



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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SECRETARY OF LABOR  
Complainant,

v.

W. E. DARIN CONSTRUCTION ENTERPRISES  
Respondent.

OSHRC DOCKET  
NO. 92-1679

**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 March 17, 1994. The decision of the Judge will become a final order of the Commission on April 18, 1994 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 April 7, 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  
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:

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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.  
Executive Secretary

Date: March 17, 1994

DOCKET NO. 92-1679

NOTICE IS GIVEN TO THE FOLLOWING:

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**Richard DeBenedetto**  
Administrative Law Judge  
Occupational Safety and Health  
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UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
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 BOSTON, MASSACHUSETTS 02109-4501  
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SECRETARY OF LABOR,	:
	:
Complainant,	:
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v.	:
	: OSHRC Docket No. 92-1679
W.E. DARIN CONSTRUCTION	:
ENTERPRISES, INC.,	:
	:
Respondent.	:

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Appearances:

Alan Kammerman, Esq.  
 Office of the Solicitor  
 U.S. Department of Labor  
 For Complainant

Robert Walsh, Esq.  
 Walsh & Fleming, P.C.  
 Buffalo, New York  
 For Respondent

Before: Administrative Law Judge Richard DeBenedetto

**DECISION AND ORDER**

On April 23, 1992, W.E. Darin Construction Enterprises, Inc. ("Darin"), was cited for serious violation of 29 C.F.R. § 1926.1051(a), which requires that a stairway or ladder be provided at all personnel points of access where there is a break in elevation of 19 inches or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.<sup>1</sup> A penalty of \$3500 is proposed for the violation. At the hearing held on May 26, 1993, Darin moved for dismissal of the citation at the close of the Secretary's case, arguing mainly that the standard is not applicable to the cited conditions (Tr. 169-70). The motion was granted for the following reasons.

The citation was issued after OSHA compliance officer Colin Sargent conducted an investigation of an accident that occurred at a Darin job site in Gettysville, New York on November 22, 1991 (Tr. 23-24). On that day, two Darin employees, Robert McCabe and Angelo Nappo, Jr., were "connecting" horizontal steel beams to vertical columns by bolting

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<sup>1</sup> The first two items of the three-item citation were resolved by agreement of the parties (Tr. 5-7).

them together with at least two bolts (Tr. 36-37, 104-05, 107, 143). In order to access the points at which these connections were to be made, Nappo and McCabe would climb up adjacent vertical columns and move from level to level, attaching each end of the beams brought in to them by a crane to their respective columns (Tr. 34-36, 67-69, 73-74, 77, 143; Exhibits C-1 & C-6). Just prior to the accident, Nappo had climbed down the column from which he was working in order to get more bolts (Tr. 68, 143-44). He was on his way back up the column when he lost his grip while reaching for the horizontal beam marking the second level of the structure and fell to the ground below; he subsequently died from the injuries he sustained (Tr. 26-28, 67-68, 143-44; Exhibits C-1 & C-6).

Darin concedes that the cited standard applies to the steel erection industry, but maintains that compliance with the standard is not required where, as here, steelworkers engage in climbing columns to make initial connections. To support its contention, Darin calls our attention to a July 20, 1992 letter sent by Patricia K. Clark, OSHA's Directorate of Compliance Programs, to a construction employer seeking an interpretation of § 1926.1051(a) with regard to the steel erection industry. The letter, in part, says:

In situations where non-routine access is required, such as climbing vertical steel to make initial connections, and where fall protection systems are used, then the concern of fall injury is addressed and ladders and stairways are not required....

(Exhibit R-1). This interpretation is consistent with the testimony given at the hearing by Sargent and McCabe, both of whom indicated that connectors typically do not utilize ladders to access initial connection points (Tr. 67-72, 93-97, 159-60).<sup>2</sup> In fact, both men indicated that utilizing a ladder under these circumstances might actually be unsafe since the steel structure against which the ladder would be leaned is not always stable or secure at this stage of the erection process and could sway or shift under a significant amount of weight

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<sup>2</sup> Although Sargent, who was an iron worker for fourteen years prior to becoming a compliance officer, conceded that it is "typical" for connectors not to utilize ladders in their work, he indicated that he has observed more connectors in recent years using ladders to access connection points (Tr. 71-73, 93-99). McCabe, who has 20 years of experience in this field, theorized that this may be due to changes in steel design, resulting in columns which may be of a round tubular type and therefore, difficult to climb (Tr. 159-60). He testified, however, that he and many others still prefer to climb columns without the use of a ladder in order to retain a certain amount of mobility (Tr. 94-95, 142, 153-54, 159-60).

(Tr. 110-13, 152-54). As such, Ms. Clark's explanation of the application of this standard seems to reflect some of the practical considerations involved in work of this nature.<sup>3</sup>

Because McCabe and Nappo were climbing the vertical columns specifically to make initial connections, Darin maintains that their work clearly required only non-routine access, as defined by Ms. Clark's letter. Moreover, because the height to which they were climbing was less than 25 feet, neither Subpart R, the section of standards devoted solely to steel erection, nor § 1926.105(a),<sup>4</sup> the general fall protection standard, required the use of a fall protection system (Tr. 124-28, 135-37). As a result, Darin claims that § 1926.1051(a) is not applicable to the work performed by McCabe and Nappo on the day of the accident.

The Secretary challenges Darin's position on two grounds. First, although the Secretary agrees that under the relevant standards Darin was not *required* to provide fall protection where the elevation was less than 25 feet, he argues that exemption from the standard was conditioned on the use of fall protection, and takes issue with Darin's argument that a protection system can be considered "in use" when one is not provided because it is not required (Tr. 125-27, 132). The Secretary is correct in pointing out the fallacy of Darin's reasoning; however, the fact remains that there is nothing under the OSHA standards to compel the use of a fall protection system under the conditions which existed here. Although the language used by Ms. Clark to describe the limitation upon the requirements of § 1926.1051(a) is, at first glance, somewhat ambiguous as to the use of a fall protection system, to require a protection system where one is not mandated under the regulations would be inconsistent with the intent of Ms. Clark's interpretation letter, which is not to substitute a fall protection system for a ladder, as the Secretary apparently argues. If we are to derive from the interpretation letter the notion of using some form of fall protection in place of a ladder, we are obliged to ponder the relevancy of such fall protection—whether

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<sup>3</sup> This interpretation would also seem to explain why § 1926.1051(a)(1) has never been the subject of a citation against a steel erection company prior to this case (Tr. 16, 100-02, 138-39, 171-72).

<sup>4</sup> The standard at 29 C.F.R. § 1926.105(a) reads as follows:

§ 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, scaffold, catch platforms, temporary floors, safety lines, or safety belts is impractical.

it be scaffolds, catch platforms, or safety belts—to the climbing hazard addressed by the standard and the “non-routine” tasks performed by the connectors. No such relevancy emerges from the record. It is reasonable and logical to believe that Ms. Clark’s reference to fall protection systems was an expression of general concern for maintaining such a system whenever the conditions so required, but that the §1926.1051(a) standard was not applicable to steel erectors when engaged in “non-routine” climbing.

The Secretary also argues that because McCabe testified that both he and Nappo had climbed the same vertical column, specifically the one from which Nappo fell, the Secretary contends that the access required was no longer routine and therefore, Darin cannot validly claim that its employees’ work was exempt from the requirements of the cited standard (Tr. 147-50, 155-56). However, the interpretation letter states that in order to negate a finding of non-routine access, it must be evident that access to the same location or by more than one employee was “frequent”. According to McCabe, it was only because Nappo was fatigued and behind in his work that McCabe came down from the column on which he was working that day and climbed up the column on which Nappo was working in order to finish a connection that Nappo was unable to complete (Tr. 150-52, 157-59). Indeed, McCabe explained that under normal circumstances, he and Nappo would have climbed up their respective columns only once during the entire connecting process (Tr. 157-58). Inasmuch as this deviation from normal connecting procedure was a one-time event and, therefore, not a “frequent” occurrence, the access required for the work being performed by McCabe and Nappo remained non-routine. Thus, under the terms of OSHA’s interpretation letter, § 1926.1051(a) does not apply to the cited condition.

The record provides an additional basis for the granting of Darin’s motion. If the cited standard were applicable, the evidence suggests that Darin may have actually complied with the requirements of § 1926.1051(a) on the day of the accident by having at least two extension ladders available at the worksite. According to Sargent, ladders were being used by a crew of Darin employees performing bolting work about 40 to 50 feet away from the area in which McCabe and Nappo were working (Tr. 32-36, 58-59, 66-67, 92-93, 167-68;

Exhibits C-2, C-4, C-5, C-9 & C-10).<sup>5</sup> McCabe testified that he was aware these ladders were available to him, but, as noted *supra*, he indicated that he preferred to climb columns without the aid of a ladder so as to retain a certain amount of mobility (Tr. 145-46, 152-54).

Section 1926.1051(a) clearly states that a ladder or stairway shall be "provided" under certain conditions. Absent an explicit use requirement in a related standard, the Commission has held that this language will be read as imposing only a supply or provision requirement upon an employer. *Pratt & Whitney Aircraft Group*, 12 BNA OSHC 1770, 1775, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986), *aff'd*, 805 F.2d 391 (2d Cir. 1986). As a result, § 1926.1051(a) would have obligated Darin only to provide or make available a ladder to its employees, not to actually require the use of such equipment. The Secretary contends that it is not enough for Darin to have ladders present at the site, noting that the cited standard specifically requires the provision of a ladder or stairway "at all personnel points of access". However, as noted at the hearing, the physical location of the work to be performed at a construction site is constantly in flux; employees may be performing connecting work at point A, then minutes later, bolting work at point B (Tr. 56-57). Given these conditions, Darin may be considered in compliance with the requirements of the standard, particularly where the ladders were in close proximity to the area in which McCabe and Nappo were working and the employees were aware that they were available, but chose not to use them.

Based upon the foregoing findings and conclusions, it is

**ORDERED** that the third item of the citation issued on April 23, 1992, regarding the standard at 29 C.F.R. § 1926.1051(a) is vacated. It is further

**ORDERED** that in accordance with the agreement entered into by the parties, item 1 of the citation is amended to reflect a nonserious violation which is affirmed and a penalty of

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<sup>5</sup> Bolting or detail work involves reinforcing the initial connections between columns and beams with additional bolts (Tr. 37-38).

\$2,500 is assessed; item 2 of the citation is affirmed as a serious violation and a penalty of \$700 is assessed.



RICHARD DeBENEDETTO  
Judge, OSHRC

Dated: March 1, 1994  
Boston, Massachusetts