UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.
POTOMAC IRON WORKS, INC.
Respondent.

OSHRC DOCKET
NO. 92-1400

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 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 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 March 24, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1400

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

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

John H. Gray, General Manager
& Assistant Secretary
Potomac Iron Works
4711 Rhode Island Avenue
P.O. Drawer 89
Hyattsville, MD 20781

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/C
1825 K Street, N.W.
Washington, DC 20006 1246

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-1400
POTOMAC IRON WORKS, INC.,	:	
Respondent.	:	

Appearances:

Anthony G. O'Malley, Jr., Esquire
Office of the Solicitor
United States Department of Labor
Philadelphia, Pennsylvania
For Complainant

John H. Gray, General Mgr. &
Assistant Secretary
Potomac Iron Works
Hyattsville, Maryland
For Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

I. INTRODUCTION

This case involves an action pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 20 U.S.C. 651 et seq., (hereinafter "the Act"). An inspection of Respondent's worksite at 400 2nd Street, N.W., Washington, D.C. 20217, conducted by the Occupational Safety and Health Administration (OSHA) Washington, D.C. District Area Office revealed a violation of Section 5(a)(2) of the Act and the regulations promulgated by the Secretary at 29 C.F.R. §1900 et seq. As a result, a serious and an

other than serious citation was issued to Respondent, Potomac Iron Works, Inc., on April 3, 1992. Respondent filed a timely notice of contest and thereafter, a hearing was held on November, 10, 1992. Following the hearing, the Secretary filed a brief. However, although specifically advised of its right to do so (see Tr. 4, 106), Respondent has not done so. As a result, the findings and opinion which follow borrow heavily from the Secretary's brief.

II. DISCUSSION

This case involves one serious citation consisting of one item which alleges a violation of 29 CFR § 1926.105(a).[1] The following findings of fact demonstrate that the Secretary has presented all of the elements necessary to establish a violation,[2] and that the preponderance of the evidence establishes a violation of that standard.

29 C.F.R. §1926.105(a) provides that:

> 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.[3]

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[1] At the November 10, 1992 hearing, the Secretary withdrew her other than serious citation item pertaining to 29 C.F.R. §1903.2(a)(1).

[2] The Secretary demonstrated that (1) the cited standard applies, (2) there was a failure to comply with the terms of the standard, (3) an employee had access and was exposed to the hazard created by the non-compliance, and (4) the employer knew or with the exercise of reasonable diligence could have known of the condition. Antra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); Dunn-Par Engineered Form Co., 12 BNA OSHC 1949 (No. 79-2553), Rev'd and remanded on other grounds, 843 F.2d 1135 (8th Cir. 1988), decision on remand, OSHRC Docket No. 79-2553 (April 12, 1989).

[3] While Subpart R of 29 C.F.R. §1926 provides particularized standards for the structural steel erection industry, it is well settled that those standards do not apply to exterior fall hazards. Instead, 29 C.F.R. §1926.105(a) is the controlling standard. Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807-810, 12 BNA OSHC 1395-1397 (3rd Cir. 1985).

In establishing a prima facie case that Respondent violated §1926.105(a), the Secretary demonstrated (a) that the workplace was twenty-five (25) feet or more above ground, (b) that none of the listed safety devices were used to protect the exposed employee, and (c) that, in the absence of a citation for failure to use safety nets, alternative safety measures were practical. Century Steel Erectors Inc., v. Secretary of Labor, 888 F.2d 1399, 14 OSHC 1273, 1275 (D.C. Cir. 1989).

The uncontradicted testimony of the Compliance Officers (CO) established that Jerry Reed, an employee of Respondent, was working at the edge of the roof-top. Both COs observed Mr. Reed for five to ten minutes working at the roof's edge from their perspective at ground level, and again found him exposed to the fall hazard when they were able to make their way to the roof top some 20 to 30 minutes later. At neither time was Mr. Reed utilizing any means of fall protection.[4] Photographs taken by CO Ashley on the date of the inspection verify these observations. See Findings 10-11, 13-14. CO Sancomb testified that he determined that the height of the building to be 68 feet by measuring the height of one of the buildings panels and multiplying that figure by the number of building panels extending from the top to the bottom of the building (Tr. 42-43).

[4] Although he was wearing a safety belt and lanyard, the lanyard was not tied off to anything so as to afford Mr. Reed protection from a fall (Tr. 13, 16, 21, 27, 33, 73, 75).

Because the failure to use safety nets was not cited, the Secretary demonstrated that alternative safety measures were practical.[5] The discussions pertaining to methods of abatement which CO Sancomb had with Respondent's superintendent, Mr. Khatcik, revolved around the use of catenary lines attached to outriggers from which Respondent's employees could tie off, thereby protecting them from fall hazards. See Finding 15. Moreover, the testimony provided by COs Sancomb and Ashley and Mr. Wiseman clearly establishes that the use by Respondent's employees of safety belts and safety lines was practical. See Findings 16-23.

The existence of a serious violation depends in part on whether a reasonably diligent employer could have known the violation was present.[6] In this case, Respondent had the means to know of the presence of the violation, and in fact did know of the violation. The exposure was in plain sight, easily visible from the ground level below the worksite building as well as from the roof top. Moreover, the exposed employee's superintendent, Mr. Khatcik, was no more than 15 to 20 feet away from the employee while he performed his work at the roof edge and admitted knowledge of the lack of fall protection to CO Sancomb. See Findings 10-13.

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[5]As noted by the U.S. Court of Appeals for the District of Columbia Circuit, "practical" meant proven successful in meeting the demands made by actual living and use. Century Steel Erectors, Inc., 14 OSHC 1273, 1277-78 (1989).

[6]See Atlas Roofing Company v. OSHRC, 518 F.2d 990, 1001-1002 (5th Cir. 1975), Aff'd on other grounds, 430 U.S. 442 (1977). See also Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1221 (Rev. Comm. 1991); Scheel Construction Co., 1976-77 CCH OSHD ¶ 21,263 (Rev. Comm. 1976).

The fall hazard to which Mr. Reed was exposed was approximately 68 feet. The Secretary correctly asserts that this evidence establishes a serious violation.[7] CO Sancomb testified how he determined the penalty of $3,500.00. See Findings 24, 26-27. The Secretary's testimony was not rebutted by Respondent. Accordingly, the appropriateness of the penalty was also established.

Respondent's presentation at the hearing consisted of the cross-examination of the Secretary's witnesses and an unsworn statement by Respondent's representative, made following the close of the Secretary's case, to the effect that Mr. Reed had worked for Respondent for 10 years, that he had indicated to Respondent that he had tied his lanyard to the outrigger, and that the COs had observed only one lift of the crane for seven minutes. This presentation is simply insufficient to overcome the *prima facie* case established by the Secretary.

III. FINDINGS OF FACT

General:

1. The Respondent is a corporation engaged in steel erection construction activities. (Deemed admitted in Answer).

2. Respondent maintained a worksite at 3rd and D Street, N.W., (U.S. Tax Court), Washington, D.C. 20217, during the period of time which included March 25, 1992. (Answer, Tr. 11-14).

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[7]CO Sancomb noted that he has participated in the investigation of a fatality resulting from a fall of 30 feet (Tr. 43). In this case, a fall of 68 feet could result in death, broken bones or severe trauma (Tr. 43).

3. Respondent uses tools, equipment, machinery, materials and supplies which have originated in whole or in part outside the District of Columbia. (Stipulated, Tr. 5, Deemed admitted in Answer).

4. Respondent, as a result of its steel construction activities, is an employer engaged in a business affecting commerce as defined by Section 3(5) of the Act. (Stipulated, Tr. 5).

5. Respondent has employees as defined by Section 3(6) of the Act. (Deemed admitted in Answer).

6. Respondent is subject to the requirements of the Act and the Regulations issued or promulgated thereunder. (Stipulated, Deemed admitted in Answer).

7. Beginning on March 25, 1992, two OSHA Compliance Officers ("CO"), Joseph Sancomb and Joseph E. Ashley, conducted an inspection of Respondent at the above-referenced worksite where Respondent was performing steel erection construction activities (Tr. 11-12).

8. The inspection was based upon a referral made by a witness who observed one of Respondent's employees at the edge of a roof without fall protection (Tr. 11-12).

9. Respondent employed four (4) employees at the aforesaid worksite at all time relevant to the OSHA inspection (Deemed admitted in Answer, Tr. 44).

10. Upon arrival at the worksite on March 25, 1992, and while standing at ground level, CO's Ashley and Sancomb observed a worker performing crane signaling activities from the edge of the roof top, some 68 feet above ground level, without utilizing any

means of fall protection and thereby in violation of the Regulations (Tr. 13, 28, 31, 33-34, 42, 72, Government Exhibit's ("GX") 1.1 - 1.8, 1.1A and 1.2A).

11. Subsequent to observing from ground level that the employee working on the roof was not tied off, CO's Ashley and Sancomb went to the roof level of the same building for further observations and investigation. Upon arrival at roof level some 20 to 30 minutes later, the CO's again observed that the employee working at the roof edge was neither tied off or utilizing any other means of fall protection (Tr. 26-28, 33-34, 53, 73-76, GX 2.1).

12. CO Sancomb had occasion to speak with Potomac's superintendent, Mr. Khatcik, who was standing some 15 to 20 feet from the employee working at the roof edge (Tr. 40-41).

13. Mr. Khatcik informed CO Sancomb that the employee in question was employed by Respondent. He admitted that said employee was untied and not utilizing any fall protection because he was moving in a lateral manner with the roof edge (Tr. 33, 76-77).

14. CO Sancomb also spoke with and questioned the exposed Potomac employee, Jerry Reed, who informed CO Sancomb that he was not utilizing fall protection as he worked at the roof edge (Tr. 41-42).

15. CO Sancomb informed Respondent's superintendent that as a means of abatement to protect his employees from a fall hazard, a catenary line could be attached

from the buildings' outrigging devices which would enable employees to tie off and allow safe lateral movement at the roof edge (Tr. 34-36, 37-40, 44, 77-78, GX 2.3 and 2.4).

16. According to CO Sancomb, the use of a safety belt and lanyard tied to an outrigger or used with a catenary line is very practical because of its ease and speed of use (Tr. 45-46).

17. Mr. John Wiseman, qualified expert in iron work and construction site safety, noted that either a safety line attached to one of the outriggers on the roof of the building in question, or a catenary line attached from one outrigger to another on the roof top of the building in question, could safely and easily have been utilized as a practical means of fall protection for employees working at the roof edge (Tr. 94, 98-103).

18. The steel outrigging devices are anchor bolted into concrete on the roof (Tr. 36, 78-80, 89, 103-104, GX 4).

19. The steel outrigging devices are able to withstand substantial weight, including four times the weight of a scaffold holding two individuals, and up to 6,000 to 7,000 pounds of weight (Tr. 36, 80-81, 83, 104).

20. CO Sancomb and Mr. Wiseman have observed other construction sites where outriggers were utilized as a means of fall protection from which employees tied off either directly to or by use of a catenary line with safety belts and lanyards (Tr. 36-37, 101).

21. A catenary line only requires a few minutes to install (Tr. 99).

22. On November 9, 1992, CO Sancomb and CO Ashley and Mr. Wiseman had occasion to observe window washers utilize the same outriggers from the roof top of the building located at 3rd and D Street, N.W., (U.S. Tax Court), Washington, D.C., as the tie-off point for their safety belt and lanyard in order to work safely at the roof edge (Tr. 37, 81-83, 99-100).

23. The window washer who utilized the outrigger in question on November 9, 1992, tied off to it in approximately one or two seconds (Tr. 82, 99).

24. Respondent's failure to utilize any means of fall protection, thereby subjecting its employees to a fall hazard in excess of 25 feet (68 feet in this case), amounted to a serious violation of 29 C.F.R. §105(a) which could have resulted in death, severe trauma, or broken bones (Tr. 43-44, 47, GX 5).

25. On April 3, 1991, Respondent was issued one serious citation with one item, and one other than serious citation with one item.

26. The proposed penalty for Respondent's failure to utilize any means of fall protection, is $3,500.00.

27. This amount was calculated after CO Sancomb considered the adjustment factors of: number of employees employed by Respondent, the good faith of Respondent, and history of Respondent (Tr. 47-49, GX 5).

IV CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Act.

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standard at 29 C.F.R. §1926.105(a) as alleged in Citation 1, Item 1. A penalty of $3,500 is appropriate.

V ORDER

1. Citation 1, Item 1, is affirmed as a serious violation of the Act.

2. A total civil penalty of $3,500 is assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated: MAR - 2 1993
Washington, D.C.