**United States of America**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
**1244 N. Speer Boulevard - Room 250**
**Denver, Colorado 80204-3582**

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>INTERSTATE ERECTORS, INC.,<br>Respondent. | OSHRC DOCKET No. 93-1160 |

APPEARANCES:

For the Complainant:

Matthew L. Vadnal, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle Washington

For the Respondent:

Jeffery R. Price, Esq., Salt Lake City, Utah

## DECISION AND ORDER

Loye, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651, *et seq*, hereafter referred to as the Act).

Respondent, Interstate Erectors, Inc. (Interstate)) at all times relevant to this action, maintained a worksite at 1776 Science Center Drive, Idaho Falls, Idaho where it was engaged in construction of skeleton steel. Interstate admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 15).

On February 9, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Interstate's Idaho Falls worksite (Tr. 99). As a result of the inspection, Interstate was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review (Commission).

Prior to hearing, the parties entered into a settlement agreement disposing of all but two of the cited violations: "Willful" citation 2, items 1 and 2, alleging violation of 29 CFR §§1926.105(a) and 1926.750(b)(1)(ii), respectively. On February **8-9, 1994*,** a hearing was held in Idaho Falls, Idaho on the matters remaining at issue. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violations

"Willful" Citation 2, item 1 alleges:

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surface(s) where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:

(a) Jobsite at 1776 Science Center Drive, Idaho Falls, Idaho: An employee accessing and welding on the east end, gridline F, third or roof deck level, was not protected from a fall of approximately 42 feet. The employee was wearing a work positioning type safety belt which was not connected while moving or while welding.

"Willful" Citation 2, item 2 alleges:

29 CFR 1926.750(b)(1)(ii): On tiered buildings or structures not adaptable to temporary flooring and where scaffolds were not used, safety nets were not installed and maintained where the fall distance exceeded two stories or 25 feet.

(a) Jobsite at 1776 Science Center Drive, Idaho Falls, Idaho: Employees accessing and welding on gridlines D and F, third or roof deck level, were not protected from a fall of approximately 42 feet. Employees were wearing work positioning type safety belts which were not connected while moving or while welding.

Facts

At or about 8:30 a.m., February 9 (Tr. 113), Compliance Officer (CO) Mahlum observed and videotaped an Interstate ironworker, Shane Olsen, on the exterior grid line of the building under

construction at the Idaho Falls site (Tr. 106, 121). Mahlum stated that he watched Olsen brush snow off an I-beam and sit down to work (Tr. 111; Exh. C-4, C-5 through C-8). Mahlum testified that Olsen was not attached to any fall protection anchorage system Tr. 109, 120, 192). The beam where Olsen worked was 42 feet above the ground (Tr. 121).

At the same time, CO David Mahlum observed and photographed another Interstate ironworker, Ryan Bateman, walking and moving about on the steel along the third floor interior grid line (Tr. 112, 122-24; Exh. C-4, C-9 through C-15). Mahlum testified that Bateman was not utilizing fall protection equipment (Tr. 106, 109, 112; Exh. C-4). Later that afternoon, Mahlum again photographed Bateman, now working seated on the D grid line (Tr. 127-28; Exh. C-20). Batemen wore a safety belt and lanyard while at his work point (Tr. 308, 492, 514-15, 551-52; Exh. C-20).[1] Bateman told CO Mahlum that he was instructed to coon the beams to get over the joists (Exh. 20B).

The third floor iron was less than 25 feet above the first floor decking (Tr. 386). However, at the time of the inspection the panels along the grid lines beneath both Bateman and Olsen had not yet been cut and fitted, leaving open holes in the first floor decking (Tr. 85, 126-28, 423; Exh. C-17, C-18, C-20A).[2] Mahlum testified that 35% to 40% of the deck was uncovered (Tr. 194). The distance to the ground, through the open floor holes, was 42 feet (Tr. 85, 155).

CO Mahlum testified that the probable result of a fall from 42 feet is death (Tr. 156).

Interstate employees were instructed to tie off when working in a stationary position (Tr. 136, 146-47, 325, 499). It is uncontested, however, that Interstate employees did not use fall protection at all times when moving about on the steel. Employees were instructed to "coon" the iron, i.e. walk to the lower flange of the beam while straddling it (Tr. 137, 146-47, 311-14, 385, 507). While a catenary line was present on site, and was feasible to install, Interstate's foreman, Terry Bishop (Tr.

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[1]CO Mahlum's testimony that Bateman did not use fall protection when seated is not credible in light of the photographic evidence and his lack of recall (Tr. 190-91).

[2] The statement of Shane Olsen (Exh. C-20A), and testimony of Larry Croft, project manager for Commercial General Construction, Respondent's general contractor, is preferred to that of Lynn Clayburn, Respondent's president. L. Clayburn never visited the Idaho Falls worksite (Tr. 482). His testimony that the decking panels had been installed, but were removed to access the structural beams for welding is not based on first hand knowledge and is therefore not credible (Tr. 462-63).

298), determined that the line was not necessary at the time of the inspection (Tr. 143, 214, 335-38, 344-46, 487).

CO Mahlum maintains that Bishop was working on the first deck, directly below Olsen and Bateman, at the time of the inspection (Tr. 154, 156). Larry Croft, project manager for Commercial General Construction, Respondent's general contractor (Tr. 75), testified that since Interstate began steel erection in January 1993, he had two or three times observed Interstate employees working on the second and third tiers without fall protection (Tr. 78-80, 91). Croft stated that he had informed Terry Bishop, who instructed the employees to tie off (Tr. 80-83; *See also*, testimony of Bishop, Tr. 342).

Respondent's corporate officers, and the foreman on the Idaho Falls site all had prior contact with OSHA in connection with fall protection (161, 165-169). In 1991 and 1992 CO Mahlum met with Terry Bishop and Lynn and Bob Clayburn, Respondent's president and co-owner, respectively, in regards to citations issued to CCC & T, another erection company with which Respondent's principals were involved (Tr. 171-72, 208, 268, 471; Exh. C-22). Mahlum specifically informed Clayburn that OSHA interpreted §1926.105(a) to require 100% fall protection from exterior falls at heights over 25 feet (Tr. 172, 269). Mahlum specifically told Clayburn that the requirement included employees moving along the beams. (Tr. 173). Mahlum discussed the use of two lanyards to provide continuous protection for ironworkers moving along beams. (Tr. 213-214, 460).

Don Rigtrup, a former CO with the Utah state plan (Tr. 224), testified that, as a result of citations for fall protection violations issued by the Industrial Commission of Utah (Exh. C-27, C-28), he was asked to conduct a training session on fall protection for CCC & T employees (Tr. 235-237; Exh. C-29). The training consisted of explanations of Federal standards §§1926.105 and 1926.750, and the need for 100% fall protection (Tr. 239-41). The training was attended by Terry Bishop and by Lynn and Bob Clayburn (Tr. 242; Exh. C-29).

Terry Bishop admitted that CO Mahlum had instructed him to use two lanyards to achieve 100% fall protection (Tr. 314-15, 330). Nevertheless Bishop testified that, despite his prior experience with OSHA, he did not understand that the employees he supervised needed to be tied off at all times (Tr. 306, 328).

Lynn Clayburn testified that he was aware of and understood CO Mahlum's explanation of the 100% tie off requirement for ironworkers working at heights over 25 feet (Tr. 461-464). Clayburn stated that the Federal standards do not specifically state that 100% protection is required, and that he did not agree with Mahlum's interpretation of the standards (461, 464, 474, 476, 484-86). Clayburn testified that the decision not to put up the catenary lines on the Idaho Falls site was an intentional decision based on his belief that belts and lanyards for stationary work, provided adequate alternative protection for his employees when used in conjunction with cooning (Tr. 487).

Alleged Violation of §1926.105(a)

The cited standard 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.

Respondent admits that the cited standard is applicable to exterior falls to which its employees may have been exposed at its Idaho Falls worksite. The evidence demonstrates that during the OSHA inspection an Interstate employee, Shane Olsen, was, in fact, exposed to a fall hazard while accessing his work area on an exterior beam.[3] The record also establishes that Respondent's supervisory personnel know of and condoned the ironworkers' practice of cooning I-beams without tying off to move across the steel.

Respondent maintains, however, that in order to make out its prima facie case under the cited standard, Complainant must show that safety nets were necessary because safety belts and lines were impractical, relying on *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664 (D.C. Cir. 1982) (*Willson I*).

Respondent's reliance on *Willson I* is misplaced. As explained in a recent Commission case, *Falcon Steel Co., Inc.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶30, 059 (No. 89-2883 and 89-3444, 1993)(*Falcon*), Complainant may prove a prima facie case under the cited standard by demonstrating that safety belts and lanyards were not used where practical. The Commission held in Falcon that

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[3]The undersigned is unable to determine from the record whether Olsen was tied off while actually performing his work. Resolution of that issue would not, however, affect the disposition of this item.

"[u]nder the plain wording of the cited standard, safety nets are the device of last resort, required if the other enumerated devices, including belts, are impractical."*Id*. at 1189.

Here, it is undisputed that Interstate's ironworkers had safety belts and lanyards and that a catenary line on the structure's perimeter was practical, in that such a line was available, feasible, and was installed the day following the OSHA inspection (Tr. 344-46). Installation of a catenary line would have afforded ironworkers a means of tying off while moving about the steel, thus providing 100% fall protection. Insofar as such protection was practical, Interstate's failure to provide it constitutes a violation of the cited standard.

Respondent's contention that Complainant's interpretation of §1926.105(a) is inconsistent with the language of the .105(a) itself, industry practice, and prior judicial interpretations of the standard is rejected. Complainant's application of the standard in this case requires only that employees be protected at all times where practical. Not only is the Secretary's interpretation reasonable; it is the *only* reasonable interpretation of the standard. Prior cases involving the cited standard state that industry usage is relevant only insofar as it demonstrates a safety measure's practicality. *Id*. at 1192. Where, as here, practicality is clearly demonstrated in the specific circumstances cited, industry practice is insufficient to refute that showing.

Finally, Respondent argues that it considered cooning the beams as a part of its fall protection system. Cooning, however, is not enumerated in the cited standard as a method of fall protection. The Commission has held that where a specifications standard does not provide for an alternative form of compliance, the employer may not unilaterally implement such alternative measure instead of those specified. *See; Secretary of Labor v. R & R Builders, Inc.*, 15 OSHC BNA 1383, 1991 CCH OSHD ¶29,531 (No. 88-282, 1991).

The Secretary has shown that Interstate violated the cited standard on February 8, 1993.

Willful

The Commission has held that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). Thus, an employer's intentional disregard of OSHA requirements in favor of its own measures is "willful" despite its belief in the adequacy of its

precautions. An employer has no discretion to proceed with an alternative program without OSHA approval. *Martin v. Trinity Industries, Inc.*, No. 92-2559, slip op. 1475 (11th Cir. Mar. 22, 1994).

In this case, Interstate's supervisory personnel was amply aware of OSHA's position, which was that 100% fall protection is required at heights over 25 feet. CO's Mahlum and Rigtrup explained how such protection could be achieved while moving on the steel through the use of a safety belt with two lanyards, or a single lanyard with a catenary line. Interstate chose to substitute its own judgement as to the requirements of the cited standard, allowing its employees to coon the iron in lieu of using approved OSHA methods.

Interstate's intentional disregard to OSHA requirements constitutes a willful violation of the Act.

Penalty

A penalty of $70,000,00 is proposed by the Secretary.

Interstate is a small company, employing seven ironworkers (Tr. 163). No adjustment in the proposed penalty was made based on Interstate's size (Tr. 273). On employee was exposed to an exterior fall hazard briefly while moving between stationary work positions (Tr. 319). The risk of falling from the iron is reduced by cooning the beams; however, the probable injury should a fall occur is death.

Taking into consideration the relevant factors, the undersigned finds that the gravity of the cited violation was overstated, based on the brief exposure of a single employee shown, and upon the reduced probability of an accident occurring where the employee coons the beam while moving. Moreover, an adjustment based on Interstate's small size is appropriate. A penalty of $28,000.00 is considered appropriate.

Alleged Violation of §1926.750(b)(ii)

The cited standard provides:

> On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet.

The evidence establishes that two Interstate employees, Shane Olsen and Ryan Bateman, were allowed to coon the iron on the third floor of the building under construction prior to the

completion of the temporary floor on the first level; Bateman also walked the I-beams.[4] The employees and the openings in the first floor were in plain sight. The incomplete temporary flooring clearly exceeded the exception provided in the standard for access openings.[5] The undersigned credits CO Mahlum's testimony that the two employees were exposed thereby to interior fall hazards of 42 feet when moving over the openings.

The record establishes that no fall protective measures were in use, and that Interstate was, therefore, in violation of §1926.750(b)(ii) on February 8, 1993. *See, El Paso Crane & Rigging, Inc.*, 16 BNA OSHC 1419, 1993 CCH OSHD ¶30,231 (No. 90-1106, 1993).

Willful

The Commission has held that a violation is willful where the evidence demonstrates "such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it." *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1257, 1987 CCH OSHD¶27,893 ( No. 85-355, 1987). The same must hold true for knowledge of the violative conditions. Though the evidence here establishes only constructive knowledge of the cited conditions, *e.g.*, that the exposed employee was walking on the iron above the open floor holes, one can infer from the record that if the Respondent had actual knowledge of the exposure, it would not have cared that the conduct or conditions violated OSHA's fall protection standards, but would have required only that the employee coon the beam, rather than tie off. The undersigned finds that, as in item 2, Respondent's decision to substitute its own judgment regarding the interpretation of OSHA fall protection for that of OSHA personnel is sufficient grounds for a finding that the cited violation was willful.

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[4]Bishop testified that, prior to the OSHA inspection, he was unaware that employees were walking on top of the beams (Tr. 312, 316). It is clear that Bishop knew, however, that ironworkers used no fall protection while cooning the iron.

[5]Section 1926.750(b)(1)(I) provides:

> The derrick or erection floor shall be solidly planked or decked over its entire surface except for access openings.

Penalty

The undersigned finds that the Secretary correctly assessed the gravity of this violation as high, but that an adjustment should have been made for the small size of the company. A penalty of $35,000.00 will be assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

Order

1. Willful citation 2, item 1, alleging violation of §1926.105(a) is **AFFIRMED** and a penalty of $28,000.00 is **ASSESSED**.

2. Willful citation 1, item 2, alleging violation of §1926.750(b)(1)(ii) is **AFFIRMED** and a penalty of $35,000.00 is **ASSESSED**.

**Benjamin R. Loye**
**Judge, OSHRC**

Dated: