tr. 146).

Lane was CWJ's superintendent and competent person on the project (Tr. 121, 133). His duties included safety and safety training (Tr. 122). Lane's belief that he was not complying

with CWJ's safety program is contrary to his statement a week earlier during his deposition when he

stated that "CWJ said it was all right for people to walk on trusses [joists] once they were trained" (Tr. 151). After rereading CWJ's plan at the hearing, Lane testified that under CWJ's safety policy, employees are not allowed to stand on floor joists (Tr. 226, 229). He also testified that he thought it was all right to stand on floor joists if working the leading edge because he had been "trained to be out on that stuff" (Tr. 152, 154). He testified that subcontractors regularly lay the first pieces of plywood decking on the floor from the floor joists instead of from the ground or a ladder as stated in CWJ's plan (Tr. 150-151).

Based on Lane's testimony, any CWJ's work rule regarding standing on joists is nonexistent, ambiguous, or unclear. The work rules do not specifically prohibit such activity.

CWJ's Communication of Work Rule

Lane testified that CWJ's fall protection plan was actively communicated to him and other employees by the owner and its safety consultant, Morrow & Associates (Tr. 223). He said that owner Curtis Wilson, Jr., was present on the jobsite at least once a month (Tr. 124). Also, the consultant who prepared the CAZ fall protection plan for Herrington Mills came to the job site and trained employees (Tr. 128). Employees are permitted to ask questions during training, and they sign a form showing that they have received the training (Tr. 128). Such training was provided on December 2, 2002, and February 3, 2003 (Exh. R-5).

Despite this training, Lane believed that he could stand on the joists without fall protection and that he was in compliance with OSHA's leading edge requirements (Tr. 146, 151). Lane's responsibilities as superintendent included employees' safety on the job and safety training. At the time of the incident, he believed that he was complying with CWJ's program (Tr. 200). Lane's confusion shows that CWJ's safety rules were not effectively communicated at least to him.

CWJ's Steps to Discover Violations

Another factor considered in determining whether an employer effectively enforced

its safety rules are its efforts to monitor adherence to those safety rules by supervisory employees. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991).

Lane testified that owner Wilson and CWJ's consultant, Morrow & Associates, regularly visited the jobsite. Wilson was on the site at least once a month (Tr. 124). The safety consultant inspected the work site every two weeks (Tr. 147). The consultant observed "the way they were setting up and working" (Tr. 224).

Lane was CWJ's only employee on the site. The record reflects that CWJ's safety training and monitoring for problems may have been more directed to the subcontractors used by CWJ to perform the work than it was directed to superintendent Lane. CWJ's monitoring overlooked its main person on site.

CWJ's Discipline

Adequate enforcement of work rules is a critical element of the employee misconduct defense. To prove that a disciplinary system is more than a paper program, an employer must show evidence of actually administering the discipline outlined in its policy and procedures. *See Pace Constr. Corp.*, 14 BNA OSHC 2216, 2218 (No. 86-758,1991). Although an employer has a system of verbal reprimand and written reprimands, if it is not enforced, it is ineffective. *GEM Industrial Inc*., 17 BNA OSHC 1861, 1864-1865 (No. 93-1122, 1996), *aff'd,* 18 BNA OSHC 1358 (6th Cir. 1998) (oral reprimands were an ineffective enforcement method, noting that the same work rule had been violated three times in the month prior to the OSHA inspection). The repeated noncompliance of safety rules indicates ineffective enforcement. The record should establish the existence of an active and effective program directed at ensuring that, insofar as possible, supervisors follow all OSHA and company rules regarding its work. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042 (No. 90-945, 1993).

CWJ did not show that it had an effective disciplinary program. CWJ's CAZ plan for Herrington Mills states that CWJ "reserves the right to issue disciplinary warnings to employees and/or subcontractors, up to and including termination, for failure to follow the guidelines of this Program" (Exh. R-1, p. 15). Lane testified that he has been "written up" for safety violations approximately fifty to sixty times in three years (Tr. 149, 167). He has been written up for employees walking on joists, but he could not recall specific incidents (Tr. 148-149, 152). It was

not shown that any of the "write-ups" occurred at Herrington Mills. No records of the "write-ups" were maintained after the job was completed (Tr. 232). Lane testified that the violations did include fall protection problems (Tr. 167). He also testified that he corrected the safety violations within 24 hours (Tr. 149).

The number of times that Lane has been "written up" suggests an ineffective safety enforcement program. Other than being written up, no other action was taken such as lost pay, suspension, or possible termination (Tr. 152). Such other action was only "threatened" (Tr. 152). Sixty safety violations over a three-year period equals approximately two violations per month by one individual. This number appears excessive and shows CWJ's disciplinary program.

CWJ's employee misconduct defense is rejected.

Repeat Classification

CWJ's violation of § 1926501(b)(13) is established. The violation is classified as repeat. A repeat violation under § 17(a) of the Occupational Safety and Health Act is established if, at the time of the alleged repeat violation, there was a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary may establish substantial similarity by showing that the violations are of the same standard or, if different standards, by showing similar hazards and means of abatement. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

In this case, the prior citation issued on April 29, 2002, at a worksite in Mobile, Alabama, was a serious violation of § 1926.501(b)(1) for failing to provide fall protection to subcontractor employees installing plywood decking to a roof. The employees were exposed to a fall hazard of 29 feet. The citation was informally settled by the parties with a reduction in the proposed penalty (Exh. C-4).[7]

[7] CWJ received another serious citation issued on July 30, 2001, for violation of § 1926.501(b)(1). This prior citation was also informally settled by the parties with a reduction in the penalty (Exh. C-3). Due to an oversight, Compliance Officer Bennett testified that the 2001 citation was not included as a basis for CWJ's repeat classification (Tr. 39). To avoid prejudice to CWJ, the earlier citation is also not included as a basis for repeat classification in this decision.

The requirements under § 1926.501(b)(1), which involve "unprotected sides and edges," are similar to the "residential construction" requirements under § 1926.501(b)(13). Both standards require fall protection if the employee's exposure is "6 feet (1.8 m) or more above a lower level." Also, both standards require that the employee be protected from falling by use of "guardrail systems, safety net systems, or personal fall arrest systems." The only distinction between the standards is that § 1926.501(b)(13) permits an employer to implement a fall protection plan which complies with § 1926.502(k) if the employer can demonstrate an infeasibility or greater hazard.

For the purposes of a repeat classification, the two standards are substantially similar. The hazard addressed in both standards is the potential for falling from surfaces in excess of 6 feet. Similarly, the means of abating the fall hazard including guardrails, safety nets, or personal fall arrest systems are the same under both standards. As noted in *Monitor Construction Co.*, *Id.* at 1594, any differences in the factual occurrences, geographical locations, commonality of supervisory control over the violative conditions, and the time lapse between violations are not deciding factors in determining the repeat classification.

CWJ's violation of § 1926.501(b)(13) is repeat.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

CWJ has nine employees and is given credit for size as being a small employer (Tr. 88). No credit is given to CWJ for history in that it has received two serious citations for failing to provide fall protection within the preceding three years (Exhs. C-3, C-4). CWJ is entitled to good faith credit because it did have a fall protection plan for the Herrington Mills project (Exh. R-1). CWJ hired a safety consultant, had a written fall plan for the project, and regularly inspected the worksite (Tr. 147, 222). OSHA's failure to give good faith credit based on a belief that CWJ's

training program was deficient (Tr. 42-43, 95). It is noted that CWJ did not receive a citation for an inadequate training program. Also, mandatory training by an outside consultant (Morrow & Associates) was provided at least twice on the Herrington Mills project (Exh. R-5). The lack of fall protection involved only one employee who was exposed for approximately two minutes, and was the only violation found during OSHA's four-hour inspection of CWJ (Tr. 85).

A $3,000 penalty for violation of § 1926.501(b)(13) is reasonable. The exposure of Lane on the joists was two minutes, which is of short duration (Tr. 192, 217). However, Lane was CWJ's superintendent of the project as well as its competent person. Lane's responsibilities included safety and safety training. Lane was exposed to a fall hazard of 10 feet to a cement patio. He was standing on 2-inch wide joists approximately 14 inches apart without any fall protection. He was also less than 5 feet from the unguarded edge of the balcony.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Repeat violation of § 1926.501(b)(13) is affirmed and penalty of $3,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: August 21, 2003