

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,

Complainant

v.

GROSSMAN STEEL & ALUMINUM CORPORATION,

Respondent

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OSHRC DOCKET NO. 12775

DECISION

Before BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BARNAKO, Chairman:

This case presents the issue of whether a subcontractor on a construction site is in violation of Section 5(a)(2)<sup>1/</sup> of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq., hereinafter "the Act"), when its employee is exposed to a hazardous condition which is contrary to a standard, but the subcontractor did not create the condition or have control over the area where it existed. Judge James P. O'Connell held that there was no liability under the circumstances of this case. He found that the facts were

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1/ This section states:

Each employer...shall comply with occupational safety and health standards promulgated under this Act.

indistinguishable from those presented in Anning-Johnson Co. v. OSHRC, 516 F. 2d 1081 (7th Cir. 1975), (hereinafter "Anning-Johnson"), and stated that he was bound to follow the decision of that case, which held that a subcontractor was not liable under the circumstances presented. The issue is a frequently recurring one and is important in the administration of the Act. For the reasons which follow, we conclude that we should partially follow the court's holding in Anning-Johnson, but that, under the circumstances of this case, Respondent should be found responsible for the violation.

The facts are not in dispute. Respondent's subcontract called for it to perform miscellaneous iron work in the construction of a school building in New York City. The work included installation of stairs, railings, catwalks, gratings, and other metal items, but not structural steel.

When the jobsite was inspected by Complainant's representative, one of Respondent's employees was observed near the center of the second floor of the building. The floor was 200 by 300 feet in size, and was 15 feet above the adjacent ground level. The open sides of the floor were completely unguarded. The employee subsequently walked toward the side of the building and descended a staircase located about eight feet from an unguarded edge. This stairway had previously been installed by Respondent.

The general contractor on the job was responsible for the erection of guardrails where needed. Respondent had no contractual obligation to erect guardrails, and its employees would not have been permitted to erect guardrails because of craft jurisdiction rules. Respondent did, however, know that there was no perimeter protection on the second floor. Its chairman inspected the jobsite weekly, and never observed guardrails on that floor. Respondent also knew of the absence of guardrails through the full-time presence of a foreman at the site.

On these facts, Respondent was cited for violating 29 C.F.R. 1926.500(d)(1).<sup>2/</sup> It is not disputed that the absence of perimeter protection on the second floor is contrary to the standard. The issue is whether, under these facts, Respondent is chargeable with a violation of the standard.

Section 5(a)(2) places a duty on employers to "comply" with the standards promulgated under the Act. The Act, however, does not otherwise delineate the nature of this duty. It must therefore be determined in accordance with the intent of Congress "to assure, so far as possible, safe and healthful working conditions for working men and women."

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2/ This standard states, in pertinent part:

Every open-sided floor or platform, 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent...on all open sides...

29 U.S.C. 651(b); See Brennan v. OSHRC (Underhill Construction Corp.), 513 F. 2d 1032, 1038 (2nd Cir. 1975). This objective, however, is not promoted by imposing a duty on employers which is unachievable.

Secretary of Labor v. OSHRC (Alsea Lumber Co.), 511 F. 2d 1139 (9th Cir. 1976); National Realty & Construction Co. v. OSHRC, 489 F. 2d 1257 (D.C. Cir. 1973); Ocean Electric Co., BNA 3 OSHC 1705, CCH E.S.H.G. para. 20,167 (1975).

In the past, we have consistently held that an employer fails to comply with a standard if its own employees are exposed to the hazard the standard seeks to eliminate.<sup>3/</sup> Robert E. Lee Plumbers, Inc., 17 OSAHRC 639, BNA 3 OSHC 1150, CCH E.S.H.G. para. 19,594 (1975) and cases cited herein. We have also held that an employer is not responsible for a condition it creates in violation of a standard so long as its own employees are not exposed to the condition, even though employees of other employers are exposed to the condition. Martin Iron Works, Inc., 9 OSAHRC 695, BNA 2 OSHC 1063, CCH E.S.H.G. para. 18,164 (1974); Hawking Construction Co., 8 OSAHRC 569, BNA 1 OSHC 1761, CCH E.S.H.G. para. 17, 851 (1974). Taken together, these rules placed the responsibility of protecting each employee solely on his or her own employer. Each employee thus received the protection intended by the Act, and the employer required to assure such protection was clearly identified.

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<sup>3/</sup> In Gilles & Cotting, Inc., OSHRC Docket No. 504 (Feb. 20, 1976) we held that employee exposure was to be determined by a rule of access rather than actual exposure. We agree with the Judge's finding in this case that Respondent's employee had access to the hazard. Brennan v. OSHRC (Underhill Construction Corp.), supra.

Correspondingly, employers were provided with an OSHRC rule by which to measure whether they were in compliance. So long as their own employees were protected, they did not have to be concerned with protecting employees of other employers.

Two courts, however, have disagreed in part with these rules. In Brennan v. OSHRC (Underhill Construction Corp.), supra, the court held that a subcontractor on a construction site who created a violation to which only employees of other contractors were exposed, had violated the standard. In Anning-Johnson, the court held that a subcontractor who did not create the violation and did not control the area where the violation existed was not responsible despite exposure of its employees.<sup>4/</sup> The court thought that imposing liability in such circumstances would place an unreasonable burden on the subcontractor which was not justified by any benefit in safety and health which would be achieved. The court stated:

We fail to see how requiring several different employers to place a proper guardrail over an opening or along the edge of open-sided floors or intermediate rails on stairways fulfills the purposes of the Act any more effectively than requiring only one employer to do so. The Secretary's position is premised on the theory that the more people responsible for correcting any violation, the more likely it will get done.

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<sup>4/</sup> The court specifically limited its holding to nonserious violations. Such violations bear a direct and immediate relationship to employee safety and health, but not such a relationship that a resulting injury or illness would likely cause death or serious harm. Crescent Wharf and Warehouse Co., 2 OSAHRC 1318, BNA 1 OSHC 1219, CCR E.S.H.G. para. 15,687 (1973).

This is, of course, not necessarily true. Placing responsibility in more than one place is at least as likely to cause confusion and disruption in normal working relationships on a construction site. Such a policy might in effect prove to be counter-productive. 516 F. 2d at 1089.

The court apparently recognized that its holding, standing alone, could result in certain employees not receiving the protection intended by the Act. It said:

Although it is not necessary for a decision in the present case, ...we are not at all sure that a general contractor, who has no employees of his own exposed to a cited violation is necessarily excused from liability under the Act. 516 F. 2d at 1091, n. 21 (citation omitted).

Presumably the court would fill the apparent gap by holding the general contractor responsible.

We agree with Judge O'Connell that the facts of this case are indistinguishable from those in Anning-Johnson. We do not, however, agree that he was therefore bound to follow Anning-Johnson.<sup>5/</sup> As the National Labor Relations Board has stated:

It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a trial examiner

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<sup>5/</sup> The facts giving rise to this case arose in the Second Circuit, and Respondent is a New York Corporation. Thus under 29 U.S.C. 660 a petition for judicial review may be filed in either of the Second or District of Columbia Circuits. Anning-Johnson was decided by the Court of Appeals for the Seventh Circuit.

to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the trial examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved. Insurance Agents International Union, 119 NLRB 768, 773 (1957).

Like the National Labor Relations Act, the Occupational Safety and Health Act of 1970 is national in scope, and its orderly administration requires that administrative law judges follow precedents established by the Commission (Gindy Manufacturing Co., 10 OSAHRC 367, BNA 1 OSHC 1717, CCH E.S.H.G. para. 17,790 (1974)), unless reversed by the Supreme Court.

We have, however, reconsidered our prior decisions in light of the court decisions in Brennan v. OSHRC (Underhill Construction Corp.) and Anning-Johnson. We continue to believe that the Act can be most effectively enforced if each employer is held responsible for the safety of its own employees. We agree with the courts, however, that this rule should be modified with respect to the construction industry. This is required by the unique nature of the multi-employer worksite common to the construction industry.

Typically, a construction job will find a number of contractors and subcontractors on the worksite, whose employees mingle throughout the site while work is in progress. In this situation, a hazard

created by one employer can foreseeably affect the safety of employees of other employers on the site. Conversely, as a practical matter it is impossible for a particular employer to anticipate all the hazards which others may create as the work progresses, or to constantly inspect the entire jobsite to detect violations created by others. Indeed, as the Anning-Johnson court pointed out, it would be unduly burdensome to require particular crafts to correct violations for which they have no expertise and which have been created by other crafts. We therefore conclude that, on a construction site, the safety of all employees can best be achieved if each employer is responsible for assuring that its own conduct does not create hazards to any employees on the site, and that imposing liability on this basis would not place an unreasonable or unachievable duty on contractors. We will therefore follow the holding of the Second Circuit to this effect in Brennan v. OSHRC (Underhill Construction Corp.).

Additionally, the general contractor normally has responsibility to assure that the other contractors fulfill their obligations with respect to employee safety which affect the entire site. The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors. It is therefore reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected. Thus, we will hold the general

contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity.<sup>6/</sup>

So long as liability is assigned as discussed above, it does not further serve the purpose of the Act to impose liability on a subcontractor who could not realistically be expected to detect a violation in the first place, or abate it once it is discovered, even though his own employees may be exposed. If the means of abatement is within the ability of another employer or employers who will be held responsible if there is a failure to abate, each employee receives the protection intended by the Act. On the other hand, 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. As noted above, each employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself 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

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<sup>6/</sup> The instant case does not involve an employer who created a hazard to which employees other than his own were exposed, nor does it involve a general contractor. Our discussion of the responsibilities of such employers is therefore dictum. We cannot, however, consider the liability of one particular class of construction employer in a vacuum. The responsibilities of all contractors on a construction site are intertwined, and must be determined in a coherent fashion. Therefore, although some of the rules set forth herein do not apply to this particular case, we fully expect to follow them in appropriate cases.

against the hazard. We therefore expect every employer to make a reasonable effort to detect violations of standards not created by it but to which its employees have access and, when it detects such violations, to exert reasonable efforts to have them abated or take such other steps as the circumstances may dictate to protect its employees.<sup>7/</sup> In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access.

In the latter respect, our holding differs from that of the Seventh Circuit in Anning-Johnson. The record there showed that the subcontractor did know of the violative conditions and the exposure of its employees. It did not indicate whether or not the subcontractor had made any effort to have the violations abated or had taken any other steps to protect its employees. It would allow subcontractors to permit their employees to be exposed to non-serious hazards without anything being done, so long as the subcontractor is not itself able to correct the condition because the condition is outside of its expertise.

In reaching its decision, the court was concerned with the economic and legal dislocations which might be caused by requiring a number of employers to correct a single condition. We think, however,

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<sup>7/</sup> As a general rule, we will not require an employer to remove its employees from the vicinity of the hazard if the condition is not corrected. In Anning-Johnson, the court held this was an unrealistic alternative, and we agree in principle.

that the court underestimated the ability of employers to protect their own employees through means of the type we have outlined, which do not give rise to the types of problems which concerned the court. Like the court's holding, ours does not require removal of employees from a jobsite, duplication of expenditures to correct violations, or place an unreasonable duty on the part of employers to identify hazards which might be beyond the scope of their expertise. Our holding does require each employer to take reasonable steps to protect its employees against known hazards which the employer can reasonably be expected to detect.

The Seventh Circuit specifically limited its holding in Anning-Johnson to nonserious violations. The instant case also involves an alleged nonserious violation. The violation, however, creates a hazard of falling 15 feet. Obviously, a significant injury could result from such a fall. We have no occasion to consider whether the violation would be properly classified as serious, for a serious violation was not alleged and the issue was not tried. See General Electric Co., 17 OSAHRC 49, BNA 3 OSHC 1031, CCH E.S.H.G. para. 19,567 (1975); pet. for review filed, No. 75-4116 (2d Cir. June 20, 1975); Dundas Pallet Co., 2 OSAHRC 511, BNA 1 OSHC 1135, CCH E.S.H.G. para. 15,467 (1973). We believe, however, that this case points out that the duty of an employer to protect his employees should not depend on whether the violation is alleged to be serious or nonserious. The duty imposed

by Section 5(a)(2) to comply with the standards is not conditioned on the severity of the violation. We think the rules we have set forth will adequately protect employees against both serious and nonserious hazards.

Turning to the facts of this case, the evidence of record shows that the standard was breached by the absence of perimeter protection on the second floor,<sup>8/</sup> that Respondent's employee had access to the hazard, that Respondent knew that perimeter protection had not been provided, and that the general contractor was responsible for the installation of perimeter protection. The record is silent as to whether Respondent made any attempt to persuade the general contractor to install the required perimeter protection, or took any other precautions to protect its employees against injury. Resolution of this case must turn on which party has the burden of proof on the issue.

The rule we have announced constitutes an exception to the general rule that an employer is liable only when its own employees have access to the violative conditions. Furthermore, the knowledge of what steps an employer has taken to have a violation corrected by another contractor or to protect its own employees is peculiarly within the knowledge of that employer, and is not the type of information one of Complainant's compliance officers could reasonably be expected to gather during an

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<sup>8/</sup> In this respect the facts here differ from those in Anning-Johnson. In that case the perimeter was protected by a cable. See 29 C.F.R. 1926.750(b)(1)(iii). A cable was not provided in this case.

inspection. Accordingly, it is appropriate to consider this issue to be an affirmative defense, and to place the burden of proof on the employer asserting the defense. See: Ocean Electric Corp., supra; Murphy Pacific Marine Salvage Co., 15 OSAHRC 1, BNA 2 OSHC 1464, CCH E.S.H.G. para. 19,205 (1975). Since there is no evidence of record bearing on the issue of steps taken by Respondent to obtain abatement by the general contractor, and we cannot conclude from the record that Respondent was without expertise,<sup>9/</sup> we find that the defense was not established. Because, however, we are here announcing the availability of this defense for the first time,<sup>10/</sup> we will afford Respondent an opportunity, if it so desires, to present any additional evidence it may have bearing on the defense.

We have considered the penalty assessment criteria established in Section 17(j) of the Act. The record shows that one employee was briefly exposed to the hazard. Respondent is a small employer, with no prior history of violations. We have no reason to question its good faith. We conclude that, regardless of whether Respondent requests further proceeding, no penalty should be assessed.

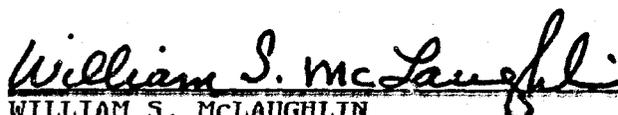
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<sup>9/</sup> In view of the nature of Respondent's business and because it did provide rail protection as to its own work on this job, it can be argued that Respondent had the expertise to abate the hazard. See note 8.

<sup>10/</sup> We have also this day issued our decision in Anning-Johnson Co., OSHRC Docket No. 3694 and 4409 ( 1976). That decision, expressing Commissioner Cleary's analysis and views regarding the problem of attaching liability as to multi-employer construction worksites, is essentially in accordance with the views stated herein.

Accordingly, the citation is affirmed, and no penalty is assessed unless within ten days of the date of receipt of this decision Respondent requests in writing a further hearing. In such event the order is withdrawn and the case remanded for further proceedings consistent with this decision. It is so ORDERED.

FOR THE COMMISSION:

  
WILLIAM S. MCLAUGHLIN  
EXECUTIVE SECRETARY

DATE: MAY 12 1976

MORAN, Commissioner, Dissenting:

Judge O'Connell correctly decided this case and, his decision, which is attached hereto as Appendix A, should be affirmed for the reasons stated therein.<sup>11/</sup> As he so appropriately held, "[t]he material facts of record in the case herein and in the Anning-Johnson Company case are identical."

My colleagues agree with this assessment of the facts but totally disregard the sound rationale in Anning-Johnson Company v. OSAHRC, 516 F.2d 1081 (7th Cir. 1975), in adopting a policy that contains the very pitfalls which the Circuit Court intended to eliminate by its Anning-Johnson decision. As they are aware, because they quote it, the Circuit Court stated therein that:

11/ The assertion in the lead opinion that Commission Judges are required to follow Commission precedents which have been reversed by the Circuit Courts is false. A decision of this Commission which has been reversed on appeal is thereby without force or effect. To cite a NLRB decision for a contrary precedent is patent nonsense. What the National Labor Relations Board does is not applicable to this Commission which was established by Congress as a new type of independent administrative tribunal solely for the purpose of adjudicating disputes. 29 U.S.C. § 651(b)(2). The NLRB has enforcement responsibilities. This Commission does not. Policy matters and enforcement under the Occupational Safety and Health Act are exclusively vested in the Secretary of Labor. See, e.g., 29 U.S.C. §§ 655-659. Furthermore, such a mandate to Judges is an unwarranted intrusion into matters which pertain to their exercise of judicial discretion.

I also find it quite interesting that Messrs. Barnako and Cleary would research published decisions of the NLRB for precedent on this matter. The converse could not be true since Mr. Barnako discontinued publication of this Commission's decisions after October 31, 1975. The following exchange between Mr. Barnako and Congressman Silvio Conte during House Appropriations Committee Hearings held in February 1976 is revealing:

"We fail to see how requiring several different employers to place a proper guard rail . . . along the edge of open-sided floors . . . fulfills the purposes of the Act any more effectively than requiring only one employer to do so. The Secretary's position is premised on the theory that the more people responsible for correcting any violation, the more likely it will get done. This is, of course, not necessarily true. Placing responsibility in more than one place is at least as likely to cause confusion and disruption in normal working relationships on a construction site. Such a policy might in effect prove to be counter-productive."

516 F.2d at 1089. Rather than paying heed to this warning, the majority concoct an epigone that will cause greater confusion for employers in the future and, indeed, will jeopardize the right of many employers to advance notice of what is expected of them.

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(Footnote 11 continued)

"MR. CONTE. Decisions issued by the NLRB are regularly published by that agency in bound volumes. Most businessmen are just as much affected by NLRB decisions as by decisions of your Commission. Shouldn't this committee, which acts on the appropriation for both of these agencies, expect that both will handle this matter in the same way? Please explain why we should appropriate funds for publication of NLRB decisions when you feel this service is unnecessary for OSHA decisions.

"MR. BARNAKO. I do not feel that I am in a position to speak for the NLRB, to evaluate the purposes their publications serve or to comment on their method of publishing decisions."

Obviously, in the case before us, Mr. Barnako feels qualified enough to cite published NLRB decisions as legal authority even though he is admittedly unable "to evaluate the purposes their publications serve." It is also apparent to me that he will rely on the NLRB as precedent when it suits his purpose to do so - and plead ignorance when NLRB precedent is contrary to his views.

The majority decision fails to enunciate any definable duties for subcontractors, but holds that in order to protect their employees they

"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."

Those requirements are only samples of what is expected of an employer.

There is no assurance that in the future my colleagues will not improvise other requirements and apply them retroactively to the cases at hand, even though an employer does not know of those requirements at the time of the inspection.

Moreover, even if my colleagues should limit themselves to the requirements listed in this decision, an employer would still be subjected to totally unascertainable standards. If a subcontractor requests the employer responsible for a violation to abate it and the responsible employer refuses, has the subcontractor fulfilled its duty? One would think so from a reading of the opinion, but it is apparent from the holding in Secretary v. Anning-Johnson Company, Docket Nos. 3694 and 4409, May 12, 1976, (a decision being issued simultaneously with this one) that such a conclusion is unjustified. In that case, my colleagues require the respondent-subcontractor to protect its employees with some alternative safety device, though the respondent took "reasonable steps" to require the responsible contractor to abate the violation. It is therefore apparent that their holding here leaves them free in the future to apply arbitrary requirements, devised with the help of hindsight, in order to impose liability.

It is obvious to me that Messrs. Barnako and Cleary, in their usual prosecutorial manner, have forgotten the purposes of the Act. As the Circuit Court observed in Anning-Johnson:

"The Act is designed not to punish, but rather to achieve compliance with the standards and the abatement of safety hazards. The underlying rationale in effectuating these purposes by placing primary responsibility on employers is that employers have primary control of the work environment and should therefore insure that it is safe and healthful."

516 F.2d at 1088. My colleagues indicate that they will punish not only the employer responsible for a hazard, but all others on a worksite. They "expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected."<sup>12/</sup> In addition, however, they mandate the impossible by requiring each employer to assure "that its own conduct does not create hazards to any employees on the site." (Emphasis added.) This will require a subcontractor to somehow insure the protection of employees of all other contractors on the worksite even though a particular condition may not present a hazard to its own employees because of their expertise in the type of work performed by the subcontractor.

The underlying rationale of the Seventh Circuit's Anning-Johnson decision is that the employer primarily at fault is the one who should be held liable therefor. In this regard, the Court observed that:

<sup>12/</sup> This is contra to the holding in Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).

"If anything at all can be gleaned from the words of [29 U.S.C. § 654(a)], it is that one who is to be charged with absolute liability be realistically in a position to comply with the promulgated standards."

516 F.2d at 1086. The validity of this fault principle has been recognized in numerous Circuit Court decisions. For example, in Brennan v. OSAHRC and Raymond Henrix, d/b/a Alsea Lumber Company, 511 F.2d 1139, 1145 (9th Cir. 1975), it was stated that:

"Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine for the totally independent act of another."

Accord Horne Plumbing and Heating Company v. OSAHRC, 528 F.2d 564 (5th Cir. 1976). That date has now arrived - unless this decision is reversed on appeal - for what Messrs. Barnako and Cleary are doing here, is to make one employer responsible for enforcing the requirements of this Act against another employer.

My colleagues correctly state that the general contractor was responsible for erecting the guardrails. They also acknowledge that "[r]espondent had no contractual obligation to erect guardrails, and its employees would not have been permitted to erect guardrails because of craft jurisdiction rules." Why then shouldn't the general contractor have been the one that was cited and held liable for the instant violation? Any ordinary person would conclude that this was the proper action. Not my colleagues, however. They elect to hold respondent liable on the basis of some broad nebulous principles which are even more indeterminate

than the general duty clause. 29 U.S.C. § 654(a)(1). The ambiguousness of this new Barnako-Cleary rule is so shadowy and vague that it leaves all employers adrift in a sea of assumptions without any bench mark to guide them. It requires subcontractors to "make a reasonable effort" to detect violations which they did not create and thereafter "to exert reasonable efforts" to have them corrected or take such other steps "as the circumstances may dictate." They further profess that their holding requires each employer to take "reasonable steps" to protect employees from known hazards which the employer "can reasonably" be expected to detect. They also state that "[a]s a general rule" they will not require removal of a subcontractor's employees from the vicinity of the hazard if a violative condition is not corrected. Are there exceptions to this general rule? If so, what are they? What does all of this legal mumbo jumbo about reasonable efforts, steps, and detection mean in the real world of the employer? I am sure that none will know until they have been convicted by my colleagues, and probably not even then. It takes nothing short of wanton self-conceit for Messrs. Barnako and Cleary to put forth this hodgepodge as a contribution to job safety jurisprudence.

My colleagues also err in placing the burden of proof on employers to prove that they are innocent even where they are not responsible for the violative conditions in issue. They do this on the ground that the information they require "is not the type of information one of complainant's compliance officers could reasonably be expected to gather

during an inspection." They fail to remember that the complainant also has the authority to investigate. 29 U.S.C. § 657(a)(2) and (b). In fulfilling his investigatory role, the complainant can interrogate witnesses and require the production of evidence. 29 U.S.C. § 657(b). A criminal investigator is not usually present when a crime is committed. He must therefore perfect his case after the fact by interrogating witnesses and gathering evidence. There is no reason why the complainant should not use the same techniques rather than shifting the burden to employers. Moreover, such a shifting of the burden is contrary to the fundamental fairness required in Brennan v. OSAHRC and Raymond Hendrix, d/b/a Alsea Lumber Company, supra, as previously discussed.

This Barnako-Cleary burden-of-proof rule means that the Secretary of Labor can henceforth cite any employer on any construction site - and that employer will be guilty of any job safety infraction on that site - unless he can prove himself innocent. This rule greatly relieves the Secretary of any investigating burdens and the only inconvenience it causes is to deprive employers of their constitutional right to a presumption of innocence plus untold thousands of dollars spent to defend themselves against charges that should never have been made.

Messrs. Barnako and Cleary assert that they are following the holding in Brennan v. OSAHRC and Underhill Construction Corporation, 513 F.2d 1032 (2d Cir. 1975). Even a hasty reading of that decision indicates that is not so. This is abundantly clear from the following statement by the Circuit Court of the principal issue in that case:

"We turn then to the important question whether a violation of the Act requires in addition to proof of the existence of a hazard, evidence of direct exposure to the hazard by the employees of the employer who is responsible for the hazard."

513 F.2d at 1036 (emphasis added after the word "employer"). The decision later states that:

"[I]t is not insignificant that it was [this employer] that created the hazards and maintained the area in which they were located. It was an employer on a construction site, where there are generally a number of employers and employees. It had control over the areas in which the hazards were located and the duty to maintain those areas. Necessarily it must be responsible for creation of a hazard."

513 F.2d at 1039 (emphasis added). The only similarity between that case and the instant one is that it involves a construction site where there were a number of employers and employees. This respondent was not responsible for the cited hazard and did not create it. The general contractor was the responsible contractor, and it was he who had control over the area and the duty to provide the guardrails.

Finally, I am constrained to comment on the majority's departure from the Seventh Circuit's Anning-Johnson decision on the ground that "a significant injury could result from . . . a fall" of 15 feet. This position is not well-taken. As respondent points out in its review brief as to its employee that was allegedly exposed to the violative condition:

"Respondent's employee was an ironworker, one of the men who had erected the stair to which he was walking when he was observed by the Compliance Officer.

The erection of stairs in an empty wellhole is a hazardous operation. Men so erecting stairs are equipped with safety belts, tie lines, etc. but they

are working at the edge of a building before there is a floor in place which can be guarded.

It is impossible to believe that men so experienced, men who often walk on beams hundreds of feet in the air, are likely to fall off the edge of a floor twenty or more feet away."

Thus, the situation here is the same as in Diamond Roofing Co., Inc. v. OSAHRC, 528 F.2d 645 (5th Cir. 1976), where it was held that 29 C.F.R. § 1926.500(d)(1) does not apply to roofs. In so doing, the Circuit Court observed:

"[T]he practice in the roofing industry is to cover or guard roof holes and openings, which present a serious and unexpected hazard to roofers, but not to guard the roof perimeter, which is an obvious danger of which roofers are highly conscious.<sup>11</sup>"

<sup>11</sup>Petitioners' employees are roofers, who would not mistakenly expect the roof perimeter to be guarded, not general construction workers, who would be accustomed to working on railed or walled as well as open-sided floors."

528 F.2d at 650. The same reasoning is applicable to respondent's ironworkers in this case - thus illustrating another breakdown in the convoluted reasoning of my colleagues.

APPENDIX A  
UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

GROSSMAN STEEL AND ALUMINUM CORPORATION,

Respondent.

DECISION AND ORDER

OSAHRC DOCKET

NO. 12775

Appearances:

Francis V. LaRuffa, Regional Solicitor, New York City,  
for Secretary of Labor; Helen E. Huyler, Esq., of Counsel.

Harold M. Grossman, Treasurer, of Tappan, New York, for  
Respondent, pro se.

James P. O'Connell, Judge.

STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the  
Occupational Safety and Health Act of 1970 (29 U.S.C. 651  
et seq., hereinafter referred to as the Act) contesting a  
citation for a nonserious violation issued by complainant  
against respondent under the authority vested in complainant  
by section 9(a) of the Act.

The citation alleges that as a result of an inspection made on February 18, 19 and 21, 1975, of a construction site and place of employment located at 888 Gates Avenue, Brooklyn, New York, the respondent violated section 5(a)(2) of the Act by failing to comply with an occupational safety and health standard promulgated by the Secretary of Labor pursuant to section 6 thereof.

The citation for nonserious violation, containing a single item, and a notification of proposed penalty were issued on March 14, 1975. Respondent by a letter received by complainant on March 20, 1975, contested both the citation and the penalty proposed thereon.

The allegation in the citation, the proposed penalty and the standard as promulgated are as follows:

CITATION

<u>Standard Involved</u>	<u>Description of Violation</u>	<u>Penalty</u>
29 CFR 1926.500(d)(1)	Every open sided floor or platform above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder.  a) It has been observed that an Iron worker on the second floor of the site, was working without perimeter guarding.	\$50.00

STANDARD

Subpart M - Floor and Wall Openings, and Stairways

§ 1926.500 Guardrails, handrails, and covers.

(d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toe board wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Hearings were held herein at New York City on June 13 and July 1, 1975. No affected employees or authorized employee representative appeared in this proceeding. At the hearing complainant presented and concluded his case consisting of certain stipulations of record and the testimony of Eugene Dreger, an OSHA compliance officer. Respondent's case consisted of the testimony of Warren J. Gross, the chairman of the board of the respondent corporation.

After both sides had rested their case, respondent moved for a dismissal of the complaint and requested that the citation and notification of proposed penalty be vacated on the grounds that complainant had failed to prove a violation of the Act as interpreted by the Seventh Circuit Court of

Appeals in its decision in the case of Anning-Johnson Company and Workinger Electric, Incorporated v. United States Safety and Health Review Commission and Peter J. Brennan, Secretary of Labor, United States Department of Labor, --- F.2d.--- (May 27, 1975). After a full discussion and arguments on the motion were made upon the record, this Judge in open hearing granted respondent's motion and ordered that the citation for nonserious violation issued herein on March 14, 1975, and the proposed assessment of penalty were deemed vacated (Tr. 94).

The oral rulings made herein in open hearing are now reaffirmed in this written decision.

#### ISSUE INVOLVED

Jurisdiction of the parties and of the subject matter are conceded. (Pleadings and stipulations).

The issue presented upon the merits of this case and upon respondent's motion is whether respondent violated the Act as alleged by complainant in the citation and complaint served herein.

#### FINDINGS OF FACT

Having carefully considered all of the pleadings, the stipulations entered upon the record, the sworn testimony presented in open hearing, having considered the oral arguments made by the parties in support and in opposition to the motion

for a dismissal and vacating of the citation made at the conclusion of the hearing, and having reviewed the prevailing law involved in these proceedings, I make the following findings:

1. Respondent is a New York corporation, and is an employer engaged in a business which affects commerce within the meaning of section 3(5) of the Act (Stipulation: Tr. 30-31).

2. Respondent, at all times pertinent herein, was engaged in the construction industry as a sub-contractor of work involving miscellaneous iron (Tr. 78).

3. On February 18, 19 and 21, 1975, respondent was a sub-contractor engaged in the erection of miscellaneous iron work comprising stairs, railings, catwalks and gratings, excluding structural steel, at a construction site in progress at 888 Gates Avenue, Brooklyn, New York (Tr. 69-70, 79-80, 83).

4. The general contractor on this construction site was Mars Normel (Tr. 36, 58, 84). It was the responsibility of Mars Normel as the general contractor to erect perimeter guarding around open-sided floors (Tr. 59, 71).

5. Respondent, under its construction contract, had no obligation for supplying or erecting perimeter guarding on the second floor of this construction site, nor did it have any responsibility under its contract for perimeter guarding on any floor (Tr. 83-86).

6. On February 18, 1975, Eugene Dreger, an OSHA compliance officer, in the course of his official duties was on the second floor of the construction site. At that time there was no perimeter guarding around the edge of the floor which was approximately fifteen feet above ground level. One of respondent's employees was observed walking towards stairways located approximately eight feet from the open and unguarded edge of the floor (Tr. 49, 51, 62).

7. Respondent's employee when he was approximately eight feet from the unguarded floor perimeter had access to the hazard of falling from the edge of the building created by an open unguarded perimeter (Tr. 40-41, 68).

8. Respondent as a sub-contractor on this construction site neither created, caused, nor was it otherwise responsible for the erection or maintenance of any perimeter guarding on the second floor.

9. Respondent neither created, caused, nor was otherwise responsible for the hazard involving the unguarded open-sided floor which existed on the second floor of the construction site at the time its employee was observed within eight feet of the perimeter.

10. Respondent, at all times pertinent herein, was not performing any structural steel or column work on the construction site (Tr. 47, 78-79)

11. The standard involved herein is identical with one of the standards involved in the Anning-Johnson Company case, supra, as are other factual items involved herein.

#### OPINION

Section 11(a) of the Act, (29 U.S.C. 660(a)) provides for judicial review of any Review Commission decision in a court of appeals upon the filing of a petition by any person adversely affected by an order of the Commission. Such an appeal was taken by the employer in the Anning-Johnson Company case, supra. The material facts of record in the case herein and in the Anning-Johnson Company case are identical. The latter case involved a subcontractor on a construction worksite charged, inter alia, with a nonserious violation of a standard set forth at 29 CFR 1926.500(d)(1) where there were employees exposed to a violative condition which was neither created, caused, nor for which the employer was responsible. Respondent herein is a subcontractor on a construction site charged with a nonserious violation of the same standard set forth at 29 CFR 1926.500(d)(1) whose employee I have found had access (exposure) to a hazard which was not created, caused, nor for which the respondent was contractually or otherwise responsible.

The unanimous decision of the Court of Appeals was that the employer was not responsible under the Act for the non-serious violation(s) charged and vacated the citations. Such decision and interpretation of the Act is binding herein. I have and do apply and follow the rule of law established by the Seventh Circuit Court in the Anning-Johnson Company case to the facts of record herein with the same result.

It is noted that the Seventh Circuit in limiting the scope of its decision ruled in the last paragraph of its lead opinion:

"We have only held that these petitioners are not responsible for the conditions deemed nonserious violation of the promulgated standards by the Secretary and, therefore, that the Secretary's policy of imposing liability on them merely because their employees were exposed to conditions which they neither created, caused, nor are otherwise responsible for, does not, on balance, fulfill the purposes of the act."

I concluded therefor, upon the merits of this proceeding, that the respondent herein as a sub-contractor on a construction site was not responsible for any nonserious violation of the standard set forth at 29 CFR 1926.500(d)(1) for which condition it neither created, caused, nor was otherwise responsible for on the date and at the place involved herein.

Accordingly, the citation for nonserious violation and the \$50.00 penalty proposed therefore issued to respondent should be vacated.

CONCLUSIONS OF LAW

1. Respondent, at all times pertinent to this proceeding, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent was subject to the requirements of the Act, including Section 5(a)(2), and any occupational safety and health standard promulgated thereunder.

3. The Occupational Safety and Health Review Commission has jurisdiction of the parties and subject matter herein.

4. Respondent as a construction subcontractor, on February 18, 1975, was not responsible for any condition deemed a non-serious violation of the standard codified as 29 CFR 1926.500 (d)(1) which existed on the second floor of the construction worksite involved herein; respondent was not in violation of the Act; and the citation for nonserious violation of 29 CFR 1926.500(d)(1) and the proposed penalty assessed therefor issued to respondent on March 14, 1975, should be vacated.

5. The Act does not allow complainant to issue a citation to the respondent construction subcontractor for a nonserious violation of the standard involved in this case.

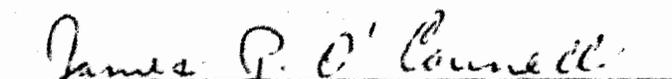
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and upon the entire record of this proceeding, it is ORDERED THAT:

1. Respondent's motion for a dismissal of the complaint and vacating of the citation for nonserious violation and the proposed penalty assessed therefor is granted.

2. The citation herein issued to respondent charging a nonserious violation of 29 CFR 1926.500(d)(1) and the proposed penalty of \$50.00 assessed therefor is vacated.

Issued at: New York, New York  
File date: August 28, 1975

  
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JAMES P. O'CONNELL  
JUDGE, OSAHRC