UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
NOBLE STEEL, INC.
Respondent.

OSHRC DOCKET
NO. 93-3066

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 16, 1994. The decision of the Judge will become a final order of the Commission on January 17, 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 5, 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
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: December 16, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3066

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Kelly F. Monaghan, Esq.
Wilkinson & Monaghan
7625 East 51st Street
Fourth Floor
Tulsa, OK 74145

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

00108738782:06

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,
Complainant,

v.

NOBLE STEEL, INC.,
Respondent.

OSHRC Docket No. 93-3066

APPEARANCES:

Robin Horning, Esquire
U. S. Department of Labor
Office of the Solicitor
Dallas, Texas
For Complainant

Kelly F. Monaghan, Esquire
Wilkinson & Monaghan
Tulsa, Oklahoma
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

On September 22, 1993, Occupational Safety and Health Administration (OSHA) Compliance Officer Gerald Young inspected the site of a water treatment facility under construction in Clinton, Oklahoma. Young had been at the site on the previous day when he spoke with a representative of Williams Brothers Concrete Construction Co. (Williams), the general contractor on the project. On September 22 Young inspected the worksite of Noble Steel, Inc. (Noble), a subcontractor on the project. Noble employees were working inside of what was to be a chlorine filter basin. As a result of Young's inspection, the Secretary issued a citation to Noble on October 26, 1993.

The citation alleges that Noble seriously violated § 1926.701(b), for failure to guard protruding reinforcing steel; and § 1926.1051(a), for failure to provide a stairway or ladder at a point of elevation where there was a break in elevation of 19 inches or more. Noble raises four affirmative defenses: (1) the violations were caused by the acts of persons not under the employment, direction or control of Noble, (2) impossibility of performance, (3) infeasibility, and (4) greater hazard. Noble also argues that a videotape (Exh. C-1) of its worksite taken by Young should not have been admitted at the hearing because it was taken without Noble's permission.

Admissibility of the Videotape

Noble contends that Young videotaped its worksite before he received permission from Noble to do so. Noble quotes extensively in its brief from portions of the *OSHA Field Operations Manual (FOM)* that pertain to opening conferences. Noble argues that Young failed to follow the *FOM* in conducting his opening conference with Noble. This argument has been addressed several times by the Review Commission.

> [T]he Commission has consistently held that the FOM is an internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer important procedural or substantive rights or duties on individuals. *H. B. Zachry Co.*, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980), *aff'd*, 638 F.2d 812 [9 OSHC 1417] (5th Cir. 1981). We therefore conclude that there is no reason to examine the Secretary's actions in this case to determine whether they conformed to the procedures outlined in the FOM.

Caterpillar, Inc., 15 BNA OSHC 2153, 2173, fn. 24, 1993 CCH OSHD ¶ 29,962 (No. 87-922, 1993). As the Commission makes clear, it is not necessary to examine Young's actions to determine if they conformed with the *FOM*. Conformance with the *FOM* has no bearing on the admissibility of the videotape.

On September 21, 1993, Young received permission from Williams to inspect the water treatment facility (Tr. 67, 118). Young returned the next day, arriving at Noble's work

area at approximately 9:00 a.m. Young met again with Williams and invited the general contractor to accompany him on his inspection. Williams declined (Tr. 36-37).

Young proceeded to Noble's worksite. According to Young, he met with Randy Palumbo, who had driven up in a pickup truck accompanied by two other employees. Young determined that Palumbo was the person in charge at that time. Young identified himself and held an opening conference with Palumbo. Young asked Palumbo's permission to videotape the site. Palumbo gave Young "tentative permission" (Tr. 40), to videotape the site, then left to make a telephone call, presumably to check with his employer (Tr. 10, 38-40). Young began videotaping the site. A few minutes later, Finis Riggs, the general foreman for Noble at the site, arrived. Young held another opening conference with him. Young had completed his videotaping by the time Riggs arrived (Tr. 44).

Palumbo remembered the events of that morning differently. He testified that he and the other two employees were already working in the chlorine basin when Young arrived. Palumbo testified that he first became aware of Young's presence when he "looked up out of the hole and saw the inspector up there" (Tr. 83). Young introduced himself to Palumbo, who then exited the basin. Young asked Palumbo for permission to inspect the site (Tr. 84). Riggs arrived at the worksite shortly after Palumbo began his conversation with Young. Palumbo testified that he did not leave to make a telephone call. Palumbo also stated that Young had already completed his videotaping before he spoke with him: "I thought to the best of my recollection that he had already videotaped it, and he let me know that he had videotaped it" (Tr. 85).

Upon cross-examination, however, Palumbo wavered in his testimony. Palumbo was shown the videotape that Young had taken. Palumbo conceded that the videotape showed only one employee, Kenneth King, in the chlorine basin. Palumbo had testified that Young completed his videotaping while he and the other two employees were working in the basin. The videotape seems to contradict this. When confronted with this contradiction, Palumbo stated, "To the best of my ability, it's hard to remember at this point if it was taken--you know, if he asked me permission to take it while I was down in there. I don't remember that" (Tr. 97).

Young's testimony is credited over that of Palumbo's. Palumbo was uncertain in his statements, and his recollection of the events of September 22 is directly challenged by the videotape. Young appeared to be a more reliable witness.

Furthermore, it is undisputed that Williams, the general contractor, gave Young permission to inspect the facility (Tr. 118). In *A. A. Beiro Construction Co., Inc.*, 746 F.2d 894 (D.C. Cir. 1984), the court addressed inspections authorized by third party consent. The court stated: "Areas of privacy exempted from third party consent have generally involved enclosed or secured places commonly used for preserving privacy." *Ibid.* at 903. While an employer may have some privacy rights with respect to enclosed spaces, such as a trailer or a tool shed, "open construction areas [are] devoid of any reasonable expectations of privacy." *Ibid.* at 902.

Noble argues that the chlorine basin was not a common area, but one where Noble had a reasonable expectation of privacy. This argument is rejected. As the videotape makes clear, the basin was an open area. The fact that it was below ground level does not make it an enclosed space used for preserving privacy.

It is concluded that Young received permission, both from the general contractor and from Palumbo, to inspect and videotape Noble's worksite. The videotape is admissible.

Item 1 : Alleged Serious Violation of § 1926.701(b)

The Secretary charges Noble with a serious violation of § 1926.701(b), which provides: "All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement."

The basin contained exposed vertical pieces of ⅞-inch rebar protruding from the basin floor (Exh. C-1; Tr. 17). The basin was approximately 10 feet deep (Tr. 21). Employees had to enter and exit the basin by climbing up and down rebar on one of the walls of the basin (Tr. 26).

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence 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 Mod. Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

The Secretary has established a violation of § 1926.701(b). There is no dispute that the cited standard applies and that the exposed rebar was not guarded. Employees had access to the unguarded rebar because they were required to climb into and out of the basin, elevating themselves above the rebar. The violative condition was in plain sight, and so was known to Noble. The hazard created was death or serious injury by impalement (Tr. 28).

NOBLE'S AFFIRMATIVE DEFENSES

Control of the Violative Condition

Noble argues that any violation of § 1926.701(b) was caused by acts of persons not under the employment, direction or control of Noble. Under the *Anning-Johnson/Grossman* rule, the Commission requires an employer who did not create or control a hazardous condition on a multi-employer worksite to show that its employees "were protected by means of realistic measures taken as an alternative to literal compliance with the cited standard." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (No. 3694, 1976).

The general contractor provided Noble with a strip of plywood, approximately 8 feet long and 8 to 10 inches wide, to use as a protective cover for exposed rebar. The strip of plywood was too small to cover most of the exposed rebar. Furthermore, it was constantly being knocked off by employees as they passed it (Tr. 89).

Young testified that the strip of plywood that Noble was using would provide no protection to an employee who fell onto the rebar: "Loose plywood on top of this thing does nothing except in the event someone were to fall onto it, it would just have to slide out of the way" (Tr. 24-25). Young recommended anchoring the plywood to the rebar with boards. He also suggested placing plastic mushroom caps, 3 inches in diameter, on top of the rebar to eliminate the risk of impalement (Tr. 24-25).

Palumbo testified that he requested rebar caps from Williams on more than one occasion. Williams never provided them to Noble (Tr. 89-90). Noble points out that the contract between it and Williams required Williams to provide the mushroom caps

(Exh. R-5). Noble also asserts that placing mushroom caps on rebar is "outside the work jurisdiction of an ironworker" (Tr. 107).

The Review Commission addressed a subcontractor's duty when faced with a hazard it did not create or control in *Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185, 1189, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976):

> [A] subcontractor cannot be permitted to close its eyes to hazards to which its employees are exposed, or to ignore hazards of which it has actual knowledge .... Simply because a subcontractor himself cannot abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard.

The fact that Noble was not supplied the mushroom caps in accordance with a contract does not excuse it from complying with § 1926.701(b). An employer is obligated to comply with the OSHA standards regardless of the terms of any contract it may enter. Noble was required to take realistic measures to protect its employees. Palumbo testified that he "mentioned" mushroom caps to Williams at least twice. Given the serious nature of the hazard, Noble was required to do more to protect its employees. It could have insisted on Williams providing the mushroom caps. If Williams refused, Noble could have purchased the mushroom caps itself. Noble was aware of the hazard and knew that the mushroom caps would abate it. Noble's *Anning-Johnson/Grossman* defense must fail.

Impossibility Performance Defense

Noble asserts that it was impossible for it to comply with § 1926.701(b). The Commission has held that infeasibility rather than impossibility is the proper focus of this defense. *See Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1956-59, 1986-87 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), *rev'd in part*, 843 F.2d 1135 (8th Cir. 1988). The Commission in *Seibel Mod. Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 (No. 88-821, 1991), formulated the infeasibility defense as follows:

> [A]ny employer seeking to be excused from implementing a cited standard's abatement measure on the basis of its infeasibility has the burden of establishing either that an alternative protective measure was used or that there was no feasible alternative measure.

Noble's infeasibility defense rests solely on the use of the strip of plywood to guard the rebar. Noble did not use an alternative protective measure, and it has failed to prove that there was no feasible alternative measure. Noble itself concedes that mushroom caps were a feasible alternative measure that it did not use. Noble's infeasibility defense is rejected.

Item 2: Alleged Serious Violation of § 1926.1051(a)

Section 1926.1051(a) provides:

> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

Employees entered and exited the 10-foot deep basin by climbing up and down the rebar held in place by wire ties, which are pieces of wire with loops on them (Tr. 26-27). Young explained that the rebar is not attached to the wire ties. The rebar can roll around on the wire ties, creating unsteady footing for the employees and exposing them to a fall onto the rebar below (Tr. 28). Young testified that a ladder could have been used, and there was a ladder available on the site (Tr. 29). The employees' use of the rebar to enter and exit the basin was done in plain view. Young observed Palumbo himself climb onto the rebar (Tr. 32). The Secretary has established a serious violation of § 1926.1051(a).

Impossibility and Infeasibility of Performance Defense

Noble asserted that it was both impossible and infeasible for it to comply with § 1926.1051(a). As noted in the previous section, the Commission recognizes the infeasibility defense as being appropriate. Noble has the burden of proving either that it used an alternative protective measure or that no alternative protective measure was available.

Noble claims that if it had used a ladder, it could not have placed it at an angle that would have been in compliance with OSHA's ladder standards. Finis Riggs testified, "OSHA states that you place a ladder in position. It has to have so many feet of--it has to be at a certain angle. If it's not at a certain angle, it's not approved. It's not safe to use. And it's my opinion that the ladder could not have been placed there in a safe manner" (Tr. 111). Yet, Noble offers no evidence beyond Riggs' bare assertion that a ladder could not have been positioned at the proper angle. No dimensions or diagrams were entered into evidence to support Noble's assertion that it could not use a ladder. It is not enough for an employer simply to claim that compliance with a cited standard would have put it into noncompliance with another standard. The employer must demonstrate how this condition actually occurred. Noble's infeasibility defense must fail.

Greater Hazard Defense

Noble claims that compliance with § 1926.1051(a) would have resulted in a greater hazard to its employees.

> To establish a defense of greater hazard, an employer must prove that (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting employees from the hazards are not available, and (3) a variance is not available or application for a variance is inappropriate .... An employer's proof of the unavailability or inappropriateness of a variance is particularly important.

Seibel, 15 BNA OSHC at 1225.

Noble did not seek a variance. Noble argues that application for a variance would have been inappropriate because "use of the rebar wall as a ladder was so common in the industry" (Noble's Brief, pg. 24). Noble does not explain why this should make application for a variance inappropriate. Noble's argument is rejected. Having failed to meet the third and crucial element of the greater hazard defense, Noble's affirmative defense must fail.

PENALTY DETERMINATION

> Section 17(j) of the Act, 29 U.S.C. § 666(j), requires the Commission when assessing penalties, to give "due consideration" to four criteria: The size of the employer's business, gravity of the violation, good faith, and prior history of violations. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J. A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 BNA OSHC 1297, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Young listed Noble's number of employees as fifty (Exh. R-2). No evidence was adduced as to Noble's prior history with OSHA or its good faith. The gravity of both violations is severe. A fall from the rebar ladder onto the unguarded rebar would most likely result in death. It is determined that the appropriate penalty for each violation is $1,125.00.

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:

1. Item 1, for the serious violation of § 1926.701(b), is affirmed and a penalty of $1,125.00 is assessed.

2. Item 2, for the serious violation of § 1926.1051(a), is affirmed and a penalty of $1,125.00 is assessed.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: December 7, 1994