UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. PRO SET ERECTORS, and its successors, Respondent.	OSHRC DOCKET NO. 01-0596

APPEARANCES:

For the Complainant:
Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
John E. Redal, Esq., Redal & Redal, Coeur d'Alene, Idaho

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Pro Set Erectors, and its successors (Pro Set), at all times relevant to this action maintained a place of business at 850 West Ironwood Boulevard, Coeur d'Alene, Idaho, where it was engaged in construction, a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent is, therefore, an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 13, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Pro Set's Coeur d'Alene, work site. As a result of that inspection, Pro Set was issued a citation alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Pro Set brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

This case was designated for E-Z trial, and on July 6, 2001, an E-Z hearing was held in Coeur d'Alene. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

On February 13, 2001, Compliance Officer (CO) Virgle Howell observed two Pro Set ironworkers, Ron Junker and Mark Boss, working from a Grove aerial (snorkel) lift approximately 30 feet above the ground (Tr. 14, 21-22, 81). The snorkel lift's basket was approximately six feet long and three feet wide, with a control panel located on the long side that extended about 12 inches into the basket (Tr. 43; Exh. R-2). The top rail of the basket was approximately waist high, the midrail knee high (Tr. 83; Exh. R-1). Howell believed that the lift was about a foot to 18 inches from the side of the building under construction, and that the top rail of the basket was level with an iron masonry ledge the employees were welding (Tr. 26, 38, 80). Pro Set's employees confirmed the basket's size and configuration, but stated that the long side of the basket was pushed up flush to the structure as they worked (Tr. 81-82, 85; Exh. R-2).

CO Howell testified that, as he watched through binoculars, Junker stepped onto the midrail and climbed out of the lift basket. Junker was not using his personal fall protection system (Tr. 24, 26, 29, 50, 53). Howell testified that after welding the ledge into place, Junker climbed back into the lift basket, still without the benefit of fall protection (Tr. 25-26). The employee remaining in the basket, Mark Boss, was tied off while he worked inside the basket (Tr. 71).

Junker, who identified himself as the crew foreman (Tr. 80, 93), testified that on the day of the inspection he and Boss were installing angle iron onto the side wall of the structure under construction (Tr. 82). Junker could not reach over the iron to weld it, so he climbed over the top rail of the basket onto a stairway inside the structure and welded the angle from there before climbing back into the bucket (Tr. 82, 85). Junker stated that, while working from inside the basket, both he and Boss wore full body harnesses attached to the basket with a lanyard (Tr. 90-91; *See also*, testimony of Mark Boss, Tr. 102). Junker admitted that he unhooked his lanyard and held it in his hand while climbing out of the basket to work from the stairway (Tr. 93).

Mark Boss testified that the lift basket's motor was off, and that the basket was pushed tight up against the wall when Junker climbed out. Boss stated that there was no movement in the basket while they worked, or when Junker climbed out (Tr. 87, 100, 106-07). According to Boss, Junker unhooked his lanyard, exited the lift basket from the left rear side opposite the control panel, completed his welding quickly, and then climbed back in (Tr. 100, 105, 109; Exh. R-2). Boss stated that Junker stepped over the angle iron they were working on and onto the stairway, as the iron ledge had not yet been welded firmly into place (Tr. 110-11).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:

> (a) 850 West Ironwood Blvd., Coeur d'Alene, ID: On February 13, 2001 an iron worker/welder made a transition without the use of fall protection out of a Grove AMZ 68, MB 306 aerial lift to work on the second story working surface. The height of the transition was approximately thirty-two feet above ground level exposing the worker to a thirty-two foot fall hazard.
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> The cited standard states:
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> 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.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

It is now well settled that §1926.105(a) applies to falls to the exterior of a structure during steel erection. *L.R. Willson and Sons, Inc.*, 18 BNA OSHC 1698; 1999 CCH OSHD ¶31,796 (No. 94-1546, 1999). This judge finds it more likely than not that Ron Junker stepped on the midrail of the lift basket to step over the top rail and the unsecured masonry ledge and onto the stairs inside the structure. Junker admits he was not using fall protection at the time. Pro Set, however, argues that the standard was not violated because the lift basket itself is a "catch platform."

CO Howell testified, that although current OSHA standards do not contain a definition of the term "catch platform," earlier versions of the standard envision a catch platform as a stationary platform, appended to the work structure, with a 42" guardrail, midrail, and toeboard (Tr. 38; Exh. C-3). In her brief, the Secretary also argues that the lift basket could not serve as a catch platform because it did not provide any meaningful fall protection for an employee climbing out of the basket. At the hearing, James Hoctor, a safety consultant testifying for Pro Set, conceded that an employee

falling from the railing of the basket would only be "caught" by the basket if he landed in an area covering "a couple" of square feet (Tr. 145), and that there was no guarantee that a falling employee would not miss the basket and fall to the ground (Tr. 146).

It is well settled that the interpretation of a standard by the promulgating agency is controlling unless clearly erroneous or inconsistent with the regulation itself. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991); *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). Though a term may not be defined by the statute, the Secretary's interpretation of that term during litigation before the Commission is an exercise of her delegated lawmaking powers and so is entitled to some weight on judicial review. *CF& I Steel, supra.* In this case, the Secretary's interpretation of the cited standard is well reasoned. The Secretary maintains that an employer cannot comply with §1926.105(a) merely by providing one of the devices enumerated in the standard; the fall protection provided must actually protect exposed employee against exterior fall hazards. Secretary's counsel cites *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1993-95 CCH OSHD ¶30,042 (No. 90-1620 & 90-2894, 1993), and cases cited therein, which note that temporary flooring that does not actually provide fall protection does not fulfill the requirements of §1926.105(a). *Id*., at 1158.

This judge agrees with the Secretary's conclusion that because the snorkel lift basket does not provide the fall protection envisioned by the cited standard, it is not the equivalent of a "catch platform." The Secretary has demonstrated that the cited standard was violated.

Finally, the Commission has held that the knowledge, actual or constructive, of an employer's supervisory personnel will be imputed to the employer, unless the employer establishes substantial grounds for not imputing that knowledge. *Ormet Corp*., 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991). Ron Junker was the acting foreman on the cited job, and Pro Set does not argue that it could not, with the exercise of reasonable diligence, have known of or prevented his violation of the cited standard.

The Secretary has established a violation of the cited standard.[1]

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[1] CO Howell testified that OSHA allows men to use aerial lifts to access structural steel construction, if there is no other feasible means of reaching an elevation, citing an 8/4/97 letter of interpretation from the regional administrator for OSHA region 10 (Tr. 75, 153-54). According to Howell, the employee must remain tied off to the basket when making the transition to the structure, however, and reclip onto the structural steel before commencing work in that location (Tr. 75). Nonetheless, Howell testified at the hearing that, because there was a stairway in place Junker could have used to access the 30 foot elevation, climbing from the basket was inappropriate in this case (Tr. 76). This judge notes that, while interviewing Junker the day of the inspection, Howell told him that he should have remained tied off while he climbed out of the lift basket; at no point did he suggest that leaving the basket was, in itself, unacceptable (Exh. R-1).

Penalty

A proposed penalty of $1,500.00 was proposed for this item. CO Howell testified that a 30 foot fall would likely result in broken bones, and/or debilitating injuries, up to and including death (Tr. 31). Howell stated that the gravity of the violation was high. Howell believed that the probability of an accident occurring was greater, in part, because he believed that Junker climbed out of the end of the basket, and sat on the 6" masonry ledge for a short period of time (Tr. 27, 44). Howell also believed that the extended basket was unstable, which could cause an employee climbing the rails to be ejected from the basket (Tr. 40, 42). The gravity based penalty was reduced by 60% based on Pro Set's small size. An additional reduction was provided for history, as Pro Set had received no prior citations from Federal OSHA (Tr. 47).

This judge finds that the gravity of this item was overstated. Junker was exposed to the cited hazard for only seconds as he climbed over the lift basket's railing. The videotape supports Pro Set's contention that the lift basket was pushed up tight to the structure, allowing both Junker and Boss to work on the four inch angle iron from both the basket and the stairway inside the structure. This judge credits Boss' assertion that wedging the basket considerably reduced the instability of the basket. Because the probability of an accident occurring was less than originally believed by Howell, a penalty of $700.00 is deemed appropriate and will be assessed.

Alleged Violations of §1926.453 *et seq.*

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Serious citation 1, item 2a alleges:

29 CFR 1926.453(b)(2)(iv): Employees were not standing firmly on the floor of the basket, and were sitting or climbing on the edge of the basket:

> (a) 850 West Ironwood Blvd., Coeur d'Alene, ID: On February 13, 2001 an iron worker/welder made a transition without the use of fall protection out of a Grove AMZ 68, MB 306 aerial lift to work on the second story working surface. The worker climbed out of the aerial lift and onto the second story working surface exposing him to a thirty-two foot fall hazard to the ground below.

Serious citation 1, item 2b alleges:

29 CFR 1926.453(b)(2)(v): A body belt was not be (sic) worn and a lanyard was not attached to the boom or basket when working from an aerial lift:

(a) 850 West Ironwood Blvd., Coeur d'Alene, ID: On February 13, 2001 an iron worker/welder made a transition without the use of fall protection out of a Grove AMZ 68, MB 306 aerial lift to work on the second story working surface. The worker climbed out of the aerial lift and onto the second story working surface exposing him to a thirty-two foot fall hazard to the ground below.

The cited standards require:

(iv) Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket. . . for a work position.

(v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Discussion

Items 2a and 2b are based on the identical conduct discussed at item 1.

As a threshold matter, this judge notes that §1926.453 *et seq.* does not appear to apply to the cited circumstances. The evidence establishes that Junker was not climbing to the edge of the basket to use it as a work position, nor was he working from the basket when he removed his lanyard to climb out.

In any event, it is well established that the Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations; similar or duplicative items may be grouped for purposes of assessing an appropriate penalty. *See, Pentecost Contracting Corp*., 21 OSHC (BNA) 2133; 1997 OSHD (CCH) ¶31,382 (No. 92-3788 & 92-3790, 1997); *H.H. Hall Constr. Co. (Hall)*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981). The violations cited at 2a and 2b are clearly duplicative of item 1, in that all three violations require the same abatement conduct. *J. A. Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). Ron Junker had only to remain tied off until reaching the structure's staircase to avoid citation for all three items.

The gravity of the underlying violation here is not high enough to justify affirming duplicative citations and imposing additional penalties for the violative conduct cited. Items 2a and 2b are vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.105(a) is AFFIRMED and a penalty of $700.00 is ASSESSED.
2. Citation 1, item 2a, alleging violation of 29 CFR §1926.453(b)(2)(iv) is VACATED.
3. Citation 1, item 2b, alleging violation of 29 CFR §1926.453(b)(2)(v) is VACATED.

/S/
Benjamin R. Loye
Judge, OSHRC

Dated: September 11, 2001