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

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SECRETARY OF LABOR
Complainant,
v.
D. A. COLLINS CONSTRUCTION CO., INC.
Respondent.

OSHRC DOCKET
NO. 95-0670

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 20, 1996. The decision of the Judge will become a final order of the Commission on October 21, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 10, 1996 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 20, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0670

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant,	
v.	OSHRC Docket No. 95-670
D. A. COLLINS CONSTRUCTION CO., INC., Respondent.	

APPEARANCES

Steven D. Riskin, Esq.
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For Complainant

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For Respondent

Before: Administrative Law Judge Paul L. Brady[1]

DECISION AND ORDER

D. A. Collins Construction Company, Inc. (Collins), is a construction contractor headquartered in Mechanicville, New York. During 1993 and 1994, Collins was engaged in a project rebuilding a New York State Thruway in Herkimer, New York. On October 31, 1994, Collins's carpenter Stan Matusz fell to his death while working on the bridge. Occupational Safety and Health Administration (OSHA) compliance officers Bill Marzeski and Ronald Williams investigated the fatality. As a result of their investigation, the Secretary issued a citation to Collins

[1] Judge Barbara Hassenfeld-Rutberg heard this case on December 4, 1995. After the hearing, Judge Hassenfeld-Rutberg's case was reassigned to Judge Paul L. Brady "to issue a decision therein based on all the evidence of record."

on March 10, 1995. The citation contained four items alleging serious violations of the Occupational Safety and Health Act of 1970 (Act), all of which Collins contested.

Prior to the hearing in this cause, the Secretary withdrew Items 1 and 2 of the citation (Tr. 7). The Secretary presented evidence on Items 3 and 4 at the hearing. At the close of the Secretary's case, Collins moved to dismiss Items 3 and 4 (Tr. 121). Judge Hassenfeld-Rutberg granted Collins's motion with regard to Item 4, which alleged a violation of § 1926.451(a)(12)(Tr. 134). Left for disposition is Item 3, which alleges a violation of § 1926.105(a) or, in the alternative, of § 1926.451(a)(6).

Background

Starting in September and continuing through October, 1994, carpenters working beneath the bridge were removing, or "stripping," the plywood sheets and aluminum spanalls used in forming the bridge's concrete road deck (Tr. 11-13, 141, 165-166). James Meyers was Collins's carpenter superintendent on the project. Meyers had three foremen under him, each of whom was supervising a crew of eight to ten carpenters. The carpenters worked in groups of two or three, stripping the formwork (Tr. 140, 149-160-161). Bob Rapp was the foreman for a two-person group consisting of carpenters Barbra Foster and Stan Matusz (Tr. 160-161).

During the week of October 24, 1994, Barbara Foster and Stan Matusz built a temporary platform 34 feet above the ground. The platform was made from the plywood sheets and aluminum spanalls of the formwork the carpenters were dismantling from beneath the bridge's road deck (Tr. 12, 14, 23, 57-58). On October 31, 1994, the platform was 100 feet long from its starting point to the leading edge. The platform narrowed from 8 feet to 4 feet wide (the width of a single plywood sheet) within the first 50 feet (Exh. C-1; Tr. 21, 24-26, 36-37, 141). There were openings of from 1½ to 2 feet between the bridge girders and the sides of the four-feet wide platform (Tr. 25-27, 118).

The platform was not guarded with guardrails (Tr. 27). Foster and Matusz wore safety belts and each was equipped with two lanyards (Tr. 28). Collins has a written work rule which states:

> [A]ll D. A. Collins employees are required to tie off 100% of the time whenever they are working or accessing work areas where there is a potential of falling 6 feet or greater.

(Exh. R-48). Neither Foster nor Matusz tied off when they were walking along the platform on their way to lunch or to breaks (Tr. 33-34).

Item 3: Alleged Serious Violation of § 1926.105(a), or, in the Alternative, of § 1926.451(a)(4)

The Secretary alleges that Collins committed a serious violation of § 1926.105(a), which provides:

> 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.

In the alternative, the Secretary alleges that Collins committed a serious violation of § 1926.451(a)(4), which provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraph (p) and (w) of this section) Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

Section 1926.105(a)

While § 1926.105(a) ostensibly addresses safety nets, the Occupational Safety and Health Review Commission (Commission) has consistently held that the standard does not require the use of safety nets. Section 1926.105(a) requires the use of any one of the enumerated methods of fall protection. *RGM Construction Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995).

> The Secretary has the burden of proving his case by a preponderance of the evidence.
>
> 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).

It is undisputed that § 1926.105(a) applies to Collins's worksite on the bridge. It is also undisputed that Foster and Matusz were not using fall protection when walking to and from the area

where they were working, in noncompliance with the standard. By failing to use fall protection, Foster and Matusz were exposed to a fall of 34 feet. Their foreman, Bob Rapp, visited the worksite on a daily basis during the week of October 24. He observed Foster and Matusz walking along the platform without tying off. Rapp himself did not tie off while moving along the platform (Tr. 33-34). As foreman, Rapp's knowledge that he and his crew did not tie off can be imputed to Collins. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

The Secretary has established a *prima facie* case for Collins's violation of § 1926.105(a). Collins asserts that it was not in violation of § 1926.105(a) because any noncompliance with the standard was the result of unpreventable employee misconduct.

Unpreventable Employee Misconduct Defense

To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to it employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1996).

At the hearing, the Secretary stipulated that Collins established the first two elements of the affirmative defense: Collins had an established work rule requiring the use of fall protection, and it effectively communicated this work rule to its employees (Tr. 7). Collins must prove that it had taken steps to discover violations and that it effectively enforced the tie-off rules when violations were discovered.

Collins maintains that it enforced its 100% tie-off rule. It offers as evidence of its enforcement Exhibit R-44, which consists of five warning notices to ironworkers working for Collins in September, 1993 (Tr. 191). James Meyers, Collins's carpenter-superintendent, testified that he witnessed project manager Don Hathaway fire an ironworker for not tying off (Tr. 150-151). Meyers stated that employees were told "they were either tied off a hundred per cent; they'd get a warning. After that, it was dismissal, because we didn't want anybody to get hurt and we were looking out for their safety" (Tr. 151).

Collins's evidence of enforcement is undercut by Foster's uncontradicted testimony that foreman Bob Rapp was aware that she and Matusz did not tie off while walking along the platform, and that Rapp himself did not tie off. Rapp was a supervisory employee.

> [W]here 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 supervisor's duty to protect the safety of employees under his supervision.

L. E. Myers Co., 16 BNA OSHC 1037, 1041 (No 90-945, 1993)

Collins failed to meet the rigorous standard of proof raised when a supervisory employee commits a violative act. In the present case, two of Collins's employees violated § 1926.105(a) on a daily basis for at least a week. Their violative conduct was observed and duplicated by their foreman. This is not an example of idiosyncratic, unforeseeable behavior on the part of employees. Rather, it was routine behavior condoned by Collins's foreman.

Collins has failed to establish its unpreventable employee misconduct defense. Collins violated § 1926.105(a). The citation alleges a serious violation. A violation is serious under § 17(k) of the Act if "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightway Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). The Secretary established a serious violation.[2]

Because Collins was found in violation of § 1926.105(a) it is unnecessary to address the alternative alleged violation of § 1926.451(a)(4).

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[2] Collins argues that, if a violation is found, it should be *de minimis*.

> A *de minimis* violation is one having no "direct or immediate" relationship to employee safety; normally that classification is limited to situations in which the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act.

Dover Elevator Co., 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991). In the present case, the hazard is not trifling. The hazard is a fall from a height of 34 feet. The violation is not *de minimis*.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "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 history of previous violations. The gravity of the violation is the principal factor to be considered.

Collins had a maximum of 99 employees (Tr. 113). Collins had a history of OSHA violations (Tr. 114). No evidence of bad faith was presented. The gravity of the violation is high. A fall from a height of 34 feet can be fatal, as it was in this case. Upon due consideration of these factors, it is determined that the proposed penalty of $3,000 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

Item 3 of the citation, alleging a violation of § 1926.105(a), is affirmed and a penalty in the amount of $3,000 is hereby assessed.

Paul L. Brady

PAUL L. BRADY
Judge

Date: August 20, 1996