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

SECRETARY OF LABOR
Complainant,
v.
MIDWEST PIPING & CONTROLS, INC.
Respondent.

Phone: (202) 606-5100
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OSHRC DOCKET
NO. 95-1435

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 January 19, 1996. The decision of the Judge will become a final order of the Commission on February 20, 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 February 8, 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
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
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: January 19, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1435

NOTICE IS GIVEN TO THE FOLLOWING:

Benjamin T. Chinni
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Steve Houseman, P.E.
Project Manager
Midwest Piping & Controls, Inc.
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Nancy J. Spies
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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 95-1435
MIDWEST PIPING & CONTROLS, INC., Respondent.	:	**E -Z**

Appearances:

Benjamin T. Chinni, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Steve Houseman, Project Manager
Midwest Piping & Controls, Inc.
Bainbridge, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Midwest Piping & Controls, Inc., is a small pipe fitting company located in Chillicothe, Illinois. It is one of at least two family-owned and operated businesses. Midwest fabricates, installs and repairs piping systems, mainly for Mead Paper Corporation, a large employer in the area. As a result of a complaint inspection conducted by William Wilkerson of the Occupational Safety and Health Administration (OSHA), Midwest was issued two citations on August 17, 1995. Two of the cited items were contested: § 1926.501(b)(1) (item 1 of serious citation No. 1) alleging that Midwest failed to guard open sides of a walking/working surface; and § 1926.250(a)(2) (item 2 of "other" citation No. 2) alleging that Midwest failed to post a maximum safe load limit for this area.

As a preliminary matter, Midwest questions the legality of citing for conditions not a part of the complaint to OSHA. Midwest further contends that the standards do not apply; but that if they do, violations resulted from employee misconduct.

This case was heard on November 30, 1995, pursuant to the "E-Z" trial procedures set out in Commission Rules 200-211, 29 C.F.R. §§ 2200.200-211. The E-Z trial is a pilot program designed to provide simiplified proceedings for resolving contests under the Occupational Safety and Health Act of 1970.

The Inspection was Valid

No warrant was requested or obtained (Tr. 33). Midwest impliedly moves to dismiss on grounds that OSHA had no right of entry to inspect for conditions which were not a part of the complaint. Since Midwest challenges the validity of its consent to inspect, the Secretary must support the appropriateness of OSHA's conduct. Midwest, on the other hand, bears the burden of establishing that entry was in some manner coerced. *Sanders Lead Co.*, 15 BNA OSHC 1640, 1648-49 (No. 87-260, 1992). The dispute is to be resolved from "the totality of all the surrounding circumstances." *Id.*

OSHA received a complaint directed at Mead Paper Corporation and its "contractors" (Tr. 30). When Wilkerson asked Mead who its contractors were, Mead named Midwest, among others, even though Mead had no active contracts with Midwest at the time.

In 1993, at Mead's request, Midwest moved its facility to the southeastern corner of Mead. Although the facility was located within Mead's large fenced perimeter, Midwest maintained ownership of its own land and building through a permanent lease. A separate gate and chain-linked fence separated Mead from Midwest. Wilkerson did not recall whether there was a gate between the properties, but he did not observe Midwest to be separated from Mead. Wilkerson assumed that Mead, rather than Midwest, owned the property. His assumption was not illogical. Even Midwest's employee, Ronald Hartmus, believed Mead to be the property owner. Wilkerson accompanied Mead's representatives as Mead came onto Midwest's premises. Wilkerson first presented his credentials to James Houseman, the father in the family that owns Midwest, but himself a non-owner, and shortly thereafter to Steven Houseman, James' son, project manager and an officer in the

corporation.[1] Wilkerson explained that he was there to conduct a complaint inspection and showed the Housemans an excerpted copy of the complaint. The Housemans did not object when Wilkerson came onto the property or, later, when Wilkerson discussed apparent violations not specifically included as complaint items (Tr. 9, 31-32, 39, 49, 70, 72).

Wilkerson sought to check for unlabeled chemicals which might have been stored by a "contractor" (a complaint item). He, therefore, looked for any area at Midwest which could serve for storage. The area in question was also in plain view as Wilkerson came onto the property (Tr. 66). Steven Houseman is educated and knowledgeable.[2] Even if he did not fully understand that Wilkerson could cite for conditions in plain view while he investigated complaint items, Houseman's "[c]onsent can be voluntary without being fully informed." *Id.* at 1649. Considering the circumstances of the inspection, the Secretary's actions were appropriate and reasonable. The OSHA inspector was properly on the property, and he lawfully observed the contested conditions. The motion to dismiss is denied.

Item 1 of Citation No. 1: § 1926.501(b)(1)

The Secretary alleges that Midwest failed to protect open sides of a walking/working surface in violation of § 1926.501(b)(1). The standard is contained within Subpart M, "Fall Protection" and provides:

> (b)(1) "Unprotected sides and edges." Each employee on a walking/working surface (horizonal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Midwest's facility is a single story metal structure, measuring 30 feet by 50 feet, with a pitched roof. Inside the building is a concrete office and tool room. The office is 6 feet long by 6 feet wide, and its ceiling is 8 feet above the floor. Because of the configuration of the building, there is a small surface space between the top of the office ceiling and the inside of the building's

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[1] Midwest is owned 100 percent by Evelyn Houseman, wife of James and mother of Steven (Tr. 79).

[2] In fact, at an informal conference with OSHA, Houseman advised that the originally cited standard (§ 1926.500(d)(1)) was no longer in effect and that § 1926.501(b)(1) was controlling. OSHA acknowledged the error and amended the citation (Tr. 43).

slanting roof (Tr. 9, 10). This area above the ceiling may be considered a "walking or working surface" if it was used as such by the employees. The Secretary maintains that employees worked from the surface and that its two open sides should have been protected by installation of guardrails.

To establish a violation of a standard the Secretary must show that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1222 (No. 88-821, 1991).

The only way to access the area above the ceiling was to use a step ladder, which was usually kept in or near the office. There was no permanent access to the space (Tr. 12). Occasionally, employees placed objects, such as a tarp, a discarded bicycle, water cooler, and rubber boots on the surface above the office ceiling. These items could be reached from the step ladder. There is no evidence that within the period at issue employees went onto the surface and were exposed to the fall hazard while retrieving or placing these articles (Tr. 13). However, stored above the office ceiling, but in the rafters, were 20-foot long pieces of stainless steel tubing which were used in the pipefitting process (Tr. 78). Employees regularly climbed onto the surface to store and retrieve the tubing. During the investigation, employee Steve Schneider informed Wilkerson that he retrieved tubing the previous week by going onto the surface (Tr. 38). Although employees conceivably could reach the tubing by more contrived methods, employee Hartmus considered getting up onto this surface to be "the only sensible way to do it" (Tr. 19). It was, in fact, the way employees did do it. Hartmus estimated that employees would go up to get the steel tubing "once a month, if that" (Tr. 11). Employees used the area as a walking/working surface when they stored and retrieved the tubing. Since two sides of the 6 foot square area were unguarded, employees were exposed to an 8-foot fall "if they were to trip, fall or stumble" (Tr. 49). A fall of 8 feet predictably results in broken bones or, conceivably, in death.

The tubing was originally placed and later retrieved by foreman, James Houseman, or by employees working under his direction (Tr.13). The knowledge of a supervisory employee (even if not formally a member of management) may be imputed to an employer. It is appropriate to impute James Houseman's knowledge to Midwest in this case. Further, Steve Houseman was or should have been aware that employees stored and retrieved tubing from the surface above the office

ceiling without using fall protection (Tr. 39, 66). The Secretary has shown each of the elements of a violation. The serious violation will be affirmed unless Midwest establishes a defense.

No Employee Misconduct

Midwest asserts that if a violation occurred, it was the result of unpreventable employee misconduct. In order to establish this defense, an employer must prove that : (1) it had work rules designed to prevent the violation; (2) the work rules had been adequately communicated to its employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (No. 89-3444, 1993).

(1) Established Work Rules

Midwest did not utilize guardrails, which was the most practical form of fall protection for this surface. It asserts employees knew they should, therefore, use personal fall protection. Midwest's safety rule adequately addressed the hazard as follows (R-2, p. 9a):

> 1. Unprotected Sides and Edges. Each employee on a walking/working surface with an unprotected side or edge which is 4 feet or more above a lower level shall be protected from falling by a guard rail system or personal fall arrest system.

(2) Adequate Communication

Employees were given a copy of this and Midwest's other safety rules. Employees signed their names to verify that they read the rules. Referring to being tied off when working from unprotected sides above 4 feet, Hartmus explained that, "I would know [of the requirement]," although "I wouldn't necessarily agree with it" (Tr.17-18). Hartmus' earlier testimony illustrates that employees did not understand how the work rule should be applied (Tr. 13):

> Q: To your knowledge, was there any requirement of management for employees to tie off on this roof area?
>
> A: I don't think, on my part, it was ever thought of. I mean, we wasn't told to or not to.
>
> Q: So no one instructed you, in other words, that you were to?

A: No. Like I said, if I went up there 100 times, I would have never thought of it myself. I never thought it was a necessity myself.

(3) Effective Enforcement

Employees, including foreman James Houseman, were not disciplined for working from the space without guardrails or fall protection (Tr. 13). When a foreman responsible for directing the actions of other employees himself violates a work rule, it is "strong evidence" that the rule was not adequately enforced. *Hamilton Fixture*, 16 BNA OSHC 1073, 1090 (No. 88-1720, 1993). *Daniel Const. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982). Nothing in this case overcomes that "strong evidence."

The work rule was not adequately communicated or enforced. Midwest has failed to established its defense. The violation is affirmed.

By statute, the Commission considers the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining an appropriate penalty. *Hern Iron Works, Inc.*, 16 BNA OSHC 1691, 1624 (No. 88-1962, 1994). Midwest is a very small employer. At the time of the inspection only two pipefitters and the Housemans were employed. Credit for good faith is appropriate, contrary to Wilkerson's opinion that credit was precluded because the violation was in plain sight. Midwest cooperated with the inspection. It even brought in welders from a sister company to enable the Secretary to monitor for lead exposure. Midwest had a written safety program and had safety equipment on site. It had no history of previous violations (Tr. 17, 41- 42, 53). Gravity, which is the primary factor in arriving at a penalty, includes consideration of the number of exposed employees, the duration of exposure, precautions against injury, and the likelihood that injury would result. *Id.* Two employees were exposed during the infrequent but regularly anticipated periods when tubing was stored and retrieved for use in the pipefitting process. The duration of the exposure was short. A penalty of $400 is assessed.

Item 2 of Citation No. 2: § 1926.205(a)(2)

The Secretary asserts that the working surface above the office was also a "storage area." Midwest had not posted maximum safe load limits for this area, allegedly in violation of § 1926.205(a)(2). The standard requires:

(2) Maximum safe load limits of floors within buildings . . . shall be conspicuously posted in all storage areas, except for floor or slab on grade.

"Storage area" is broadly defined. Not so broad, however, as to encompass any elevated surface upon which items are placed. Acknowledging that the area was not intended to be used for storage, Wilkerson considered the allegation "technical." He cited "to make sure the company was aware that if they're going to store up there, they needed to consider the storage capacity of the floor" (Tr. 46). The asserted violation is anticipatory. The standard was cited in the expectation that Midwest may change the surface into a storage area at some future date. The violation is vacated.

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 on the foregoing decision, it is ORDERED:

(1) Item 1 of serious citation No. 1, alleging a violation of §1926.501(b)(1), is affirmed as serious and a penalty of $400.00 is assessed.

(2) Item 2 of "other than serious" citation No. 2, alleging a violation of § 19205(a)(2), is vacated.

/S/ NANCY J. SPIES
NANCY J. SPIES
Judge

Dated: January 11, 1996
Atlanta, Georgia