

Kokosing Construction Co., Inc.  
OSHRC Docket No. **00-2190 - EZ**

## APPEARANCES

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

Roger L. Sabo, Esq.  
Schottenstein, Zox & Dunn  
Columbus, Ohio  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

### **DECISION AND ORDER**

Kokosing Construction Co., Inc., (Kokosing) contracted in February, 2000, with the Ohio Department of Transportation to widen 16 miles of Interstate 71 (I-71), north of Columbus, Ohio. While performing work on three bridges along I-71 on October 18, 2000, Kokosing was inspected by the Occupational Safety and Health Administration (OSHA). As a result of OSHA's inspection, Kokosing received a serious citation on October 26, 2000. Kokosing timely contested the citation.

The citation alleges serious violations of 29 C.F.R. § 1926.200(a) or, in the alternative 29 C.F.R. § 1926.200(g)(1) (item 1), for failing to post signs warning motorists of employees who had stacked form work next to a road which passed under the interstate; 29 C.F.R. § 1926.202 (item 2), for failing to place cones or barricades to direct traffic away from employees who had stacked form work next to two roads which passed under the interstate; and 29 C.F.R. § 1926.502(b)(1), or in the alternative 29 C.F.R. § 1926.501(b)(1) (item 3), for failing to provide fall protection to employees who were jack hammering bridge decking next to the parapet wall on a bridge passing over the interstate. The proposed penalties totaled \$4,500.

The case was designated to proceed under the Review Commission's EZ Trial procedure, 29 C.F.R. § 2200.200. The hearing was held June 28-29, and August 7, 2001, in Columbus, Ohio. The parties stipulated jurisdiction and coverage (EZ Trial Conference Order; Tr. 5). The parties filed post-hearing briefs.

Kokosing denies the alleged violations and classifications. Kokosing argues that it complied with the applicable safety standards for the use of traffic controls and warning signs.

With regard to fall protection, Kokosing asserts that the 29-inch high parapet wall provided fall protection and complies with industry practice. Kokosing's unpreventable employee misconduct defense was not pursued and was withdrawn (Tr. 525-526, 633-634, 642).

For the reasons discussed, the violation of § 1926.202 (item 2) is vacated. The violations of § 1926.200(g)(1) (item 2) and § 1926.501(b)(1) (item 3) are affirmed and penalties of \$1,000 and \$1,500 are assessed.

### *The Inspection*

Kokosing, with corporate offices in Fredericktown, Ohio, is engaged in heavy construction projects throughout Ohio and occasionally in surrounding states. Kokosing has been in business since 1951 and is currently owned and managed by the heirs and spouses of its founder, William Burgett. Kokosing employs approximately 1,600 employees (Tr. 614-615, 673-674).

Kokosing, a union employer, operates five divisions: treatment, highway, building, utility, and asphalt. The highway division is the largest division, with approximately 800 employees. Most of Kokosing's highway construction work is under contracts with the Ohio State Department of Transportation (ODOT) (Tr. 117, 614, 636, 673, 687, 721).

In February, 2000, Kokosing initiated work to widen 16 miles of I-71, north of Columbus, Ohio, in Franklin and Delaware counties, pursuant to a contract with ODOT (Exh. R-3; Tr. 342, 687). The \$45 million contract required Kokosing to add one traffic lane in each direction of the interstate as well as raising and resurfacing the bridges over the interstate (Tr. 360, 410, 686, 689-691). Automobile traffic on I-71 was continuing during construction (Tr. 362). In widening the interstate, Kokosing had to make changes on 21 bridges, both mainline and overhead bridges. A mainline bridge is part of the interstate highway. An overhead bridge passes over the interstate (Tr. 122, 343, 345, 689). At its peak, Kokosing, under its project superintendent Kirby Fontaine, had approximately 140 employees working on the interstate project (Tr. 336, 391). Kokosing's work is still ongoing (Tr. 429).

In June, 2000, the I-71 project was inspected by OSHA. The inspection involved the Dustin bridge. No citations were issued (Tr. 131-133, 382-383, 387).

On October 18, 2000, OSHA compliance officer (CO) Richard Burns initiated a programmed inspection of the project pursuant to a local emphasis program. After the opening conference, CO Burns and Kokosing safety officer Joseph Sellers drove the interstate project in Sellers' truck (Exh. C-1; Tr. 38, 40-42, 130, 535).

The first worksite inspected<sup>1</sup> which involved an alleged violation was the Dustin Road bridge, an overhead bridge. CO Burns arrived at approximately 2:20 p.m (Exh. C-9; Tr. 122, 141). The Dustin Road bridge had been constructed in the early 1960's (Tr. 714). There were six employees working on the bridge. Dustin Road was closed to traffic. Four Kokosing employees, using jack hammers, were breaking up the concrete pavement on the bridge deck. Two of the employees jack hammering were observed next to the parapet wall at the edge of the bridge (Tr. 78, 89, 216). The bridge was 16 feet above the interstate (Tr. 91). The employees were not wearing fall protection. The parapet wall from the concrete deck was 29 inches high and 6 inches wide at the top (Tr. 84, 195). The 16-inch railing which ran across the top of the parapet had been removed (Tr. 384-385, 718). In addition to replacing the bridge decking, Kokosing was to increase the height of the parapet<sup>2</sup> to 36 inches (Tr. 698, 713, 721). Kokosing asserts that the parapet is a wall and additional fall protection is not required.

The second worksite inspected by CO Burns was the mainline bridge over Africa Road. It was approximately 3:11 p.m. Three Kokosing employees were removing form work from underneath the bridge where the embankment rose up to the bridge (Exh. C-3; Tr. 143-144, 218). The employees removed only the form work which could be reached by hand from the embankment. While removing the form work, the employees were working between the bridge's columns (piers) and on the embankment (Tr. 46, 151-152, 540). After removing the form work, the employees stacked the forms within 15 feet of Africa Road, near a drainage ditch (Tr. 154, 157-158, 161-162, 541). According to Kokosing safety officer Joseph Sellers, the form work whalers<sup>3</sup> were approximately three feet from the edge of the pavement (Tr. 541). The form work was to be removed by crane for use in other locations (Tr. 158-159). There were no motorist

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<sup>1</sup>Other sites were inspected but no alleged OSHA violations were observed.

<sup>2</sup>To increase the height, Kokosing uses a special machine which adds on the additional concrete without removing the existing parapet (Tr. 700, 704).

<sup>3</sup>Whaler is a main support board in a form work system (Tr. 156, 376).

warning signs, cones, or barricades placed along Africa Road. Africa Road, with two traffic lanes and a posted speed limit of 45 miles per hour (mph), was not closed to automobile traffic (Tr. 46-47, 51-52, 60, 542).

The third worksite inspected was the mainline bridge over Bale Kenyon Road. It was approximately 3:30 p.m. (Exh. C-6; Tr. 144). Earlier in the day, Kokosing employees, using a manlift, had removed form work from underneath the bridge and stacked it on the side of Bale Kenyon Road (Tr. 223). While removing the form work, the employees had arranged 50 traffic cones tapering automobile traffic through one lane under the bridge, used flaggers to direct traffic, and had placed motorist warning signs including “Flagger Ahead” and “Road Construction Ahead” (Tr. 171, 481, 483, 549). However, by the time of OSHA’s inspection, the form work had been removed and stacked. CO Burns observed only four traffic cones in the center of Bale Kenyon Road and two flaggers located on the side of the road in either direction from the bridge (Tr. 60). The employees were waiting for a crane to remove the form work (Tr. 574-575, 731, 734). Bale Kenyon Road, a rural two lane road with a reduced, posted speed limit of 35 mph, was open to automobile traffic (Tr. 68).

Based on CO Burns’ inspection, a serious citation was issued for failing to have fall protection for employees on the Dustin Road bridge (item 3); to have motorist warning signs before the Africa Road bridge (item 1); and to have barricades or cones on Africa Road and Bale Kenyon Road (item 2).

### Discussion

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer’s noncompliance with the standard’s terms, (c) employee access to the violative conditions, and (d) the employer’s actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The facts are generally undisputed. None of the alleged violations occurred on I-71 itself. Kokosing does not dispute that there were no posted traffic warning signs and barricades on Africa Road. Also, although there were four traffic cones and flaggers, there were no barricades at the Bale Kenyon Road site. Both Africa Road and Bale Kenyon Road were open to automobile traffic.

On the Dustin Road bridge, Kokosing acknowledges that the employees using the jack hammers were not using other fall protection systems. In accordance with Kokosing's practice, the employees relied on the 29-inch high parapet wall for fall protection. Application of the construction standards at Part 1926 and employer knowledge of the conditions is not in dispute.

Kokosing disputes that the terms of the standards cited were violated and that employees were exposed to a hazard. Kokosing argues that it complied with OSHA standards and industry practice when employees stacked form work along side Africa Road and Bale Kenyon Road and while employees jack hammered adjacent to the parapet wall on the Dustin Road bridge.

#### ALLEGED VIOLATIONS

##### Item 1 - Alleged serious violation of § 1926.200(a), or in the alternative § 1926.200(g)(1)

The citation alleges that employees who stacked form work off the shoulder of Africa Road were not protected by posted signs<sup>4</sup> warning motorists of their work. Section 1926.200(a) provides:

Signs and symbols required by this subpart shall be visible at all times when work is being performed, and shall be removed or covered promptly when the hazards no longer exist.

Section 1926.200(g)(1), which the Secretary asserts in the alternative, provides:

Construction areas shall be posted with legible traffic signs at points of hazard.

Kokosing does not dispute that there were no traffic signs posted warning motorists of the employees stacking form work adjacent to Africa Road. Kokosing argues that § 1926.200(a) and § 1926.200(g)(1) were not violated.

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<sup>4</sup> "Signs are the warnings of hazard, temporarily or permanently affixed or placed, at locations where hazards exist." 29 C.F.R. § 1926.303(b).

Because of the embankment and the bridge columns, CO Burns agrees that there was no hazard to employees when they were removing the form work from underneath the bridge (Tr. 154). The issue involves the employees stacking the form work along the road. CO Burns observed three employees stacking the form work within 15 feet of the road (Exh. C-3). The employees were carpenters<sup>5</sup> who generally are not involved in stacking form work and traffic control (Tr. 649).

Section 1926.200(a) does not apply to the conditions cited because the standard does not identify when warning signs are to be used. If the sign is used, § 1926.200(a) requires that it be visible. The issue in this case is whether a warning sign was required because of where the form work was stacked along the side of Africa Road.

Section 1926.200(g)(1) is a more specific standard and preempts § 1926.200(a). Section 1926.200(g)(1) informs an employer to post legible signs at “points of hazards.” Africa Road was a construction area as contemplated by the standard. The Kokosing employees used the side of the road to stack the form work for other use on the I-71 project.

Also, the employees were stacking the form work at a point of hazard because it was less than 11 feet from Africa Road, where traffic was traveling 45 mph (Tr. 46-47, 554). Kokosing safety officer Sellers testified the whaler was stacked approximately three feet from the pavement (Tr. 541). CO Burns testified that the form work was stacked approximately one foot from the road’s shoulder (Tr. 46). The two lanes of Africa Road were open to automobile traffic traveling at a posted speed limit of 45 mph (Exh. C-3; Tr. 51). Without other protection, stacking form work that close to an active road was a “point of hazard” as contemplated by § 1926.200(g)(1). There were no warning signs posted for motorists. The employees were exposed to an automobile hazard (Tr. 47).

Kokosing had knowledge of the condition. Although laborers generally stack the form work, Kokosing could have known with reasonable diligence of the lack of signs. Kokosing’s supervisor assigned the stripping work to the carpenter crew (Tr. 649). No laborers were assigned to assist. The supervisor’s instruction did not prohibit stacking. The employees were performing the work as assigned. Their work was not monitored (Tr. 416-417, 667). The stacked form work and the lack of signs were in plain view (Tr. 53). According to CO Burns,

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<sup>5</sup>According to Kokosing, laborers perform the stacking work (Tr. 650).

Kokosing safety officer Sellers agreed that signs should have been posted (Tr. 52). Sellers did not dispute Burns's testimony (Tr. 542). The employees were not disciplined for failing to post the signs (Tr. 416). There is no showing that the employees were instructed to place warning signs.

The violation of § 1926.200(g)(1) is affirmed as serious. A violation is serious under § 17(k) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 666(k), if the violative condition creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

As discussed, Kokosing should have known that the employees were stacking the form work along the side of Africa Road without posted warning signs. In the event of an accident, death or serious injury would be the probable result if an employee was struck by an automobile traveling 45 mph, the posted speed limit.

#### Item 2 - Alleged serious violation of § 1926.202

The citation alleges that there were no cones or barricades<sup>6</sup> to direct traffic away from employees stacking bridge form work along Africa Road and Bale Kenyon Road. Section 1926.202 provides:

Barricades for protection of employees shall conform to the portions of the American National Standards Institute D6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades.

Kokosing does not dispute that cones or barricades were not placed on Africa Road where employees had stacked the form work (Exh. C-3). Also, there were no barricades where form work was stacked along Bale Kenyon Road (Exh. C-6). Four cones were observed in the center of Bale Kenyon Road and two flaggers were located in either direction away from the bridge<sup>7</sup>

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<sup>6</sup> "Barricade means an obstruction to deter the passage of persons or vehicles." 29 C.F.R. § 1926.203(a).

<sup>7</sup> According to CO Burns, cones and flaggers are not barricades (Tr. 60).

(Tr. 60). One flagger told CO Burns that he was stopping traffic. CO Burns observed the flagger step out in front of a car to stop it (Tr. 64, 67). According to Kokosing safety officer Sellers, the crane was stationed on the bridge to remove the form work from the road and all automobile traffic was stopped from passing under the bridge (Tr. 545, 573-574). CO Burns testified that not all traffic was stopped (Tr. 731). He agreed that the employees could be waiting for the crane (Tr. 734).

A violation of § 1926.202 is not established. The standard does not require the use of barricades but identifies the type of barricades, when used. The reference to ANSI Manual on “Uniform Traffic Control Devices” distinguishes barricades and cones (Exh. C-5). The standard, referring only to barricades, does not identify when conditions require barricades, as opposed to traffic cones, to protect employees. Under § 1926.203(a) “barricade” is defined as “an obstruction to deter the passage of persons or vehicles.” See *Andrew Catapano Enterprises, Inc.*, 1994 CCH OSHD ¶ 30,490 (Nos. 90-0050 et al., 1994) (ALJ vacated alleged violation because “§ 1926.202 does not impose any use requirements on the employer”), *decision affirmed on other grounds*, 17 BNA OSHC 1776 (1996) (violation of § 1926.202 not addressed by Review Commission).

Also, at Bale Kenyon Road, the weight of evidence indicates that the crew was merely waiting for the crane before closing the road to traffic and hoisting the form work up to the bridge (Tr. 669, 680). Neither barricades nor cones would be required during hoisting because all automobile traffic would be prohibited from passing under the bridge (Tr. 731-732).

### Item 3 - Alleged serious violation of § 1926.502(b)(1) or in the alternative § 1926.501(b)(1)

The citation alleges that on the Dustin Road bridge, employees were jack hammering the bridge deck next to a parapet wall without fall protection.

Section 1926.502(b)(1) provides:

Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

Section 1926.501(b)(1), which the Secretary asserts in the alternative, provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an *unprotected side or edge* which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. (Emphasis added).

The facts are not in dispute. Six employees were observed removing concrete from the deck of the Dustin Road bridge. Two employees were observed operating jack hammers next to the parapet wall on the outside edge of the bridge (Exh. C-9). The parapet wall was 29 inches high and 6 inches wide (Exh. C-9). Other than the parapet wall, the employees were not protected by other fall protection. The bridge deck was 16 feet above I-71, which was open to automobile traffic at a posted speed limit of 65 mph (Tr. 90-91).

Section 1926.502(b)(1) is not the more specific standard addressing the hazard. The 16-inch railing attached to the parapet wall was removed by Kokosing to allow the employees to do the jack hammering (Tr. 348, 718). The height of the parapet wall and railing are dictated by ODOT (Exh. R-15; Tr. 352, 687).

In the alternative, § 1926.501(b)(1) is applicable. A bridge is specifically within the meaning of “walking/working surface.” *See* § 1926.500(b). Also, “unprotected sides and edges” are defined as:

[A]ny side or edge (except at entrances to points of access) of a walking/working surface, e. g., floor, rook, ramp, or runway *where there is no wall or guardrail system at least 39 inches (1.0 m) high.* 29 C.F.R. 1926.500(b). (Emphasis added).

Kokosing’s argument that it complied with the standard because the 29-inch high parapet is a wall within the definition of “unprotected sides and edges” is rejected. The 39-inch requirement in the definition of “unprotected side and edge,” Kokosing argues, applies only to the height of guardrail, not walls. Where there is no parapet wall, Kokosing does require other fall protection. “[I]t is well settled that the test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose application is questioned.” *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). The standard’s wording must be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries, Inc.*, 10 BNA OSHC 1596 (No. 77-4313, 1982). The words are to be viewed in context, not in isolation, and judged in light of its

application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). Also, a safety standard such as § 1926.501(b)(1), and the definition at § 1926.500(b), are generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working conditions.

In support of its interpretation of “wall” as used in the § 1926.500(b) definition of “unprotected sides or edges,” Kokosing claims that the bridge construction industry has always considered the bridge’s parapet wall, which ranges in height from 26 inches to 50 inches, as fall protection and in compliance with OSHA (Tr. 347, 352, 458, 461, 601-602, 711-712, 721). Representatives of the Velotta Company (25 years of bridge construction work), the Ruhlin Company (50 years in construction), and the Ohio Contractors Association (construction industry trade association) testified in support of Kokosing’s interpretation (Tr. 288, 300, 317-318, 321, 468). Additionally, Kokosing conducted an informal survey of other bridge construction companies and found that they also considered the parapet wall as fall protection (Tr. 659-660). Kokosing, based on industry practice, argues that if there is a parapet wall on the bridge, there is no *unprotected side and edge* as contemplated by § 1926.501(b)(1).

Kokosing’s interpretation is rejected. Industry practice is not relevant where a standard such as § 1926.501(b)(1) prescribes employer conduct in specific terms and is not vague. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1117 (No. 84-696, 1987). The standard at § 1926.501(b)(1) is clear and unambiguous. It requires fall protection for employees working at an unprotected side and edge. A parapet wall less than 39 inches is an “unprotected side and edge.” The only reasonable reading of the § 1926.500(b) definition is that the wall or guardrail has to be at least 39 inches. The prepositional phrase *at least 39-inches high* as used in the definition modifies equally the nouns, wall and guardrail system. The use of “or” implies equal weight. There is no punctuation separating the nouns.

Also, the fall protection standard at § 1926.501(b)(1) applies to the entire construction industry and is not limited in application to the bridge construction industry, which is the basis of Kokosing’s industry practice argument. Although there are no cases specifically addressing the bridge construction industry, cases involving other industries, such as roofing, have considered the parapet wall inadequate fall protection. *See Baker Drywall Co., Inc.*, 18 BNA OSHC 1862, 1864 (No. 98-2088, 1999, Chief ALJ) (12-inch parapet wall not adequate fall protection);

*Wolkow Braker Roofing Corp.*, 18 BNA OSHC 1891, 1895-1896 (No. 97-1773, 98-0245, 1999, ALJ) (parapet wall 28 inches not adequate fall protection where employees' upper bodies were hanging over the parapet).

Kokosing's reliance on the Review Commission's decision in *Tri-State Steel Construction, Inc.*, 15 BNA OSHC 1903, 1920-1922 (Nos. 89-2611, 89-2705, 1992), is misplaced. In that case, the Review Commission vacated a violation of § 1926.500(d)(1), which was the prior standard, on the basis that a paved highway ramp or bridge with a 29-inch concrete parapet wall on each side was not an open-sided floor within the meaning of the cited standard. The cited standard at § 1926.501(d)(1) specifically applied to "open-sided floors, platforms, and runways."

As noted by the Secretary, the current Subpart M "Fall Protection" standards became effective on February 6, 1995 (59 Fed. Reg. 40672 (August 9, 1994)) and replaced § 1926.500(d)(1) cited in the *Tri-State Steel* case. Unlike § 1926.500(d)(1), the standard cited in this case, § 1926.501(b)(1), applies to employees on a "walking/working surface," which includes bridges. See definition at § 1926.500(b). Therefore, the *Tri-State Steel* decision does not apply. Also, it is noted that the Review Commission in *Tri-State Steel* specifically found it unnecessary to decide whether the parapet wall served the purpose of an equivalent guard to prevent a fall hazard. *Tri-State Steel*, BNA OSHC at 1921.

Kokosing's interpretation would result in unreasonable consequences. Although, under some circumstances, a wall may provide adequate fall protection, the wall in this case was insufficient because it did not extend at least 39 inches above the bridge deck. Kokosing made no showing that the 29-inch parapet wall at the Dustin Road bridge provided equivalent means of fall protection, *i.e.*, equal or greater degree of safety for employees. See definition of "equivalent" in § 1926.500(b). A wall of minimal height clearly provides no fall protection. Kokosing safety officer Sellers conceded that if a parapet wall was less than 15 inches, he believed additional fall protection for employees was needed. He also could not decide whether 18 or 22-inch walls would provide fall protection (Tr. 594-595). The 29-inch parapet wall on the Dustin Road bridge did not provide adequate fall protection. The parapet wall appears to be below the employees' waist (Exh. C-9). The purpose of the parapet wall on the Dustin Road

bridge was to keep automobiles on the bridge (Tr. 317, 717). The purpose was not fall protection for employees.

Kokosing also argues that OSHA failed to cite this condition in previous inspections. The record, however, fails to establish that employees were previously observed by OSHA compliance officers working next to a parapet wall less than 39 inches high (Tr. 410). The Secretary's failure to cite a condition in prior inspections does not amount to a determination that the condition does not constitute a violation. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223-1224 (No. 88-821, 1991) (cases cited therein). An employer cannot rely on OSHA's failure to issue a citation (which is not shown in this case) to establish lack of knowledge. *Columbian Art Works*, 10 BNA OSHC 1132, 1133 (No. 78-29, 1981). There is no evidence that OSHA made any representations that deprived Kokosing of fair notice of the standard's requirements. *Miami Industries, Inc.*, 15 BNA OSHC 1258, 1264 (No. 88-671, 1991) (OSHA's affirmative representations that it considered the employer in compliance deprived the employer of fair notice), *aff'd. in relevant part and set aside in part without published opinion*, 983 F.2d 1067 (6th Cir. 1992). Kokosing's witnesses were never on a worksite during an OSHA inspection when employees were jack hammering adjacent to a 29-inch parapet wall without using fall protection (Tr. 328, 411-412, 415-416, 668).

The violation of § 1926.501(b)(1) is affirmed as serious. The employees were jack hammering the bridge decking in accordance with Kokosing's policy and practice. The crew foreman was present on the bridge (Tr. 93-94). If an employee fell 16 feet from the bridge onto I-71, death or serious injury was the probable result.

#### Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Kokosing does not dispute the reasonableness of the penalties proposed by the Secretary. Kokosing is a large employer with 1,600 employees. Kokosing is not entitled to credit for history because it has received serious citations within the preceding three years (Tr. 59).

Kokosing is entitled to good faith credit (Tr. 58). Kokosing has a good safety program with eight company safety officers who regularly inspect each of its worksites. Kokosing has a written safety program and prepares site specific plans for each worksite, including the I-71 project (Exh. R-3). Kokosing has weekly employee safety meetings, provides additional employee in-depth safety training, and has employee incentive safety programs (Exhs. R-2, R-3, Tr. 134, 136-137, 357, 518-519).

A penalty of \$1,000 is reasonable for violation of § 1926.200(g)(1). Three employees stacked form work along the side of Africa Road and no motorist warning signs were posted. The employees' exposure was of short duration. There is no dispute that while removing the form work from underneath the bridge, the employees were not exposed (Tr. 220-221).

A penalty of \$1,500 is reasonable for violation of § 1926.501(b)(1). Employees were working adjacent to the outside parapet wall of the bridge. Although the parapet provided employees some fall protection (29 inches is an acceptable height for a midrail in a guardrail system), it did not provide employees with adequate fall protection. The fall hazard was 16 feet onto I-71. There were two employees observed jack hammering next to the parapet.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

### **ORDER**

Based upon the foregoing decision, it is ORDERED that serious Citation:

1. Item 1, alleged serious violation of § 1926.200(g)(1), is affirmed and a penalty of \$1,000 is assessed.
2. Item 2, alleged serious violation of § 1926.202, is vacated.
3. Item 3, alleged serious violation of § 1926.501(b)(1), is affirmed and a penalty of \$1,500 is assessed.

