Secretary of Labor, Complainant, v. North Pacific Enterprises, Respondent.	OSHRC Docket No. **98-0613**

Appearances:

Cheryl L. Adams, Esquire
U. S. Department of Labor
Office of the Solicitor
San Francisco, California
For Complainant

Rip Stephanson, Pro Se
Saipan, MP
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

North Pacific Enterprises, Inc. (North Pacific), is a contractor specializing in light commercial and residential construction (Tr. 70). Its primary office is located in Saipan, the Commonwealth of the Northern Mariana Islands. North Pacific contests the one-item serious citation issued to it on March 12, 1998, following an inspection by Occupational Safety and Health Administration Compliance Officer Felipe Lopez and fellow Compliance Officer Castro. Specifically, the Secretary asserts that North Pacific violated § 1926.451(g)(1) when its employees worked from a scaffold more than 25 feet above the ground level without using fall protection. North Pacific admits that its employees were potentially exposed to the fall hazard, but asserts that the exposure was the result of employee misconduct. For the reasons discussed below, the undersigned finds that the Secretary established a violation and North Pacific failed to prove its defense.

The Inspection

Late in the afternoon on February 18, 1998, Castro and Lopez observed two men sitting on and working from wooden scaffolding placed around a tall sign at the Microl Toyota automobile dealership in Saipan. The men were at a height of approximately 28 feet above a concrete parking lot. Lopez specifically observed that the men were not wearing safety harnesses or using any other form of fall protection. The scaffold had no guardrails (Exh. C-2; Tr. 9, 29, 30). Because of their observations, the compliance officers decided to inspect the workers' employer the next morning (Tr. 10).

When Castro and Lopez returned to the Microl site on February 19, 1998, they again observed two men, Rodolfo Tabianan and Exequiel Jimenez, on the upper part of the scaffold hammering and working on the sign. The wooden scaffold had no work platform. Tabianan and Jimenez sat on a piece of 2- by 4-foot lumber, which spanned between the scaffold frames at a height of at least 25 feet above the concrete parking lot (Tr. 10, 25). Lopez observed that some safety harnesses were hung from the bottom tier of the scaffold (Exh. R-1; Tr. 11).

The compliance officers approached the scaffold, and the two employees climbed down. When Tabianan reached the ground, he immediately ran towards the back of the Microl building. North Pacific's foreman, Nonito Lapeciros, who was supervising a North Pacific excavation crew at the back of the Microl building, saw Tabianan run by. Lapeciros went to the front of the building and spoke with the compliance officers. He directed them to North Pacific's office (Tr. 13, 24, 37, 40).

Rip Stephanson, North Pacific's president and general manager, was at the office. Stephanson advised Lopez and Castro that, like them, he had seen the two employees on the scaffold on February 18, 1998, and noted that they had not been wearing their safety harnesses (Tr. 16). Stephanson apparently did not admonish the two employees for their failure to use fall protection at that time. Stephanson told Lopez of his exasperation with trying to secure the

cooperation of contract workers,[1] like Tabianan and Jimenez, in complying with safety standards. He concluded that some employees "aren't trainable" (Tr. 15).

Discussion

In pertinent part, § 1926.451(g)(l) provides:

> Each employee on a scaffold more than 10 feet above a lower level shall be protected from falling to that lower level . . . .
>
> (vii) . . . by the use of personal fall arrest systems or guardrail systems meeting the requirements of ¶ (g)(4) of this section.

The Secretary has the burden to establish each of the four elements of her proof. These are:

> (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).

Without question, the scaffolding standard applies to North Pacific's use of the wooden scaffold. North Pacific's employees were exposed to a fall hazard as they sat on and worked from a narrow board more than 25 feet above the ground level. The employees were not wearing fall protection or protected from falls by guardrails. Only the last element, that of employer knowledge, remains to be discussed.

As stated, Stephanson saw the employees working on the scaffold the day before the inspection and knew that they were not wearing fall protection. Without his intervention, Stephanson should have known that these employees would likely ignore the same fall protection requirements as they resumed their work.

[1] Contract workers from the Phillippines and other countries may enter and work in Saipan under the terms specified in The Immigration and Nationality Act, 8 U.S.C. 1101, *et seq*. Employers offer contract workers 40 hours of work a week and provide housing and medical care (Tr. 59-60). The United States Department of Labor has enforcement responsibility for some of the provisions of that Act (Tr. 61).

Foreman Lapeciros testified that he instructed Tabianan and Jimenez to wear fall protection, but Lapeciros's credibility was seriously undermined by his lack of fluency in the English language. Even when North Pacific's engineer translated from English to Tagalog for him, Lapeciros's demeanor showed his confusion and indicated a desire to respond without having an understanding of the question asked. Accordingly, his testimony is not afforded any significant weight, especially when it lacks corroboration or when it contradicts the testimony of other witnesses. Lapeciros knew that the men were working from a scaffold just around the front of the building from the rest of the crew. Had he checked the scaffold work going on in plain sight, he would have seen the safety harnesses hanging at the bottom of the scaffold.[2] It is concluded that with the exercise of reasonable diligence, North Pacific should have known of the violative conditions.

The Secretary has met her burden of proof. If an accident occurred, a fall of more than 25 feet to concrete or onto parked cars would result in serious injury or death (Exh. C-1). A serious violation of the standard occurred.

Employee Misconduct Defense

Once the Secretary proves the violation, unless the employer establishes its defense, the violation will be affirmed.

North Pacific's employee misconduct defense centers on its alleged difficulty in convincing its employees to follow safety procedures. It contends that after an earlier OSHA citation, the company purchased safety equipment, trained one of its employees, and made an effort to include safety in the operation of its business (Tr. 48, 50). Even with that, according to Stephanson, its employees did not embrace a safety program. Especially its contract workers, the majority of whom were from the Phillippines, considered safety rules and equipment to be a hindrance to the effective performance of their jobs. Many of the contract employees had work experience in their home countries and were not familiar with the safety practices required by the

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[2] Lapeciros's testimony differs on this point. Lapeciros testified that the employees took their safety harnesses up to the top of the scaffold but removed them for some unknown reason (Tr. 36, 40). The testimony of Compliance Officer Lopez was persuasive that the harnesses were hanging from the lowest tier of the scaffold (Tr. 11). Lopez recorded this observation on OSHA Form 1-B, which was written shortly after the inspection (Exh. R-1).

Occupational Safety and Health Act. It was also Stephanson's opinion that regulations which sought to protect contract employees from exploitation had the unintended consequences of making such employees almost immune from the employer's discipline (Tr. 58-60).

It has long been recognized that an employer is not strictly liable for its employees' actions. One way in which an employer may validly defend against an apparent violation is by showing that the condition resulted from an isolated incident of employee misconduct. In order to negate a violation on the grounds of employee misconduct, the employer must show that: (l) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to its employees; (3) it took steps to discover violations of those rules; and (4) it effectively enforced the rules when violations were discovered. *E.g., Gary Concrete,* 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991).

Did North Pacific have a safety rule designed to prevent the specific conduct which violated the standard? North Pacific did not present evidence that it had a workrule which required guardrails or the use of safety harnesses while working above 10 feet on scaffolds. Stephanson testified that North Pacific had a safety manual that was "over 1,000 pages" (Tr. 66). He explained that he failed to provide Lopez, and later the Secretary's attorney, with a copy of the manual because he did not understand that this is what they were seeking. Accepting that the manual existed, however, does not permit the undersigned to speculate as to what may or may not have been covered in its pages. North Pacific also claims that it had an oral workrule regarding the use of safety harnesses (Tr. 36). Again, the testimony was too vague to establish the existence of a specific workrule.

The second element of the defense concerns communication of the workrule. Even if a specific workrule existed, North Pacific failed to prove that the workrule was effectively communicated to its employees. North Pacific conducts monthly safety meetings. It introduced a one-page "Employee Safety Checklist" as evidence of the fact that the monthly meetings occurred and to show the topics covered at its monthly meeting on February 15, 1998. There was nothing on the checklist that addressed fall hazards. Although Stephanson stated that the topic was covered at that meeting, it is noted that the blank space on the checklist indicating discussion of "other personal protective equipment " was left blank (Exh. R-2).

The third and fourth elements relate to how the employer discovers violations of its workrule and the enforcement procedures it utilizes when it does. Stephanson did not prevent Tabianan and Jimenez from continuing their unsafe activities after he saw them working without fall protection on February 18. This is considered strong evidence that the rule was not adequately enforced. *See Hamilton Fixture,* 16 BNA OSHC 1073 (Docket No. 88-1720, 1993). Further, the fact that two employees felt free to disobey the alleged workrule over a two-day period sounds less like an idiosyncratic action and more like weak enforcement. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1194 (Docket Nos. 89-2883 & 89-3444, 1993). North Pacific failed to establish that it had an effective disciplinary program. It presented no written program of progressive measures of discipline. To the contrary, the evidence was that violative conditions remained uncorrected.

The undersigned does not discount North Pacific's difficulties in reaching beyond the barriers of language and custom. These barriers, however, cannot justify a lesser effort towards maintaining a safe workplace. As the Commission stated in another context, compliance "will, in some instances, require some creativity on the part of employers seeking to achieve compliance." *Pitt-Des Moines*, 16 BNA OSHC 1429, 1433-34 (Docket No. 90-1349, 1993). North Pacific needed to prove each of the elements of its defense but proved none of them. The violation is affirmed.

Penalty

In determining an appropriate penalty, the Commission must give "due consideration" to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of past violations. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.,* 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

North Pacific is a small company with twenty employees (Tr. 70). Although it had a history of previous serious violations within three years of the inspection, the recommended penalty mistakenly included a full credit for past history (Tr. 20). Good faith considerations include North Pacific's cooperation with the inspection; the fact that it had regular safety

meetings; and that it had a written (although poorly communicated and enforced) safety program. Further, North Pacific provided safety harnesses for the use of its employees.

Gravity considerations include the fact that two employees were exposed to a fall of more than 25 feet for at least portions of two days. They sat on nothing wider than a 2- by 4-foot piece of lumber and were in the closest proximity to the hazardous condition. The probability of an accident occurring in these circumstances was high.

The Secretary has proposed a penalty of $525.00 for the serious violation. Considering all factors, including any special difficulty North Pacific encountered in enforcement of its safety procedures, the recommended penalty is more than reasonable and is assessed.

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), Fed. R. Civ. P.

ORDER

Based on the foregoing decision, it is ORDERED that the violation of § 1026.451(g)(1) is affirmed and a penalty of $525.00 is assessed.

NANCY J. SPIES
Judge

Date: August 2, 1999