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SECRETARY OF LABOR
Complainant,
v.
CLARENCE WALL & CEILING, INC.
Respondent.

OSHRC DOCKET
NO. 93-0824

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 December 2, 1994. The decision of the Judge will become a final order of the Commission on January 4, 1995 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 December 22, 1994 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
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Review Commission
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Petitioning parties shall also mail a copy to:

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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: December 2, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0824

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 93-824
CLARENCE WALL AND CEILING, INC., Respondent.	:	

APPEARANCES:

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Office of the Solicitor
U. S. Department of Labor
For Complainant

Joseph Matteliano, Esquire
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For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Clarence Wall and Ceiling, Inc. (Clarence), was cited on February 3, 1993, for serious violations of three construction safety standards: 29 C.F.R. § 1926.300(b)(1), which requires that power-operated tools be equipped with guards when designed to accommodate such guards; § 1926.303(d), which requires that all abrasive wheels and tools meet applicable requirements of the American National Standard Institute (ANSI), B7.1-1970, Safety Code for the Use, Care and Protection of Abrasive Wheels; § 1926.500(d)(1), which calls for guarding every open-sided floor or platform 6 feet or more above floor or ground level. The

Secretary proposes that a penalty of $675 be assessed for each of the two items relating to the power-operated tool and $1,125 for the alleged fall hazard.

The three-item citation stems from an inspection conducted by OSHA on December 21 and 22, 1992, at a construction site in Clarence, New York, where Clarence was engaged in the process of erecting a metal framework for a new roof. In the course of his inspection on December 21, the OSHA compliance officer climbed the roof where he observed in the work area a 7-inch Black & Decker angle sander/grinder. The compliance officer noted that the tool was not equipped with a guard and that its grinding wheel "was worn past the permissible limit," the limit being marked or indicated on the tool by the manufacturer, according to the compliance officer (Tr. 13-14, 27-28).

The absence of a guard and a worn grinding wheel on the same power tool constitute the first two items of the citation. The third item of the citation--an open-sided work platform--was not observed until the following day, December 22, when the compliance officer returned to continue his inspection of the worksite (Tr. 46).

The Alleged Violation of the Tool Guarding Standard

As previously noted, the standard at § 1926.300(b)(1) calls for the guarding of the tool when designed to accommodate such guards. The instruction manual for the tool in question repeatedly instructs and cautions the use of "proper guarding" whenever the tool is used for grinding (Exh. C-2 at pgs. 2, 4, 7).

During the hearing and in its posthearing brief, Clarence makes a faint effort to turn the course from a grinding operation to "sanding" where apparently a guard would not be appropriate according to the instruction manual. However, in its answer to the Secretary's complaint, Clarence admitted using the tool as a grinder (section A of affirmative defense); and its own job foreman described his use of the tool as a "grinder" (Tr. 214, 216).

Clarence defends on several grounds. The claim is made that use of a guard would have created "a greater safety hazard since its use would block [the foreman's] vision of the work." (Clarence's Brief at 13). An employer seeking to be excused from implementing a cited standard's abatement measure on the basis of its infeasibility has the burden of

establishing that there was no feasible alternative measure. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991).

Clarence's foreman testified that he was able to use the tool with the appropriate half-moon guard when cutting the top flange of the metal stud but not the lower flange (Tr. 216). The foreman's testimony was directly contradicted by the compliance officer whose work experience included over thirteen years as an ironworker (Tr. 8, 21-22, 162-163). Moreover, the compliance officer testified that the work on the lower flanges could have been accomplished by using a "smaller tool" in the form of a 4½-inch grinder (Tr. 120). Clarence offered no evidence to dispute the compliance officer's testimony as to such alternative means of abatement.

Clarence also contends that it had no knowledge that its foreman used the tool in violation of the OSHA standard, and that it should not be held responsible for the unguarded tool because the improper use of the tool was not authorized and was a violation of Clarence's own safety policy for which the foreman was disciplined (Tr. 315) (Clarence's Brief at 3-4, 7-8). The argument raises two issues: employer knowledge and unpreventable employee misconduct. These two issues are closely related.

The employer's duty under the Occupational Safety and Health Act must be one which is achievable. *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Thus, the Secretary is required to show that an employer knew or should have known of the existence of a violation. *Brennan v. OSHRC (Raymond Hendrick)*, 511 F.2d 1139, 1145 (9th Cir. 1975). Under Commission law, the supervisor's knowledge of a violation, both actual and constructive, is imputable to the employer for the purpose of proving employer knowledge of the violation unless the employer establishes that it took all necessary precautions to prevent the violation, including adequate instruction and supervision of its supervisor. *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-351, 1991).

With respect to the issue of employee misconduct, the Secretary points out that it is an affirmative defense and argues that it should be stricken because it was not raised in the answer to the complaint, as required by the Commission. Rule 36(b), 29 C.F.R.

§ 2200.36(b). This argument loses its force when one considers that the employer's burden of defending against imputing the foreman's knowledge of a violation to the employer closely parallels his burden of establishing the unpreventable employee misconduct defense:

> Once the Secretary has made a prima facie showing of employer knowledge through its supervisory employee, the employer can rebut that showing by establishing that the failure of the supervisory employee to follow proper procedures was unpreventable. In particular, the employer must establish that it had relevant work rules that it adequately communicated and effectively enforced.

Consolidated Freightways, supra, 15 BNA OSHC at 1321.

As the Secretary notes in his posthearing brief at pages 8 through 9, Clarence failed to establish that it had a work rule relevant to guarding power-operated tools (Tr. 233-237). In fact, Clarence's president testified that when the foreman was given a warning notice following the OSHA inspection, it was not for the failure to use the tool with a guard but because "he was not using the tool for the purpose it was intended to be used at the site" (Tr. 315).

Evidence that a supervisor was involved in misconduct is strong evidence that the employer's safety program was lax. *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). The compliance officer's credible testimony that Clarence's own safety director had observed, and apparently did not object to, the tool being used without a guard (Tr. 15), is further evidence of the inadequacy of Clarence's safety program.

So tenuous are Clarence's other contentions that they need not be discussed. The compliance officer's testimony concerning the serious nature of the potential hazards to which the employee was exposed from the unguarded tool is sufficient to sustain a serious citation (Tr. 15-16), and the proposed penalty of $675 is consistent with the penalty criteria of 29 U.S.C. § 666(j).

The Alleged Violation of the Abrasive Wheel Standard

Clarence was cited for allegedly violating the abrasive wheel standard at 29 C.F.R. § 1926.303(d), which incorporates by reference the ANSI safety guidelines for abrasive wheels. In both the citation and the complaint, the Secretary maintained that Clarence failed to comply with section 9.11 of the ANSI requirement, which provides that "all spindles, adapters, flanges, or other machine parts on which wheels fit be periodically inspected and maintained to size." The Secretary's description of the violation specified that the grinding wheel (of the Black & Decker sander/grinder) used to grind the metal studs was worn below the permissible level of usage.

During the course of the hearing, it became evident that the ANSI provision did not apply to the grinding wheel. The Secretary accordingly moved, under Rule 15(b) of the Federal Rules of Civil Procedure, to amend the charge by substituting therefor, the general standard at § 1926.300(a) which provides, in pertinent part, that "[a]ll hand and power tools . . . shall be maintained in a safe condition" (Tr. 107). Clarence opposed the amendment at the hearing[1] and continues to oppose it on the grounds that it presents a new issue which was not raised by the pleadings nor tried by the express or implied consent of the parties, as required by Fed.R.Civ.P. 15(b). Clarence makes the following argument:

> The issue raised by the Secretary's initial citation concerned whether or not the wheel was maintained to size pursuant to the regulations cited. On the other hand, the Secretary seeks to amend to assert that the wheel was not maintained in a safe condition. A determination of whether or not a wheel was maintained to size involves a separate issue than would a determination as to the safety condition of the entire hand and power tool in question. Indeed, even if the wheel was not maintained to size (pursuant to a specific regulation which, if one exists, the Secretary has failed to cite), it is clear that the hand and power tool, as used, could have been maintained in a safe condition. Testimony on this was precluded by the fact that the Secretary did not seek to amend prior to the Hearing and did not articulate specific hazards which Respondent could have researched prior to the Hearing.

Clarence's Brief at 15.

Under Rule 15(b), a liberal provision is made for amendments to conform the pleadings to the evidence. The fact that it involves a change in the legal theory of the action

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[1] A ruling on the Secretary's motion to amend the citation to conform to the evidence was reserved.

is immaterial so long as the opposing party has not been prejudiced in presenting his case. *Moore's Federal Practice*, ¶ 15.13[2].

One problem with Clarence's argument is that it requires us to draw a distinction between a wheel maintained "to size" and one maintained "in a safe condition." This position can only be sustained by ignoring the thrust of the Secretary's charge. The very definition of an OSHA standard automatically injects the question of "safety" into all enforcement proceedings:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

29 U.S.C. § 652(8).

At the pleading stage, Clarence was well aware that the Secretary called into question nothing more nor less than the safety of the wheel which was described in the citation as being "worn below the permissible level of usage." The amendment merely substitutes a standard befitting the cited condition of the tool. Indeed, Clarence's answer to the complaint addresses the very issue raised by the amendment:

> B. Citation 1 - Item 2 - CFR 1926.303(d)
>
> We deny that this tool was used in a manner which would violate the standard which was cited. The sanding wheel used in this manner in no way created a hazard for any employee. It was not worn down below any permissible limits. In addition, it is a synthetic wheel which is designed by the manufacturer not to shatter and all employees are required to wear safety glasses and were, in fact, doing so when in use.

It is significant to note that in its answer to the first item of the citation dealing with a guard for the tool in question, Clarence pleaded essentially the same affirmative defenses:

> . . . the hazard with safety flanges are designed to protect employees from is that of flying pieces of the wheel in case of breakage. This hazard does not exist when the employee of Clarence Wall & Ceiling Inc. was using the Black and Decker heavy duty angle sander, Ser. #13451. This piece of equipment uses a synthetic wheel which has been designed by the manufacturer not to shatter. In addition, all employees are required to wear protective eyewear when in use.

Clarence did not present any evidence relating to the alleged shatterproof "synthetic wheel" in defense of either the first or second item. But even if Clarence did present evidence on this point, the alleged hazard would not be entirely eliminated.

The compliance officer testified that using the overly worn wheel in a grinding operation could cause the wheel to move in an unpredictable or unstable manner, resulting in serious lacerations of the operator's hands. In addition, he mentioned the shattering effects of the wheel on the operator's face, particularly the eyes. On cross-examination, Clarence's counsel questioned the compliance officer in connection with the abrasive wheel and the possible benefits of wearing "protective eye wear." Counsel also questioned the compliance officer concerning the gravity of the hazard stemming from the use of the cited condition of the wheel (Tr. 102-104). This cross-examination occurred after Clarence's counsel called into question the applicability of the initially cited ANSI provision. Counsel's own witness, foreman Zwolinski, gave testimony concerning the wearing of personal protective equipment and work clothing, including goggles, hard hat, heavy jacket, and work pants, gear that would apparently be equally relevant to both the first and second items of the citation, with or without the amendment.

I am able to see no way in which Clarence's case would be prejudiced by granting the Secretary's motion to amend the second citation item. Its main line of defense on this item was essentially the same as the first item. But, more importantly, the Secretary's basic charge against Clarence is not significantly changed by the amendment; therefore, the amendment is granted.

The compliance officer's testimony as to the hazardous nature of the worn wheel was straightforward and unequivocal, and was informed by over thirteen years' experience as an ironworker, including operating grinding wheels similar to the one in question (Tr. 8, 40). The wearing of protective gear or clothing is not a valid defense for using a power tool in an unsafe manner. Personal protective equipment "depends upon the vagaries of human behavior [and] are inherently less reliable than well-maintained mechanical methods." 43 Fed. Reg. at 52,990.

The lack of stability of the worn abrasive wheel exposed the operator to the potential hazard of sustaining severe laceration of the hands; therefore, the charge is properly

classified as a serious violation within the meaning of the Occupational Safety and Health Act and a penalty of $675, as proposed by the Secretary, is warranted.

The Alleged Violation of the
Fall Protection Standard at § 1926.500(d)(1)

When the compliance officer returned to the construction site on the following day, he observed one of the employees, Alonson Scriven, standing on the platform of an aerial lift which was elevated about 12 feet above the ground. The platform had guardrails along three sides; the side which was open faced the upper wall of the building and roof level. The compliance officer testified that 16 inches of space existed between the edge of the open platform and the wall of the building, and that the employee was not wearing a safety belt (Exhs. C-3, C-4, C-5; Tr. 48, 55-56, 64).

Clarence was cited for serious violation of § 1926.500(d)(1), the fall protection standard which requires that every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent.[2] Clarence's defense against this item goes in all directions. In its answer to the complaint, Clarence denied that a fall hazard existed because the gap between the open-sided platform and the wall was claimed to be less than 12 inches and too narrow to fall through, that there was another aerial lift platform on the other side of the wall "which would have acted as a catch platform," and that placing guardrails on the open side of the platform would have made it impossible to perform the work.

During the hearing and in its posthearing brief, Clarence's defense took several new turns by claiming that the violative condition was caused by employee misconduct, that the § 1926.500(d)(1) standard did not apply to the aerial lift, and that the employee was protected from falling by the use of a safety belt. These defenses have no substance.

While there may be some merit to a strategy of pleading inconsistent defenses, it raises serious credibility questions where, as here, it is infused into the testimony of the witnesses. If the employee, who had been seen by the compliance officer working on the

[2] A standard railing consists of a 42-inch high top rail, intermediate rail, and toeboard. 29 C.F.R. § 1926.500(f)(1).

lift platform, had in fact been wearing a safety belt properly tied off to some anchorage point, it would likely be the first line of defense, simply because of its obvious application to the fall hazard in question. In fact, the safety belt defense does not surface until after the matter was raised during the hearing when Clarence's foreman, Zwolinski, was testifying as to the difficulties of erecting the pitched roof with the guardrails installed on the platform. When the foreman was asked about the use of a safety belt as an alternative method of abatement, there was no response (Tr. 225).

The improvisatorial nature of the safety belt defense is clearly displayed by Clarence's attempt to converge two separate events in order to overcome the compliance officer's testimony and photographic evidence. After the compliance officer observed the employee working on the elevated platform, he took a series of three photographs (Exhs. C-3, C-4, C-5) before he reached the employee's work station, all of which show no signs that the employee was wearing a safety belt. When the employee Scriven was questioned by the compliance officer, he was informed that it was the employer's policy to permit working on the platform without the guardrails so long as it was "up tight to the building" (Tr. 60).

On direct examination, Scriven testified that when the compliance officer observed him on the platform, he had only been checking the height of the platform and he did not actually do any work on the platform until after he put on a safety belt (Tr. 256-258). Scriven claimed that two of the three photographs (Exhs. C-4, C-5) depict him working with a safety belt, which he suggested was obscured by his winter clothing. This testimony is simply incredible in light of the rather bulky dimensions of a safety belt which could not possibly be entirely hidden in the folds of a person's work clothes, to say nothing about the lanyard and the hardware attached thereto.

The record actually reflects that Scriven had not been wearing a safety belt the entire time he was observed and photographed by the compliance officer working on the platform, and that upon being questioned by the compliance officer, he left the platform and did not return to his work of installing trusses until, in his own words, "after we were instructed to go back up with safety belts" (Tr. 258).

Clarence's affirmative defense of employee misconduct regarding the platform charge was not raised in the pleadings; however, it manages to make a weak appearance in its

posthearing brief at 18. This defense does not warrant any serious comment but it is noteworthy when juxtaposed to Clarence's argument that the platform standard at 500(d)(1) is not applicable to the cited working condition, and that, instead, the ANSI safety requirements for scaffolding should govern, specifically 4.5.9 of ANSI A10.8 - 1988, which in relevant part provides that "[g]uardrail systems shall not be required on the building side when the platform is less than 16 inches from the building...."[3]

Both Clarence's foreman and safety director testified that it was common practice to use the aerial platform without a guardrail on the side "close to the working wall" (Tr. 227, 292-93). In its brief, at 11, Clarence makes the following argument in behalf of the ANSI requirement:

> An analogy to a scaffold situation is appropriate in the instant case. The use of the Lift in question is similar to the type of use a scaffold would have (143). Indeed, Mr. Scriven and Mr. Scime indicate that in the instant case, the Lift served the same function as would a scaffold (294).

The difficulty here is that Clarence ignores or overlooks OSHA's own standard for scaffolding at § 1926.451(a)(4) which provides the "[g]uardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor...." This standard does not provide an exception for a platform which is less than 16 inches from the building. The ANSI requirement does not displace the OSHA standard.

In its posthearing brief at 9, Clarence counters the 500(d)(1) charge by claiming that OSHA's own definition of platform as a working space "for the operation of machinery and equipment"[4] requires dismissal of the Secretary's case because "the platform in question was not being used for the operation of machinery and equipment." The case law does not support this argument.

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[3]According to Clarence, the gap between the platform and the wall of the building ranged from 12 inches (Clarence's answer) to 13 or 14 inches (Alonson Scriven's testimony at 263). The compliance officer actually measured the distance at 16 inches. The 16-inch distance is accepted as the correct one.

[4]"Platform" is defined by 29 C.F.R. § 1926.502(e) as:

> A working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment.

Although an early Commission case does suggest that an elevated surface is not a platform unless it is erected and designed for use by employees while operating machinery and equipment, *see Allis-Chalmers Corp.*, 4 BNA OSHC 1227, 1228 (No. 5210, 1976); *Globe Indus., Inc.*, 10 BNA OSHC 1596, 1599 n.7 (No. 77-4313, 1982), then Chairman Rowland, apparently the last proponent of this reasoning, later adopted a less restrictive view of the "platform" definition. In *Clement Food Co.*, 11 BNA OSHC 2120, 2126 n.6 (No. 80-607, 1984), he concluded that where the work of the employees is "*analogous* to the operation of machinery and equipment", the activity being performed on the surface is regular and frequent, and the employer intends the surface to be used as one from which to work, the surface can be considered a "platform" for the purposes of § 1910.23(c)(1). (Emphasis added).[5]

In *Superior Electric Co.*, 16 BNA OSHC 1494, 1496 (No. 91-1597, 1993), the Commission held that a 3-foot catwalk erected as a walkway for workmen requiring access to equipment located above the ceiling (10 feet above the ground floor) so that the equipment could be serviced or repaired constitutes a platform as defined at § 1926.502(e). Because the evidence indicated that the catwalk was installed for employees to walk on to reach the equipment and to stand on while they services or repaired it, the Commission found "without reservation that this catwalk was an elevated working space for persons and; as such, a platform... Because the whole purpose of installing the catwalk was to enable workmen to get to and service or repair the equipment located above the ceiling, the catwalk clearly falls within the definition contained in 29 C.F.R. § 1926.502(e)."

Although a narrower view of the "platform" definition was applied by the D.C. Circuit in *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir. 1984, nevertheless, the Court's definition was broad enough to encompass the activities on the aerial platform in question. The Court noted that in order to be considered a platform under § 1926.502(e), a construction-related task must be performed on the surface in question, "one that requires employees to work from the [surface] or to remain on it for some time." In this respect, the

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[5]The general industry standard at 29 C.F.R. § 1910.23(c)(1) for "Protection of open-sided floors, platforms and runways" is essentially the same as the § 1926.500(d)(1) construction standard, and the word "platform" has the same meaning for the general industry. 29 C.F.R. § 1910.21(a)(4).

court held that a bridge used by employees merely to transport decking materials was *not* a platform. *Id.* at 176. Had the employees, however, used the bridge as a surface from which to *install* the decking, the court noted that it could properly be considered a platform. *Id.*, n.9.

In its answer and during the hearing, Clarence briefly addressed the matter of a second aerial platform located on the other side of the wall which was alleged to have served as a "catch platform." Inasmuch as the Secretary did not allege, and no evidence was presented to show, that any employee was exposed to a hazard of falling over "the other side of the wall," the defense has no relevancy to this case. Other matters which Clarence has argued in its brief have not been overlooked, but are without substance or merit and require no further comment.

The 16-inch space between the platform and the wall was large enough to pose a substantial threat of serious physical harm, and, therefore, the classification of this violation as serious is justified. Applying the statutory criteria of 29 U.S.C. § 666(j), a penalty of $1,125, as proposed by the Secretary, is appropriate.

Based upon the foregoing findings and conclusions, it is ORDERED that the three-item citation is affirmed, as amended, and penalties totaling $2,475 are assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: November 18, 1994
Boston, Massachusetts