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SECRETARY OF LABOR Complainant, v. ODYSSEY CONTRACTING Respondent.	OSHRC DOCKET NO. 92-3149

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
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Review Commission
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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.

Date: March 17, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3149

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. ODYSSEY CONTRACTING CORPORATION, Respondent.	OSHRC Docket No. 92-3149

APPEARANCES:

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For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Odyssey Contracting Corporation (Odyssey) contests a citation issued to it on September 17, 1992. The citations resulted from an inspection of Odyssey's worksite at the Monaca/Rochester Bridge in Monaca, Pennsylvania, conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer Michael Laughlin. Laughlin's inspection was in response to a report that an Odyssey employee fell while working on the bridge on July 14, 1992, sustaining serious injuries.

The citation issued to Odyssey contains six sub-items. Items 1a through 1c originally alleged serious violations of the Occupational Safety and Health Act of 1970 (Act) regarding fall protection. At the hearing, the Secretary's motion to amend the citation to allege items 1a through 1c as willful violations of the Act was granted (Tr. 162). Items 2a through 2c remain as alleged serious violations.

The Monaca/Rochester Bridge was undergoing complete rehabilitation (Tr. 21). Mossites Corporation was the general contractor on the project. Mossites subcontracted Odyssey to perform work on the bridge beginning in November 1991 and ending in the summer of 1993. Odyssey's job "was to sandblast clean the structural steel and all the superstructure steel and then paint it with three coats of paint. During the sandblasting operation [Odyssey was] to provide a pollution control system, because there was lead paint on the bridge" (Tr. 217).

On July 14, 1992, Odyssey foreman John Todd fell 20 to 25 feet from a runway. As he fell, Todd struck two 4 x 4 vertical posts about 15 feet below the runway. Todd landed on a cable about 6 feet from the containment floor and then fell the remaining 6 feet to the floor (Exh. G-2; Tr. 98). Todd was not using any form of fall protection (Tr. 99).

Item 1a: Alleged Willful Violation of § 1926.105(a)

The Secretary charges Odyssey with a willful violation of § 1926.105(a), which provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The Secretary argues that Odyssey should have provided safety nets below the bridge runway, which was approximately 300 feet long and 36 inches wide (Tr. 106, 110). The runway was approximately 85 feet above the surface of the water (Tr. 113).

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Siebel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Odyssey contends that the cited standard, § 1926.105(a), does not apply to the conditions specified in the citation which states, "There were no safety nets being used where workers were utilizing the walkway[1] that was approximately 85 ft. above the water surface." Odyssey argues that the Secretary is attempting to transform the runway into a platform. That the structure in question is a runway is established by the record. Section 1926.502(f) defines "runway" as "[a] passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings." During the hearing, Compliance Officer Laughlin was asked three times what the structure was used for. Laughlin replied once that the structure "is the walkway into the containment area" (Tr. 105) and twice that it was used "[t]o access the containment area" (Tr. 110, 119). Section 1926.502(e) defines "platform" as "[a] working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." No work was performed on the runway (Tr. 177). In the three sub-items (1a, 1b, and 1c) that deal with fall protection, the citation specifically refers to the "Bridge Walkway." It is concluded that the structure in question is a runway within the meaning of the Act. The structure is not a platform within the meaning of the Act.

Section 1926.105(a), however, requires that safety nets be used when the "workplace" is more than 25 feet above the ground. "Workplace" covers a much broader range than either "runway" or "platform." The Act does not define "workplace," but the clear meaning of the word is obvious. "Since Congress left the term 'workplace' undefined in the Act, it should be given its ordinary, common sense meaning . . . The term 'workplace' connotes the

[1] The structure was referred to as a "walkway" at the hearing. The structure is referred to as a runway for the purpose of this decision in keeping with the terminology found in § 1926.502(f).

place where one must be in order to do his job." *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1331 (11th Cir. 1983).

Odyssey employees used the runway to gain access to the containment area. Laughlin observed three Odyssey employees moving a cart along the length of the runway as depicted in Exhibit G-29 (Tr. 115). The runway was the place where Odyssey employees were required to perform their jobs. The cited standard, § 1926.105(a), applies to the cited condition.

It is undisputed that safety nets were not provided below the runway's surface. The runway was unguarded on one side. No other form of fall protection was in use (Tr. 114). The Secretary specifically faults Odyssey for failure to provide safety nets, not for failure to provide any of the alternative safety measures mentioned in § 1926.105(a). "The standard provides that safety nets are required where other devices are impractical, not the safety nets are required unless other devices are practical." *Falcon Steel Co., Inc.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶ 30,059, p. 41,327, 41,336 (Nos. 89-2883 & 89-3444, 1993). In *Falcon Steel*, the Review Commission paraphrased *Century Steel Erectors, Inc.*, 888 F.2d 1399, 1402, 1405 (D.C. Cir. 1982), regarding the Secretary's burden of proof in § 1926.105(a) cases:

> (1) if the Secretary cites an employer for failure to provide *safety nets*, and if none of the fall protection devices listed in section 1926.105(a) was used, then the Secretary will establish a prima facie case upon showing that employees were exposed to a fall in excess of 25 feet and that none of the protective devices was used; and
>
> (2) if the Secretary cites an employer for failure to provide a fall protection device listed in section 1926.105(a) *other than safety nets* [*e.g.* belts], then the Secretary must prove that use of that device is practical.

Falcon Steel, 1993 CCH at p. 41,337 (emphasis in original).

The Secretary is proceeding under option (1) above, in which his burden is to show that employees were exposed to a fall of at least 25 feet and that none of the protective devices was used. He has shown that. Employees were exposed to falls of 85 feet from the runway, and none of the fall protection devices listed in § 1926.105(a), including safety nets, was used.

Exposure is established by Laughlin's observation of the three Odyssey employees moving the cart on the runway. Employer knowledge is established by the fact that an Odyssey foreman, John Kavouras, was one of the three men observed by Laughlin (Tr. 110). The Secretary has established that Odyssey was in violation of § 1926.105(a).

The Secretary alleged that the violation was willful.

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.G., Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *Id.*
>
> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. *Id.* Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances. *Id.* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990).

Laughlin was asked his basis for recommending a willful violation. He responded (Tr. 125):

> A. It is pretty obvious. I have a foreman who fell 20 feet and wasn't belted off. I have a foreman walking down a cart with two other workers who are wearing belts and the foreman is not.
>
> I have a safety director on site. I have a safety policy dictating the foremen are trained and they will be trained in responsibilities. There is really not a whole bunch to think about. We have knowledge. We have knowledge of a violation of a standard.

Laughlin's reasons support a finding of a serious violation, but they fall short of the standard set for a willful violation. The Secretary has failed to show any kind of "heightened awareness" of the illegal conditions or a conscious disregard on the part of Odyssey that would justify a finding of willfulness. The violation is classified as serious.

Item 1b: Alleged Willful Violation of § 1926.500(d)(1)

The Secretary charges Odyssey with a willful violation of § 1926.500(d)(1), which provides:

> 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)(1)(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 toeboard 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.

It is with this item that Odyssey's previous argument becomes effective. The water side of the runway was guarded by a rope barrier, which Laughlin testified was acceptable under the Act (Tr. 117). The bridge side of the runway had no guardrail at all (Tr. 118).

Section 1926.500(d)(1) refers to a "floor" or "platform." As pointed out in the previous section, the runway is not a platform within the meaning of the Act. "Floor" is not defined by the Act, but it is not necessary to determine whether or not the runway is a floor because § 1926.500 provides an exception to the guardrail standard. Section 1926.500(d)(3) provides:

> Runways used exclusively for special purposes may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway not less than 18 inches wide.

The runway was 36 inches wide, twice the width required by the standard. The runway was used exclusively to gain access to the containment area. Odyssey's project manager, Theodore Kartofilis, testified that the operating conditions necessitated the omission of the bridge-side guardrail (Tr. 222):

> That cart that Mr. Laughlin referred to, the walkway was 36 inches wide. The cart that they were carrying the empty paint cans off of was 36 inches wide. If there was a rail on both sides, that cart wouldn't be able to make it down there. The wheels were within that, but the outside structure of the cart was the same width as the walkway. They would have to carry the cart out over the rails.

Odyssey has shown that its runway meets the requirements of § 1926.500(d)(3). The runway was used exclusively for ingress to and egress from the containment area. One side of the railing was removed because Odyssey's operating conditions (moving equipment along the runway) necessitated the omission. The falling hazard from the runway was minimized by the width of the runway, which was 36 inches. Odyssey has established that the cited standard, § 1926.500(d)(1), does not apply to the runway. Item 1b is therefore vacated.

Item 1c: Alleged Willful Violation of § 5(a)(1)

The Secretary alleged a willful violation of § 5(a)(1) of the Act, which provides:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The citation charges that on the bridge runway:

> Workers were exposed to an 85 ft. fall hazard while handling a cart on a 36 inch wide walkway and were not provided fall protection.
>
> Among other methods, one feasible and acceptable abatement method to correct this hazard is the use of safety belts, lanyards and lifelines.

At the hearing, Laughlin testified that Odyssey could have abated the fall hazard "[b]y either using nets, catch platforms, safety belts or install a guardrail along the north side" (Tr. 121). As noted in the previous section, a guardrail on the north side was not required because of the exemption provided by § 1926.500(d)(3). The other three methods of abatement that Laughlin mentioned, *i.e.*, safety nets, catch platforms and safety belts, are all specifically referred to in § 1926.105(a), which Odyssey was charged with violating in item 1a.

Section 5(a)(1) was intended by Congress to be used when there is no applicable specific standard. A specific standard takes precedence over the general duty clause. "[A] citation for a violation of § 5(a)(1) is invalid and will not lie, where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act." *Brisk Waterproofing Co., Inc.*, 1 BNA OSHC 1263, 1264, 1973 CCH OSHD ¶ 16,345 (No. 1046, 1973). The Secretary would have Odyssey penalized twice for the same hazardous condition. Such a finding would be duplicative and against the policy of the Act. Item 1c of the citation is vacated.

Item 2a: Alleged Serious Violation of § 1926.1053(b)(16)

The Secretary alleged a violation of § 1926.1053(b)(16), which provides:

> Portable ladders with structural defects, such as, but not limited to, broken or missing rungs, cleats, or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired.

Laughlin observed a 20-foot portable aluminum extension ladder which had a missing bottom rung and a twisted siderail (Exhs. G-31 thru G-34; Tr. 140). The ladder was not marked or tagged as defective, nor was it withdrawn from service (Tr. 143-144). Laughlin observed Odyssey employee Richard Muellbronner climb the ladder from the catch platform (Tr. 139). Muellbronner told Laughlin that the ladder was the only access to the catch platform and was used routinely (Tr. 143). The hazard created by the use of the defective ladder was that the ladder could slip or fall, and an employee climbing on the ladder could lose his balance, falling from 2 to 20 feet (Tr. 144).

Odyssey argues that because the ladder was tied off at its top, there was no danger of the ladder slipping (Tr. 226-227). Kartofilis, Odyssey's project manager, testified that he was aware of the ladder's condition and that he believed it did not present a hazard (Tr. 228): "That ladder was there for awhile. I observed it."

Odyssey contends that the missing bottom rung and the twisted siderail do not *per se* constitute structural defects. In its posthearing brief, Odyssey argues (Odyssey's Brief, pg. 9):

> It must be noted that the regulations do not indicate that a broken rung constitutes a structural defect, but only indicates that such an occurrence, along with other specifically itemized potential problems, as well as unitemized potential problems, can constitute a structural defect. When they exist, one must examine the item in question and determine whether or not it is actually defective.

That is not what the cited standard requires. Under § 1926.1053(b)(16), the Secretary's burden is to show that an employer was using a portable ladder with structural defects, such as missing rungs or other defective components, and that the portable ladder was not marked as defective and withdrawn from service. The Secretary established and proved these elements. Odyssey's employees were using the ladder and Odyssey, through Kartofilis, was aware of the ladder's condition and its use. The question of whether or not to use a ladder with a broken rung and twisted siderail is not discretionary under the standard which requires that such a ladder be marked and removed from use. Odyssey was in serious violation of the cited standard.

Item 2b: Alleged Serious Violation of § 1926.20(b)(1)

Odyssey was charged with a serious violation of § 1926.20(b)(1), which provides:

> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Odyssey has a written safety program (Exh. G-37; Tr. 147). Laughlin testified that he recommended a citation for the violation of § 1926.20(b)(1) because the program had some deficiencies. Laughlin stated that the program was deficient because "management was not observing the safety rules" which he inferred from the fact that "they were violating them" (Tr. 148). Laughlin repeated the same litany of faults which led to his recommendation that Odyssey be issued a willful citation for the fall protection items (Tr.

149): "I have a foreman that fell 20 feet. I have a foreman pushing a cart on an open-sided floor, and I have a foreman climbing a busted up ladder.[2]"

Apparently, Laughlin's concerns are not with Odyssey's safety program as written, but with his perception of Odyssey's failure to comply with it. The open-sided runway was not a violation of the Act. The lack of safety nets and the use of the defective ladder were addressed under the appropriate standards. The mere fact that violations exist does not establish that an employer did not initiate and maintain an adequate safety program. Odyssey had a written safety program which Laughlin did not fault. Odyssey held weekly safety meetings with its employees (Tr. 215). Absent some other substantial evidence that the safety program was deficient, it cannot be concluded that Odyssey was in violation of § 1926.20(b)(1). Item 2b is vacated.

Item 2c: Alleged Serious Violation of § 1926.20(b)(2)

The final item at issue is the serious violation of § 1926.20(b)(2), which provides:

> Such programs shall provide for frequent and regular inspections of the jobsites, materials, and equipment to be made by competent persons designated by the employers.

"Competent person" under § 1926.32(f) "means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

Kartofilis informed Laughlin that Odyssey's foremen were the designated competent persons on the jobsite. The foremen made weekly inspections of the site (Tr. 153). Laughlin testified that the foremen could not have been competent within the meaning of § 1926.32(f) because they failed to identify the hazards that Laughlin identified (Tr. 156): "An 85 foot fall, open-sided flooring, lack of guardrails, lack of nets, structurally deficient ladder." As noted previously, the open-sided flooring and lack of guardrails were not

[2] Laughlin incorrectly identified Muellbronner as a foreman. Muellbronner was a painter and sandblaster for Odyssey, not a foreman (Tr. 221, 256).

violations of the Act. The absence of safety nets and the use of the structurally deficient ladder were, however, obvious hazards that a competent person should have identified and corrected.

The Secretary has established a violation of § 1926.20(b)(2). The hazard presented by the absence of safety nets was an 85-foot fall and, by the use of the defective ladder, a 2- to 20-foot fall. The violation is serious.

Penalty Determination

Under § 17(j) of the Act, the Commission has authority to assess appropriate penalties against the employer, "giving due consideration" to "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

Laughlin testified that the company had "25 or more employees" (Tr. 128). There was no indication of bad faith on Odyssey's part. Odyssey had been cited for a serious violation within three years prior to the hearing (Tr. 130). The gravity of item 1a, the absence of safety nets, is severe. The gravity of item 2a, the use of the defective ladder, is somewhat less severe, as is item 2c, the inspections by a competent person.

Upon due consideration of the relevant factors, it is determined that the following penalties are appropriate:

Item	Standard	Penalty
1a	§ 1926.105(a)	$1,000
2a	§ 1926.1053(b)(16)	700
2c	§ 1926.20(b)(2)	700

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 hereby ORDERED:

(1) That item 1a, alleging a violation of § 1926.105(a), is affirmed as serious and a penalty of $1,000 is assessed;

(2) That item 1b, alleging a violation of § 1926.500(d)(1), is vacated;

(3) That item 1c, alleging a violation of § 5(a)(1), is vacated;

(4) That item 2a, alleging a violation of § 1926.1053(b)(16), is affirmed and a penalty of $700 is assessed;

(5) That item 2b, alleging a violation of § 1926.20(b)(1), is vacated; and

(6) That item 2c, alleging a violation of § 1926.20(b)(2), is affirmed and a penalty of $700 is assessed.

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

Date: March 7, 1994