



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,
v.
DYNAMIC PAINTING CORPORATION
Respondent.

OSHRC DOCKET
NO. 93-0398

**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 28, 1994. The decision of the Judge will become a final order of the Commission on January 27, 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 January 17, 1995 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:

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.
Executive Secretary

Date: December 28, 1994

DOCKET NO. 93-0398

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. 93-0398
	:	
DYNAMIC PAINTING CORP.,	:	
	:	
Respondent.	:	
	:	

Appearances:

Alan L. Kammerman, Esq.
 U.S. Dept. of Labor
 New York, New York

Alan Ross, Esq.
 Nydick & Ross, Esqs.
 Melville, New York

For the Complainant

For the Respondent

BEFORE: CHIEF ADMINISTRATIVE LAW JUDGE IRVING SOMMER

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an inspection of Respondent's business site at Bay Shore, New York the Secretary of Labor issued two citations to the Respondent charging a serious-repeat violation of the standard at 29 CFR 1926.105(a), serious violation of the standard at 29 CFR 1926.451(i)(8) and other than serious violations of the standard at 29 CFR 1926.106(a) and

(c). A hearing was held in New York, N.Y. No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

Alleged Violation of 29 CFR 1926.105(a)

Section 1926.105(a) provides:

1926.105 Safety Nets

(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.

The citation alleges that the Respondent violated the standard because one of its employees was painting a diagonal beam on a bridge located seventy-five feet above the water and was not protected from falling by the use of a safety net. This allegation was amended in the complaint to charge that the violation occurred because the employees was not protected from falling “by a safety net, a safety belt, or any other means of fall protection.”

Compliance officer Donohue testified on direct examination that he appeared at the jobsite at 10 A.M. (T 8) and spoke to the Respondent’s foreman, Mr. Magasic indicating that a man on a diagonal bridge beam who was painting had no fall protection and the foreman brought the man down (T 12). He further testified that he took two photographs (C 1 & 2 in evidence) at approximately 10:30 a.m., both of which depict employees on the bridge structure. The employee lying on the steel was situated “close to the center of the bridge at the highest point,---with no fall protection, approximately 75 feet above water.”

(T 11). On examination by counsel for the Respondent a distinct change of scenery took place. In reconstructing the happenings of that day (October 16, 1992), Donohue testified that the pictures were taken after the opening conference which his OSHA 1(a) form reports states occurred at 11:25 A.M. Upon further examination he changed the time of picture taking to 10 A.M. after counsel confronted him with his own report which listed same. The denouement of this episode was a complete reversal of his original testimony as follows:

Q. (Respondent's Counsel): Now, based on the document that you entered at the time in the regular course of your duties as a Compliance Officer, you actually took this photograph that is marked Exhibit C-1 for identification one hour and 25 minutes before you presented your credentials; isn't that a fact--based on the document?

A. Yes. (T19-20)

Magasic testified that he first saw Donohue between 7:30 and 8 A.M. on October 16, after being told by one of his men that someone was taking pictures. He went over to Donohue who stated, "I'm from the OSHA, and if I were you, I wouldn't put those guys on that rig.", and with that he was told "I'll come to you later." Magasic testified he saw Donohue about 11:30 A.M.

Of further interest herein is the distance the employee working on the beam was above the ground or water surface. When questioned by the Court Donohue stated that the roadbed was only 15 feet below structure but that if the employee was over the water it was approximately seventy-five feet (T23-4). He further testified that "close to the center of the bridge at the highest point, I observed a man lying on a piece of steel with no fall protection, approximately 75 feet above water." (T11). To further confuse the issues, in later

demonstrating by Exhibit C-3 (a Dept. of Transportation official map of the bridge), Donahue states the location of the employee was where he wrote in "105(a) on the map"; a review of this exhibit shows that the employee was very close to or working over the roadbed and not as testified working at the highest point in the superstructure above the water. I have had the opportunity of observing this witness upon the stand and to weigh accordingly the credibility of his testimony. His testimony as to the circumstances giving rise to the violation of 1926.105(a) is far from convincing and presents a pattern of inconsistencies and equivocation both as to the time the photographs were taken, the area where the employee was working as to cause one to doubt the veracity of the compliance officer's statements as to where to violation occurred, what the employee was doing at the time, and whether or not he was tied on or not (Donohue merely referred to the photographs, which were not helpful). In short, the trustworthiness of his testimony relative to a violation of 1926.105(a) is suspect. As Judge Learned Hand stated in *NLRB v. Remington Rand*, 94 F2d 862, 873 (2nd Cir), cert. den. 304 U.S. 576, we must rely in making findings upon "the kind of evidence on which responsible persons are accustomed to rely on inserious affairs." The evidence as to the alleged violation of 1926.105(a) is totally insufficient to sustain the Secretary's burden of proof. Accordingly, citation no. 1, item no.1 alleging a violation of 29 CFR 1926.105(a) is vacated.

Alleged Violation of 29 CFR 1926.451(i)(8)

Section 1926.451 Scaffolding as relevant provides:

(i)(Swinging scaffold) two-point suspension

(8) Each employee shall be protected by an approved safety life belt attached to a lifeline. The lifeline shall be securely attached to substantial members of the structure(not scaffold), or to securely rigged lines, which will safely suspend the employee in case of a fall.

Concerning this alleged violation, the compliance officer testified that he observed an employee of the respondent doing painting work on a scaffold with his lanyard wrapped around the guard rail of the scaffold. This is depicted in photographic exhibits C-1 and C-2. Said condition is in contravention of the standard that lifelines be attached to the structure from which a scaffold is suspended, not the scaffold itself. The compliance officer stated that fall protection was not provided in case the scaffold itself fell, causing the employee to fall approximately 85 feet into the water with the possibility of being killed.

Respondent contends that if there was a violation in the failure to comply with the standard it was unpreventable employee misconduct, and additionally the scaffold was being set up prior to doing any work thereon, and it was infeasible to tie on during the process. The compliance officer admitted that the respondent had a safety program in effect, that they had a "rule requiring the workers to tie off their lanyard to a fixed structure"(T26).

Furthermore, he testified in response to the question, "How could the company have known of this condition?, that "They had a lifeline there, they had lifelines in place. The Foreman directed him to tie off when working 25 feet above water."(T46) Respondent's foreman testified there were weekly safety meeting wherein all safety matters were discussed and emphasized including tying off and in some instances disciplinary action had been taken. The compliance officer interviewed none of the employees and neither sought nor obtained any information from them as to the efficacy of the program, its communication to the

employees or any other aspect of its enforcement. The general testimony of Magesic as to the concern of respondent with safety, the presence of a written program, with regular safety meetings and a presence of past discipline of employees for non-observance was not discredited nor contradicted by direct evidence, nor by any legitimate inferences from the evidence. It was not opposed to the probabilities nor by its nature surprising or suspicious. Consequently, I am of the opinion there is no reason for denying the conclusiveness that the respondent's safety program was being carried out effectively, and that the violation that occurred was one due to unpreventable employee misconduct. In making this finding concerning the presence of unpreventable employee misconduct, I have accepted the testimony of Magesic and the documentary evidence regarding the issue of safety and the company program to carry it out inasmuch as he impressed me as one testifying in a straightforward, frank and convincing manner worthy of belief.

Alleged Violation of 29 CFR 1926.106(a)

Section 1926.106(a) provides:

(a) Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast-Guard approved life jacket(s) or buoyant vests.

The citation alleges that respondent violated the standard at 1926.105(a) because employees were not wearing life jackets or buoyant work vests while they were painting a roadway 40 feet above water. The compliance officer testified that he saw two men painting from a hanging scaffold 40 feet above the water with "no type of life jackets or buoyant work vests". C-7 & C-8 in evidence are photographs he took of the scene. The Respondent's foreman stated that the men were not permitted to work without such vests,

and no man was working without one to his knowledge. The evidence shows that under the company safety program, all men were provided with such vests (R-5 in evidence). The citation is based solely on a picture taken from at least twenty-five feet away; the compliance officer stated he had never observed such vests being worn under the shirt, but there is no evidence either that it is not done, nor that it is not possible. There is no direct evidence concerning the presence or absence of the use by the said employees of the requisite life vests; the compliance officer never spoke to them, nor observed them in his presence. The evidence as a whole is insufficient to support a finding of a violation of the standard. The Secretary has not borne its burden of proof of a violation of the standard at 1926.106(a) by a preponderance of the evidence, and the citation is vacated.

Alleged Violation of 29 CFR 1926.106(c)

Section 1926.106(c) provides:

(c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

The citation alleged that the respondent violated 1926.106(c) because employees painting the side of the roadway were not provided with ring buoys with at least 90 feet of line attached. The compliance officer testified that during his inspection of the area where the men were painting he observed no ring buoy with line as required; he observed a skiff which allegedly belonged to the company and a barge and he observed no such ring thereon; in contrast, the company foreman stated he had seen the ring buoy with 90 feet of line the day before on the inspection (October 15, 1992) on the boat next to the barge. Obviously, being present the day before the inspection does not make it available thereafter. The

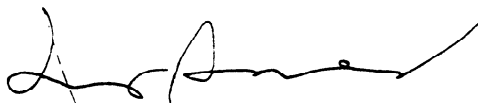
record supports a finding that said ring buoy as required by the standard was not within 200 feet of where the employees were working. The preponderance of the evidence reasonably demonstrates that the Respondent was in violation of 1926.106(c). The citation is affirmed with no penalty assessed.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed motions, findings or conclusions inconsistent with this order are denied.

ORDER

1. The allegation of a serious-repeat violation of 29 CFR 1926.105(a) found in citation no. 1, item 1 is vacated
2. The allegation of a serious violation of 29 CFR 1926.451(i)(8) found in citation no. 1, item 2 is vacated.
3. The allegation of an other than serious violation of 29 CFR 1926.106(a) found in citation no. 2, item 1 is vacated.
4. The allegation of an other than serious violation of 29 CFR 1926.106(c) is affirmed, and no penalty is assessed.



IRVING SOMMER

Chief Judge

DATED: DEC 22 1994
Washington, D.C.