Secretary of Labor,
Complainant,

v.

Docket No. 00-2275

T. C. ERECTORS, INC.
Respondent,

DECISION AND ORDER

T. C. Erectors, Inc. (TCE), is a small contractor engaged in steel erection construction. In spring 2000, TCE was a subcontractor on a project to build a grocery store in Columbus, Ohio. On May 1, 2000, TCE employee, Steven Newsom, fell approximately 28 feet from the roof to the interior of the building, sustaining multiple injuries. Pursuant to a complaint regarding the fall, filed with the Occupational Safety and Health Administration (OSHA) on October 16, 2000, OSHA Compliance Officer (CO) Gerald Miller conducted an inspection on October 26, 2000. As a result of this inspection, TCE was issued a serious citation on October 31, 2000. TCE timely contested the citation.

Citation 1, Item 1, alleges a serious violation of 29 C. R. F. § 1926.105(a) for failing to provide fall protection for employees working more than 25 feet above the ground; the proposed penalty is $1,500.00.

Before the hearing, the Secretary moved to amend the citation to allege in the alternative a violation of the steel erection standard § 1926.750(b)(1)(ii) for failing to provide fall protection for employees working more than 25 feet above the ground. This motion to amend was granted on May 29, 2001.

The case was originally designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.*; however, E-Z procedures were discontinued. A hearing was held on June 12, 2001, in Columbus, Ohio. Both parties submitted post-hearing briefs.

For the reasons that follow, Citation No. 1, Item 1, is affirmed and a penalty of $1000.00 is assessed.

Joint Stipulations of Fact

On April 23, 2000, prior to the hearing, the parties submitted the following Joint Stipulations of Fact:

1. T. C. Erectors, Inc. (Respondent) is an Ohio corporation with a principal place of business at 3363 Hazelton Etna Road, Pataskala, Ohio 43062. Respondent is a steel erection contractor.

2. On May 1, 2000, Respondent had a job site at 1000 East Dublin Granville Road, Columbus, Ohio, where it was a subcontractor engaged in steel erection in the construction of a Giant Eagle grocery store (Giant Eagle job site/Giant Eagle building).

3. Respondent was a steel erection subcontractor for the Giant Eagle building pursuant to a contract with Schlegel Construction, who had a contract with Continental Building Systems, the general contractor for the construction of the Giant Eagle building.

4. On May 1, 2000 and at all times thereafter, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970 (the Act), 29 U. S. C. §§ 651-678 (1970), in that it was engaged in handling goods or materials which had been moved in interstate commerce.

5. On May 1, 2000, Respondent was an employer of employees engaged in construction work at the Giant Eagle job site.

6. On May 1, 2000, Respondent was subject to the requirements of the Occupational Safety and Health Act (the Act) and the regulations promulgated under the Act.

7. The Occupational Safety and Health Review Commission (OSHRC) has jurisdiction over the parties and the subject matter.

8. On May 1, 2000, one of the Respondent s employees, Steven Newsom, received injuries, including multiple fractures in both wrists and one foot, and a head contusion, in a fall at the Giant Eagle building while dragging decking to where other employees were installing metal decking on the roof of the Giant Eagle building.

9. On or about October 26, 2000, Compliance Safety and Health Officer (CSHO) Gerald Miller of the Occupational Safety and Health Administration (OSHA) conducted an inspection, regarding a complaint received on or about October 16, 2000, concerning Mr. Newsom s May 1, 2000 fall at the Giant Eagle job site. The

Giant Eagle building was substantially completed at the time of the OSHA inspection.

10. On October 31, 2000, OSHA issued a Citation and Notification of Penalty to Respondent containing an allegation of one serious violation of 29 C. F. R. § 1926.105(a), and proposing a penalty of $1,500.00. A copy of the Citation is attached hereto as Exhibit A.

11. On December 1, 2000, Respondent filed a timely Notice of Contest with OSHA, which was duly transmitted to OSHRC.

12. The sole issue in this proceeding is whether 29 C. F. R. § 1926.105(a), the standard cited in Citation 1, Item 1 of OSHA Inspection No. 1123539986, applies to the cited conditions. Specifically, the applicability issue rests on whether the Giant Eagle building is a tiered or untiered building within the meaning of the OSHA steel erection standards, 29 C. F. R. § 1926.750, *et seq.* (Subpart R). For purposes of this OSHA proceeding only and in order to resolve this matter, if the OSHRC determines that § 1926.105(a) applies, the Respondent will not contest any elements of the Secretary s prima facie case which are not established by these stipulations. This agreement not to contest elements of the Secretary s prima facie case as stated above does not constitute an admission by Respondent, but constitutes an offer to compromise with OSHA for the purpose of expeditiously resolving this case.

13. The total square footage of the Giant Eagle building is 126,418 s.f. The mezzanine (a separate intervening level) is located in the southeast corner of the building, and measures 10,180 square feet. Eighty-three percent (83%) of the building has a height of less than 25 feet. The remaining 17% of the building is over 25 feet. The mezzanine comprises 60% of this higher portion of the building. Therefore, the mezzanine constitutes approximately 8-10% of the Giant Eagle building.

14. Both as built and by design, the Giant Eagle building contains no vertically stacked columns.

15. On May 1, 2000, the mezzanine was partially installed in that some of the columns and beams had been erected. However, on that date, no permanent or temporary floor existed in the area of Mr. Newsom s fall.

16. On May 1, 2000, Mr. Newsom was dragging deck pieces to employees who were installing metal decking on the roof of the Giant Eagle building as a part of the steel erection process. Mr. Newsom was wearing a safety belt, but was not tied off. At the time of Mr. Newsom s fall, there was no perpendicular line on which to tie off, although one could have been installed, as there were static points available. Mr. Newsom fell into the interior of the building, from a height of 28 feet, in the southeast corner of the building, within the footprint (area) where the mezzanine was partially installed. No safety nets or other fall protection was utilized.

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a standard.

> 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).

Alleged Violation of § 1926.105(a) or, in the alternative, § 1926.750(b)(1)(ii)

The citation alleges that fall protection was not utilized where employees perfomed associated steel erection roof decking operations, exposing employees to fall hazards in excess of 25 feet; and, that one employee fell and sustained serious injuries.

Section 1926.105(a) provides in part:

> (a) 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.

Section 1926.750(b)(1)(ii) provides in part:

> (b) *Temporary flooring--skeleton steel construction in tiered buildings.*
> (1)(ii) On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures low.

It is undisputed that there were no safety nets, that employees were not tied off, and that no other means of fall protection was used (Jt. Stip. 16).

The primary issue to be decided in this case is whether the applicable standard is § 1926.105(a) or § 1926.750(b)(1)(ii), as the Secretary contends, or § 1926.750(b)(2)(i), as TCE contends. The parties have stipulated that the applicability issue rests on whether the Giant Eagle building is a tiered or untiered building (Jt. Stip. 12).

The Secretary s position is that the Giant Eagle building is untiered and subject to § 1926.105(a); or, in the alternative, the building is tiered but not adaptable to temporary floors and is subject to § 1926.750(b)(1)(ii). Both of these standards require safety net fall protection for employees working over 25 feet above the ground.

TCE argues that the building is tiered and subject to § 1926.750(b)(2)(i). Section 1926.750(b)(2)(i) provides:

> (2) (i) Where skeleton steel erection is being done, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed, except when gathering and stacking temporary floor planks on a lower floor, in preparation for transferring such planks for use on an upper floor. Where such a floor is not practicable, paragraph (b)(1)(ii) of this section applies.

TCE contends that it was not required to provide fall protection for its employees because they were working less than 30 feet above the ground on a tiered building.

Applicability of § 1926.105(a)

Section 1926.105(a) is a general construction standard covering personal protective and life saving equipment. (T)he general fall protection standards for the construction industry do apply to conditions not addressed in Subpart R the steel erection standards. *Peterson Brothers Steel Erection Co.,* 16 BNA OSHC 1196, 1198 (No. 90-2304, 1993), *aff d,* 26 F.3d 573, 577 (5th Cir. 1994). Five Circuit Courts hold that the specific steel erection standards at Subpart R do not preempt § 1926.105(a), a general construction standard, where the steel erection standards provide no protection. *Peterson Brothers Steel Erection Co. v. Reich,* 26 F.3d 573, 577 (5th Cir. 1994). *See also Brock v. Williams Enterprises of Georgia, Inc.,* 832 F.2d 567, 570 (11th Cir. 1987); *Brock v. L. R. Willson & Sons,* 773 F.2d 1377, 1382 (D. C. Cir. 1985); *Donovan v. Adams Steel Erection, Inc.,* 776 F.2d 804, 810 (3rd Cir. 1985); *Donovan V. Daniel Marr & Son,* 763 F.2d 477, 483 (1st Cir. 1985).[1] The steel erection standard at § 1926.750(b) provides for fall protection in tiered buildings . In this case, if the Giant Eagle building is tiered, the § 1926.750(b) standard is the applicable standards; if the building is untiered, § 1926.105(a) is the applicable standard.

[1] Furthermore, the Fourth Circuit holds that the steel erection standards do not preempt the general construction standards requiring the use of personal protective equipment. *Bristol Steel & Iron Works v. OSHRC,* 601 F.2d 717, 722 (4th Cir. 1979).

The term tiered is not defined in the standards. The Review Commission holds that the term tiered building is not limited to multi-floored structures but includes any building or structure in which a skeleton steel framework is erected in vertically stacked steel columns. *Daniel Construction Company,* 9 BNA OSHC 1854, 1858 (No. 12525, 1981) *aff d, Daniel International Corp. v. Donovan,* 705 F.2d 382 (10th Cir. 1983).

OSHA defines tiered in its Directive 00-03 as follows: Tiered means the skeleton steel framework is erected in vertically stacked columns; tiered structures are not limited to multi-floored structures. OSHA Directive 00-03 (CPL 2-1) - Steel Erection (Feb. 11, 2000). By its definition tiered includes multi-floored structures and structures without multi-floors that have vertically stacked columns. Directive 00-03 states that in a non-tiered building both exterior and interior falls of 25 feet or more are covered by § 1926.105(a).

It is well established that an agency s construction of its own regulations is entitled to substantial deference. *Martin v. OSHRC,* 499 U. S. 144, 111 S. Ct. 1171, 1175 (1991). The Secretary s interpretation of the regulation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. *GAF Corp. v. OSHRC,* 561 F. 2d 913, 915 (D. C. Cir. 1977). *See also Albemarle Corp. v. Herman,* 221 F. 3d 782 (5th Cir. 2000) (the Secretary s interpretation is not entitled to deference if it is unreasonable). In addition to being reasonable, the interpretation of a standard should be consistent with the purposes of the OSH Act. *Nooter Construction Co.,* 16 BNA OSHC 1572, 1574 (No. 91-237, 1994). The purpose of the Act is to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. 29 U. S. C. 651(b). OSHA s standards must be construed & to protect the employees. *GAF Corp.* at 915. *See also Brennan v. OSHRC,* 491 F.2d 1340, 1344 (2nd Cir. 1974) (interpretation of the standards should achieve the congressional goal of accident prevention).

In this case, § 1926.105(a) is the applicable standard if the Giant Eagle building is untiered. OSHA s definition of tiered requires vertically stacked columns. It is undisputed that the Giant Eagle building did not have vertically stacked columns (Jt. Stip. 14). OSHA further defines tiered as multi-floored. The Giant Eagle building is a warehouse-type of grocery store that has a small mezzanine (Tr. 26). By its definition a mezzanine is a fractional story that projects in the form of a balcony over the ground story. *Webster s Third New International Dictionary.* In this building the mezzanine is 10,180 square feet; the building is a total of 126,418 square feet.

The mezzanine is only 8-10% of the total square footage of the entire building (Jt. Stip. 13). This is a small fraction of the total amount of space a floor in this building could occupy. Because the mezzanine comprises a very small area in this building, the building cannot be considered tiered or multi-floored.[2]

However, even if the building could be defined as tiered or multi-floored, it was not tiered or multi-floored on the date of the injury, May 1, 2000. It is undisputed that on that date, there was no floor, either temporary or permanent, in the mezzanine area (Jt. Stip. 15). Subsequent modifications to the building did not change the nature of that mezzanine area on the day of the injury. Thus, the building was untiered on that date.

Noncompliance of the cited standard is established by the evidence of the employer s failure to use any of the protective measures mentioned in the standard. *El Paso Crane & Rigging Co.,* 16 BNA OSHC 1419, 1421 (No. 90-1106, 1993). In this case TCE did not provide safety nets, ladders, scaffolds, catch platforms, temporary floors, or safety lines for the employees, as required by § 1926.105(a). Although TCE provided safety harnesses, the lanyards on the harnesses were not tied off to a safety line and therefore did not provide any fall protection (Tr. 61, 77, 215; Jt. Stip. 16). The employees were exposed to a 28-foot fall and subject to serious injury.

To establish a violation of § 1926.105(a) for failing to require a listed fall protection device other than a safety net, the Secretary must also show that the device was practical in the cited employer s circumstances. *Armstrong Steel Erectors, Inc.,* 18 BNA OSHC 1630, 1632 (No. 97-0250, 1999). The installation of a safety line was possible and practical as demonstrated by TCE s installation of a safety line soon after the accident occurred (Tr. 226-227).

Therefore, the Secretary has established a violation of § 1926.105(a).

Serious Classification

A serious violation exists if there is a substantial probability that death or serious physical harm could result. 29 U. S. C. § 666(k). One employee who fell 28 feet sustained multiple fractures in both wrists and one foot and a head contusion on May 1, 2000. At the time of the

[2] Although not of precedential value, an OSHRC administrative law judge held that an employer s worksite was not multi-level since more than 95% of the building under construction was a single story with no intervening floor between the ground and the top. *Havens Steel Co.,* 1975-76 CCH OSHD ¶20,467 (No. 13463, 1976).

hearing on June 12, 2001, over a year later, he was still undergoing physical therapy for his injuries. Thus, the violation of § 1926.105(a) is affirmed as serious.

Penalty Assessment

Section 17(j) of the Occupational Safety and Health Act requires that when assessing penalties, the Commission gives due consideration to (1) the size of the employer s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

TCE is a small employer with 8 employees, plus the owner, at the time of the accident. It has no history of OSHA violations in the past three years. Credit is given for small size and no prior history of violations.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, 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 Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Eight employees were continuously exposed to the hazard of falling off the roof from a height of 28 feet and no fall protection was utilized. Falling 28 feet could result in serious injury (as it did in this case) and possibly death. Thus, the gravity of the violation is high.

Although TCE cooperated with the investigation, it did not otherwise demonstrate good faith. The general contractor, Continental, required 100% tie off on the project for all employees working 6 feet above the ground (Tr. 100, 119). Wetmore stated that Continental asked him to lay roof deck on the day of the accident because they were concerned about getting behind schedule since another subcontractor who was supposed to be laying roof deck had not shown up for a couple of days (Tr. 132-133). Employees Newsom and Hale testified that on the morning of the accident Wetmore told the employees to look like they were tied off by wearing their safety harnesses and letting their lanyards drag behind them (Tr. 63, 67, 73). Wetmore denied that he told his employees not to tie off (Tr. 139). Both Newsom and Hale further stated that no one was tied off on that morning because there was no safety cable or anything on the roof to tie off to (Tr. 61, 77). Foreman Foor stated that no one was tied off but Newsom could have tied off by setting

up a safety cable (Tr. 215, 222). Newsom testified that he could have put up a safety line by himself but (w)e were told to go up and lay deck and no one told him to put up a safety line (Tr. 62-63). After the accident, it took Foor and two other employees about two hours to install two safety cables (Tr. 226-227).

I find that the employees testimony outweighs Wetmore s testimony. Newsom (the injured employee) did not exhibit any malice toward the employer during his testimony. Hale did not exhibit any malice toward the employer and had no reason to lie about what Wetmore said to them. Both employees testified that Wetmore had never told them to look like they were tied off before that day (Tr. 70, 74). Thus, TCE should not receive any credit for good faith.

Based on these factors, the assessed penalty for the violation of § 1926.105(a) is $1000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is ORDERED that:

Citation No. 1, Item 1, alleging a serious violation of § 1926.105(a) is affirmed and a penalty of $1000.00 is assessed.

Dated this 2nd day of November, 2001.

/s/
Stephen J. Simko, Jr.
Judge