



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

FAX:
COM (202) 606-5060
FTS (202) 606-5060

SECRETARY OF LABOR
Complainant,

v.

SUPER SKY PRODUCTS, INC.
Respondent.

OSHRC DOCKET
NO. 92-1663

**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 November 17, 1993. The decision of the Judge will become a final order of the Commission on December 17, 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 December 7, 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
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.
Executive Secretary

Date: November 17, 1993

DOCKET NO. 92-1663

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

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Jay Poirior
Super Sky Products, Inc.
4940 Shady Moss Lane
N. Ridgeville, OH 44039

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

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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.

SUPER SKY PRODUCTS, INC.,
 Respondent.

OSHRC Docket No.: 92-1663

Appearances:

Gary Williams, Esquire
 Office of the Solicitor
 U. S. Department of Labor
 Cleveland, Ohio
 For Complainant

Jay Poirior, *Pro Se*
 4940 Shady Moss Lane
 N. Ridgeville, Ohio
 For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Super Sky Products, Inc. (Sky), contests a two-item citation issued by the Secretary on May 7, 1992. Item 1 alleges a serious violation of § 1926.28(a) for failure to require the wearing of appropriate personal protective equipment for an employee exposed to a hazardous condition. Item 2 alleges a serious violation of § 1926.1053(b)(1) for failure to ensure that the side rails of a ladder used for access to an upper landing surface extended at least 3 feet above the upper landing surface to which the ladder was used to gain access.

Elizabeth Ashley works as an attorney with the Labor Department, Office of the Solicitor, in Cleveland, Ohio. The Cleveland Office of the Solicitor is located on the eighth floor of the Federal Building on East Ninth Street. On April 27, 1992, Ashley observed from an office window a man on the atrium of the North Point Building located 500 feet diagonally from the Federal Building (Tr. 9-10, 15, 78).

Ashley did not believe the man, who was “either standing up or in a crouched position,” was tied off to a safety line. She looked through a pair of binoculars and, as she testified, “I could see that he in fact wasn’t attached to anything. He was just simply out there on the glass doing work with no safety line” (Tr. 11). Ashley did not see a lanyard or a safety line. She thought it possible that the man may have been wearing a safety belt (Tr. 11).

Ashley went down the hall to OSHA’s offices, where she spoke with William Kremzar, an assistant area director (formerly known as supervisor) for OSHA (Tr. 13). Kremzar returned to the office with her and looked at the man on the atrium. He could not tell whether the man was tied off until he looked through the binoculars, when he confirmed that the man was not tied off. Kremzar watched for approximately 15 minutes as the man moved from point to point over a distance of 10 to 15 feet on the atrium (Tr. 22, 24). The man was traveling on a ledge or gutter traversing the atrium (Tr. 22). The atrium was sloped. The distance from the ledge or gutter to the bottom the sloped atrium was 20 to 25 feet. It was another 30 to 40 feet from the bottom of the atrium to the patio below (Tr. 23).

Kremzar assigned compliance officer Michael Pappas to inspect the site. Pappas first looked through the binoculars from the solicitor’s office and determined for himself that the man was not tied off (Tr. 26-27). By the time that Pappas got over to the North Point Building, it was lunch time and the man was no longer on the atrium (T. 27). Pappas located Jay Poirior, Sky’s field superintendent, and held an opening conference with him (Tr. 28). Poirior, Pappas, and another OSHA employee, identified as Diana, went up on the atrium (Tr. 40). Pappas also spoke with the man who had been on the atrium, who was identified as Jesse. Pappas testified that Jesse admitted to him that he was not tied off (Tr. 30).

Pappas wanted Jesse to go back up on the atrium so that Pappas could take some pictures. Pappas said that he told Jesse to wear a safety belt and that Jesse went to his truck to get one (Tr. 40). Poirior, who represented Sky *pro se*, disputes this, saying that Jesse went to his truck to get a lanyard and that Jesse’s safety belt was lying up on the atrium where Jesse had left it when he went to lunch (Tr. 40).

The Secretary introduced three photographs taken by Pappas. All three are underexposed and their quality is poor (Exhibits C-1, C-2, C-3). Exhibit C-1 shows Jesse climbing Sky's ladder to the atrium. Jesse does not appear in Exhibit C-2, which shows the ladder leaning against the side of the atrium. Exhibit C-3 shows Jesse standing on the ledge or gutter that crosses the atrium. Because of the poor quality of the photographs, it is difficult to make out much detail in them.

Poirior insists that Sky had a safety line already up on the atrium, and that it was a 70 foot long, 5/8 inch nylon rope with a safety hook on one end (Tr. 58). Pappas testified initially that he did not recall seeing a safety line on the atrium (Tr. 42). Under cross-examination by Poirior, Pappas's testimony wavered (Tr. 46):

Poirior: You stated that you told Jesse that when he climbed up there to put on his safety belt and put on a lanyard?

Pappas: Yes.

Poirior: What did he tie the lanyard to?

Pappas: As far as I can recall, we just had him to go up so far and back down. We didn't let him go past the top of the ladder. We asked him to go up to --

Poirior: Isn't there a picture of him in the gutter there?

Poirior is correct: Exhibit C-3 clearly shows Jesse standing in the gutter, well above the point where the ladder ends. Poirior continued his cross-examination (Tr. 47):

Poirior: Being an OSHA person, obviously, you wouldn't let him go up there unless he was tied off?

Pappas: Right.

Poirior: Now, if he is up there, what would he tie his lanyard to if he was up there?

Pappas: If I recall right, I don't recall seeing a safety line there before, but he did tie off to a safety line. If I am thinking right he took it up with him.

...

Judge Brady: You don't recall if it was already there or not?

Pappas: No, I don't.

Although it is difficult to see, a close examination of Exhibit C-3 reveals that a rope runs the length of the gutter where Jesse is standing, and hangs vertically at the right of the photograph. Based on Pappas's questionable recall of where the safety line came from and Poirior's firm insistence that the safety line was in place during the time Jesse was working on the atrium, it is concluded that the safety line was in place during the time Jesse was atop the atrium. The question remains whether Jesse was tied off to the safety line.

Item 1: Alleged violation of § 1926.28(a)

The Secretary alleges that Jesse was not tied off, in violation of § 1926.28(a), which provides:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

Poirior testified that Jesse was atop the atrium "water testing the skylight" (Tr. 60). Poirior was inside the building, under the atrium, looking for leaks. Poirior and Jesse were wearing voice-activated headsets and so were in contact with each other (Tr. 60). Poirior contends that Jesse's safety belt was hooked directly to the safety line while he was on the atrium. Poirior stated that, "Jesse did tell me at one time afterwards that he untied to move across the gutter because the hose got hooked" (Tr. 60). Poirior claims that, contrary to Pappas's testimony, Jesse told OSHA that he was tied off the day of the inspection (Tr. 55).

Poirior knew where Jesse was working on the day of the hearing. The judge offered to recess the hearing for several hours in order for Poirior to contact Jesse and have him appear as a witness. Poirior declined, and Jesse did not testify (Tr. 55-58). Without Jesse's testimony that he was, in fact, tied off on the day of the inspection, Sky cannot overcome the Secretary's case. Even discounting Pappas's testimony that Jesse admitted to him that he was not tied off, this court is left with Ashley's and Kremzar's testimony that they viewed Jesse through binoculars over a period of about 30 minutes and saw that he was not tied off.

Based on their testimony, it is concluded that Sky was in violation of § 1926.28(a). Jesse was exposed to the hazard of a 20 to 25 foot fall to the end of the atrium, and an additional 30 to 40 foot fall to the patio below. Such a fall would likely result in death or serious physical injuries. The violation was serious.

Item 2: Alleged violation of § 1926.1053(b)(1)

The Secretary alleged a violation of § 1926.1053(b)(1), which provides:

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

It is undisputed that the ladder that Jesse was using to gain access to the gutter where he was working did not extend at least 3 feet above the gutter. In fact, the ladder ended several feet below the gutter (Exh. C-3; Tr. 32). Pappas testified that this presented a hazardous condition because in order to get from the ladder to the gutter, Jesse had to walk up the atrium with no handholds or grabrails. Jesse was exposed to slipping or falling on the sloped glass (Tr. 37). The Secretary has established a serious violation of § 1926.1053(b)(1).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

No testimony was adduced as to the size of Sky. Sky demonstrated good faith in dealing with OSHA and had a good written safety program (Tr. 38). No history of previous

violations was mentioned. The gravity of the violations was severe. Upon due consideration of the relevant factors, it is determined that a penalty of \$2,250 is appropriate for each item.

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 ORDERED:

1. That item 1, alleging a violation of § 1926.28(a), is affirmed and a penalty of \$2,250 is assessed; and
2. That item 2, alleging a violation of § 1926.1053(b)(1), is affirmed and a penalty of \$2,250 is assessed.

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

Date: November 9, 1993