UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. JERSEY STEEL ERECTORS, Respondent.	OSHRC Docket No. 90-1307

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

I. Introduction

On March 16, 1990, Jersey Steel Erectors ("Jersey") was engaged in the construction of a strip mall on Route 70 in Lakewood, New Jersey. While driving by the site, Occupational Safety and Health ("OSHA") compliance officer Bernard DeZalia noticed that two employees, engaged in steel connecting, were not wearing hard hats. The compliance officer turned into a parking lot where he again observed the employees without proper head protection. Following OSHA policy, he called his office and obtained permission to conduct an inspection. He proceeded onto the site and presented his credentials to the foreman, Scott Volk. The foreman identified the two men as Jersey employees.

Based on the compliance officer's observations, Jersey was issued a citation alleging a repeat violation of 29 C.F.R. § 1926.100(a)[1] on the grounds that two employees were not wearing protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns. A penalty of $4800 was proposed.

After a hearing, Commission Administrative Law Judge Michael H. Schoenfeld issued a decision affirming the repeat citation and assessing the proposed penalty of $4800.

On review, Jersey does not dispute that the Secretary established a prima facie violation of section 1926.100(a). Jersey contends, however, that the citation should be vacated because the failure of the employees to wear hard hats was the result of unforeseeable employee misconduct. Jersey also argues that the judge erred by refusing to admit into evidence the OSHA Safety Manual that Jersey required be kept at the worksite and any testimony relevant to that manual.

For the reasons that follow, we affirm the repeat citation and assess a penalty of $4800.

II. Unpreventable Employee Misconduct

A. Jersey's Enforcement Program

Jersey's workrules require employees to wear hard hats. The requirement is made known to employees in several ways. For example, employees are issued hard hats from the union with their tools and, when they prepare their W-4 forms, they are checked to ensure that they have a hard hat. Employees are not supposed to work until they obtain a hard hat. When an employee does not have a hard hat, there is a service truck on the site that will provide one. Jersey also conducts weekly toolbox meetings where employees are orally instructed to wear hard hats and given instructions on other safety matters. When the employees get paid, they are required to read and sign a form letter that *inter alia*, reiterates

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[1]The standard provides:

§ 1926.100 Head Protection.

(a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

the requirement that they must have their hard hats in their possession. Safety flyers, distributed to employees, discuss a new safety related topic every week. Jersey shares other safety documents it receives from various associations and organizations with its employees.

Despite its efforts, Jersey has had substantial difficulty enforcing the rule requiring that hard hats be worn. Jersey has had special difficulty getting connectors, such as the ones observed by the compliance officer, to wear their hard hats. The connectors find them cumbersome, uncomfortable, and unnecessary. They frequently brush their hats against the beams when they bend over, and the connectors flip them off.

In describing his frustration in getting the employees to wear their head protection, Jersey president, James Gill, testified that his efforts "almost came down to physical," that he "called the guys names to their face," and that he "spat in their faces." Gill testified that employees who failed to wear their hard hats were warned that unless they wore them they would be sent "down the road." However, to avoid disrupting the work, the employees who refused to wear head protection were dropped from the payroll either at the end of the workday or as part of the normal downsizing that occurs as the job progresses. Consequently, the employee was never officially informed that his failure to follow safety rules was a factor in his termination.

Jersey has been issued three prior citations for violating 29 C.F.R. § 1926.100(a), all of which have resulted in final orders of the Commission. Two of these citations alleged a repeat violation of the cited standard.

B. Judge's Decision

Judge Schoenfeld held that Jersey failed to establish that the violation was the result of unpreventable employee misconduct. He found that, despite workrules requiring that hard hats be worn, Jersey failed to establish that the rules were effectively enforced. The judge noted that the evidence established that the company president was aware that employees occasionally would not wear their hard hats and that the foreman did not require that the hard hats be worn.

C. Discussion

Jersey argues that the judge erred by considering the wrong defense. According to Jersey, the judge applied a strict liability defense that required it to show that the employer did all that was possible to enforce the workrule. Rather, Jersey argues that this matter is controlled by the Third Circuit decision in *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1985). Therefore, once it showed that it had, and enforced, a workrule that required the wearing of hard hats, the burden shifted to the Secretary to establish that the violations were foreseeable and the steps the employer should have taken to prevent the misconduct. According to Jersey, the Secretary failed to make this showing, and the citation should be vacated. We disagree with Jersey's characterization of the defense.

The Commission has consistently held that, to prove a violation, the Secretary must show that the cited employer had knowledge of the violative condition. He can satisfy this burden by establishing that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,581 (No. 87-692, 1992); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537, 1992 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992); *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer. *Tampa Shipyards, id.*, *Consolidated Freightways, Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,809 (No. 86-351, 1991).

Once the Secretary has made a prima facie showing that the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition, the employer can establish, as an affirmative defense, that it had a thorough safety program which was adequately communicated and enforced and that the violative conduct of the employee was idiosyncratic and unforeseeable. *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 1987); *Pride Oil Well*, 15 BNA OSHC at 1815, 1992 CCH OSHD at p. 40,585; *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1414-15, 1991 CCH OSHD ¶ 29,546, p. 39,905 (No. 89-1027, 1991). As part of the defense, the employer must show that it has taken steps to discover violations. *Pride Oil Well, id., R. Zoppo Co.*, 9 BNA OSHC 1392, 1395, 1981 CCH OSHD ¶ 25,230, p. 31,183 (No. 14884, 1981).

The evidence shows that Jersey failed to establish the defense. As noted earlier, while driving by the worksite, the compliance officer observed that the steel connectors were not wearing their hard hats. After the compliance officer brought the violations to the attention of the foreman, the foreman ordered two other employees to throw hard hats up to the connectors. This evidence shows that the employees did not even have the hats with them, and suggests that they had been working without head protection for some period of time. Gill testified at length that, as a group, steel connectors were especially reluctant to wear head protection.[2] Nonetheless, the foreman, who should have been aware of the reluctance of steel connectors to wear hard hats, did not discover the violation until it was pointed out by the compliance officer. Had the foreman been reasonably diligent in enforcing the safety rule, he would have known of the violation. Thus, at a minimum, the foreman had constructive knowledge of the violation. As noted earlier, the foreman's knowledge is imputable to the company.

Although the evidence established that Jersey did have a workrule requiring the wearing of hard hats, we cannot say that its enforcement of that rule was adequate to establish the affirmative defense of unpreventable employee misconduct. Jersey points to both Mr. Gill's rather unorthodox efforts to get employees to wear hard hats and its policy of terminating employees who did not wear hard hats as evidence of its efforts to enforce its workrule. While we sympathize with Gill's frustrations, spitting on, cursing at, and threatening physical violence against employees who violate workrules does not constitute an effective safety program. To the contrary, it demonstrates that Jersey lacked a formal, well-conceived program for enforcing those workrules.

The difficulty with Jersey's practice of terminating employees who failed to wear hard hats is its timing. Gill testified that rather than fire recalcitrant employees when their failure to wear hard hats was discovered, Jersey waited for either the end of the workday or for the normal downsizing of the jobs to let them go.

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[2]We would note that the evidence shows that the reluctance of the steel connectors to wear hard hats was well known to the company. Therefore, even if we were to apply the test set forth by the Third Circuit in *Pennsylvania Power*, 737 F.2d at 357, and place the burden on the Secretary to establish that the employee violations were foreseeable, that burden has been met.

While we do not necessarily believe that termination is the only method of discipline available to Jersey for enforcement of its rule, Jersey's resort to it at some point after the rule is violated suggests that the employee's failure to wear hard hats would be tolerated until it was convenient for Jersey to terminate the employee. Moreover, Jersey never told terminated employees that their failure to comply with the rule was the reason for their termination. This evidence suggests that an employee's refusal to wear a hard hat was but one factor to be considered in Jersey's decision to terminate employment.[3] Viewing the totality of the evidence, it appears that these employees were viewed as disciplinary problems who were terminated for the convenience of the employer, rather than as part of a coherent and integrated policy designed to increase employee compliance with Jersey's work rule.

Accordingly, we find that Jersey failed to establish that the failure of the steel connectors to wear their hard hats was the result of unpreventable employee misconduct.

III. Exclusion of Evidence

A. Procedural Background

On August 2, 1990, Judge Schoenfeld issued a prehearing order. At paragraph 4(c) of that order, the judge ordered that the parties exchange:

> A list of the documents and other exhibits to be offered in evidence along with a copy of such documents and a description of any physical exhibit.

Also on August 2, 1990, the Secretary served on Jersey his "First Request for Production of Documents." In that request, the Secretary specifically asked for all documents pertaining to Jersey's affirmative defenses. Paragraph 4 of the request asked for:

> [a]ll documents relating to Respondent's alleged workrule relating to the wearing of hard hats, the communication or instruction of such rule to employee(s) working on March 16, 1990 at the cited worksite, and the enforcement activities, if any, to secure compliance with said rule at the subject worksite.

At the hearing, during its examination of Gill, Jersey sought to adduce evidence regarding an OSHA Safety Handbook. The Secretary objected to the use of the handbook

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[3] The only specific incidence of termination in the record is that of the site foreman at the time of the inspection. However, Gill testified that although the foreman was terminated after the inspection, his failure to adequately enforce the hard hat rule was one of several factors considered in the decision to fire him.

on the grounds that it was not mentioned in response to either the discovery request or the judge's prehearing order. In the ensuing discussion, Jersey's attorney failed to offer a convincing explanation for its failure to disclose its intended use of the OSHA handbook.[4]

Ultimately, the judge refused to allow into evidence either the document or any testimony relating to the document. Despite Jersey's protest that the Secretary would not be prejudiced by its failure to disclose the Secretary's own handbook, the judge held that the failure to disclose the document precluded the Secretary from fully preparing for cross-examination.

Jersey sought an adjournment of the hearing to enable the Secretary to review the document. The judge, noting that Jersey had over six months to respond properly to the prehearing order, denied the motion for adjournment.

B. Discussion

Prehearing procedures that aid in the early formulation of issues benefit all parties during trial preparation and result in the more efficient use of Commission resources at both the hearing and review stages. The imposition of appropriate sanctions is important, therefore, to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221, 1980 CCH OSHD ¶ 24,384, p. 29,718 (No. 78-5034, 1980) (consolidated). A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders, and a judge who stays within the bounds of that discretion will not be reversed. *Chartwell Corp.*, 15 BNA OSHC 1881, 1882, 1992 CCH OSHD ¶ 29,817, p. 40,626 (No. 91-2097, 1992). Therefore, the standard to be applied when reviewing sanctions imposed by a judge for a party's failure to comply with the judge's prehearing order is whether the judge abused his or her discretion.[5] *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1201-02 (3d Cir.

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[4]First, Jersey's attorney claimed that he did not realize that the Secretary's request for production of documents included all documents that were to be introduced into evidence. The attorney also pleaded ignorance of the judge's pre-hearing order, claiming that he never received it. When pressed on the issue, the attorney backed off this claim and contended instead that despite the explicit language of the order, he was unaware that he was required to provide a list of the documents he intended to offer into evidence.

[5]Abuse of discretion does not imply improper conduct by the judge. Rather, it merely indicates that the judge erred as a matter of law in exercising his discretion. "Abuse of discretion" is a term used by the courts to describe more than a mere error or difference of judicial opinion. It occurs when a judge's decision is clearly

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1978); *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1582, 1992 CCH OSHD ¶ 29,662, p. 40,184 (No. 88-1545, 1992) (consolidated); *Samsonite Corp.*, 10 BNA OSHC 1583, 1587, 1982 CCH OSHD ¶ 26,054, p. 32,737 (No. 79-5649, 1982). We find that the judge did not abuse his discretion by excluding all evidence relevant to the OSHA handbook.

The exclusion of critical evidence for its failure to be listed in the pre-trial order is "an extreme sanction" which is "not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 905 (3d Cir. 1977); *Gidlewski v. Bettcher Indus., Inc.*, 619 F. Supp. 87 (E.D. Pa. 1985), *aff'd*, 779 F.2d 42 (3d Cir. 1985). There is no intimation in the record that Jersey's failure to disclose its intent to use the OSHA Handbook was the product of either willful deception or a flagrant disregard of the judge's order. Therefore, if the excluded evidence was critical to Jersey's case, and in the absence of certain other critical considerations[6] that would cause admission of the evidence to create a manifest injustice, the judge's refusal to admit the evidence would have been an abuse of discretion.

We find that the evidence excluded by the judge was not critical to Jersey's ability to establish its defense of unpreventable employee misconduct. Jersey' purpose in introducing evidence relevant to the OSHA Handbook was to bolster its contention that it had a workrule requiring its employees to wear hard hats. However, the existence of a workrule

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[5](...continued)
unreasonable, arbitrary, or fanciful, when the decision is based on erroneous conclusions of law, or when the record contains no evidence on which the judge rationally could have based his decision. Abuse of discretion occurs when a relevant factor that should have been given weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper factors are considered, no improper factors are considered, but the judge nevertheless commits a clear error of judgment in weighing these factors. *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 at n.7, 1991 CCH OSHD ¶ 29,398, p. 39,582 n.7 (No. 88-1431, 1991).

[6]These considerations would include (1) bad faith on the part of the party seeking to introduce evidence not listed in his pretrial memorandum, (2) ability of the party to have discovered the evidence earlier, (3) validity of the excuse offered by the party, (4) willfulness of the party's failure to comply with the court's order, (5) the parties' intent to mislead or confuse his adversary, (6) the importance of the excluded evidence, (7) the prejudice or surprise in fact of the party against whom the excluded evidence would have been introduced, (8) the ability of the party to cure the prejudice, and (9) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in court; and (10) bad faith or willfulness in failing to comply with the court's order. *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d at 1201-2; *Meyers*, 559 F.2d at 904.

was conclusively established by other evidence. The OSHA Handbook was not relevant to the central remaining issue, whether Jersey adequately communicated and enforced that workrule among its employees.

Having found that the evidence was not critical to Jersey's ability to establish its defense, we must now consider several factors to determine whether the judge abused his discretion by refusing to admit evidence, including: whether admission of the evidence would prejudice the party against whom it would be offered; whether the failure of the party to obey the judge's order was the result of contumacious conduct; and whether admission of the evidence would unduly interrupt the proceedings. *See supra.* note 5

Jersey argues that the Secretary would not have been prejudiced by the admission of the excluded evidence. Jersey first asserts that the Secretary should have known of its intention to use the handbook because, in response to an interrogatory, it stated that it informed employees that the wearing of hard hats was an OSHA requirement. Jersey's assertion to the contrary, we fail to see how Jersey's response to the interrogatory could have alerted the Secretary to Jersey's intent to introduce the OSHA Handbook into evidence.

Jersey also contends that any prejudice suffered by the Secretary was mitigated by the fact that the document in question was a handbook put out by OSHA. Therefore, it claims, the Secretary already knew what was inside the handbook. We disagree. The mere fact that a document was published by the Secretary does not mean that the Secretary was prepared to cross-examine based on a party's use of that document. For example, had Jersey sought to introduce an OSHA document to show that OSHA's interpretation of a standard was contrary to the Secretary's in this case, failure to disclose the document to the Secretary prior to the hearing would have been demonstrably prejudicial. Without the ability to prepare, the Secretary might not be able to adduce evidence that the interpretation applied to a situation distinguishable from the case at hand, or that the interpretation had been subsequently overruled. The mere fact that the document was published by OSHA does not necessarily mean that the Secretary had, at his fingertips, all relevant information required for effective cross-examination.

Jersey also argues that even if admission of the excluded evidence would have prejudiced the Secretary, that prejudice could have been cured. At the hearing, the judge denied Jersey's motion for an adjournment to allow the Secretary to review the document.

It is not possible to tell from the record how long an adjournment would have been necessary for the Secretary to have adequately prepared for cross-examination. However, the hearing took the best part of a day to complete. An adequate adjournment could have required the case to carry over to the next day, along with the attendant expenses to all parties, as well as to the Commission. It is the responsibility of the Commission and its judge's to ensure that, consistent with the public interest, cases brought under the Act are adjudicated in a manner consistent with orderly procedure. *Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1514, 1982 CCH OSHD ¶ 25,974, p. 32,569 (No. 78-1361, 1982); *Consolidated Freightways*, 9 BNA OSHC 1822, 1827, 1981 CCH OSHD ¶ 25,369, p. 31,573. We find nothing in the record to show that the judge's ruling was inconsistent with the proper discharge of that responsibility.[7]

Having found that the evidence excluded by the judge was not critical to Jersey's ability to establish its defense, and that the judge properly determined that admission of the evidence would have prejudiced the Secretary, we conclude that the judge did not abuse his discretion by refusing to admit the evidence in question.

IV. Characterization of the Violation as "Repeated"

A. Previous Violations

During the 5-year period prior to issuance of the instant citation, Jersey was issued three citations for violations of 29 C.F.R. § 1926.100(a). All three citations alleged that employees engaged in steel erection and working around cranes failed to wear appropriate head protection.

Two of these three citations[8] alleged a repeated violation of that standard and were

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[7] Although we find that the judge did not abuse his discretion by excluding the evidence relating to the OSHA handbook, we are disturbed by his handling of this matter. Particularly bothersome, is the judge's failure to inquire how long it would have taken the Secretary to review sufficiently the evidence to cure any possible prejudice or, at a minimum, state for the record why it was not feasible to allow any such review. As noted, the judge may have had compelling reasons for not allowing such a review and, given the relative unimportance of the evidence, we have granted the judge substantial latitude in this matter. However, had the excluded evidence been critical to Jersey's case, we would have been more inclined to find that the judge's precipitous handling of this matter constituted an abuse of discretion.

[8] The previous repeat citations were issued on October 1, 1987 and May 20, 1985. The third citation, which alleged a serious violation of the Act, was issued on April 11, 1985. We would also note that the repeat

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settled with Jersey agreeing to withdraw its notice of contest. The third citation was not contested.

B. Discussion

A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Edward Joy*, 15 BNA OSHC 2091, 2092 (No. 91-1710, 1993); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Unless the violation involves a general standard, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. *Edward Joy Co.*, 15 BNA OSHC at 2092. Where the standard is a general standard, the Secretary would have the burden of proving that the violations are substantially similar in nature. *Id.*

The evidence establishes that all the citations involved violations of 29 C.F.R. § 1926.100(a), a standard requiring the use of protective headwear where employees are exposed to the possibility of head injury. Moreover, even if the standard was general, the nature of the violations, as described in the citations, were strikingly similar to the violative condition alleged here. As we noted earlier, in each instance, the citations alleged that employees engaged in steel erection and working near cranes failed to wear proper head protection. Therefore, we find that the Secretary made a prima facie showing that the violation was repeated.

Jersey, however, argues that in *Bethlehem Steel Corp. v. OSHA*, 540 F.2d 157 (3d Cir. 1976), the court, in finding that two previous violations did not justify a repeated violation, stated that repeatedly means "constantly, frequently, occurring again and again." *Id.* at 162, n. 11. Moreover, *Bethlehem* indicated that to support a repeat violation, the Secretary would have to show a "flaunting" of the Act similar to that required for a willful violation. *Id.* at

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[8](...continued)
citations reference several earlier citations for violations of 29 C.F.R. § 1926.100(a) that were not introduced into evidence by the Secretary. Because the record fails to establish the circumstances surrounding these referenced citations we do not consider them in our determination of whether the current citation was properly characterized as repeated.

1454. Therefore, Jersey argues, a mere three violations of the standard do not, without more, warrant classifying the violation as repeated. We do not agree.

Aside from the Third Circuit, the various United States Courts of Appeals have generally accepted the *Potlatch* test. *See e.g., J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853 (6th Cir. 1982); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982); *Bunge Corp. v. Secretary*, 638 F.2d 831, 837 (5th Cir. 1981); *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 839 (4th Cir. 1978); *Todd Shipyards Corp. v. Secretary*, 566 F.2d 1327, 1330 n.5 (9th Cir. 1977). We continue to adhere to the *Potlatch* test. However, even if we were to apply the *Bethlehem* test, we believe that the violation was properly characterized as repeated. Respondent has three prior citations for the same violation, two of which were characterized as repeated. In our view, this history satisfies both the requisite "again and again" and "flaunting" standards set by *Bethlehem*.

Jersey also argues that the violations are not properly classified as repeated because (1) there was no evidence that any of the citations involved the same employees, (2) the previous violations were too remote in time to form the basis for a "repeated" charge, and (3) it made efforts to enforce its workrule requiring the use of head protection.

We find no merit in Jersey's argument that to support a "repeated" charge, there must be some overlap in the identity of the involved employees. The argument overlooks one of the Act's founding principles, that it is the employer, not the employee, who has the ultimate responsibility for complying with the Act. *Brennan v. Gerosa, Inc.*, 491 F.2d 1340, 1344-45 (2d Cir. 1974); *Atlantic & Gulf Stevedores*, 3 BNA OSHC 1003, 1010, 1974-75 CCH OSHD ¶ 19,526, p. 23,304 (No. 2818, 1975) (consolidated). Moreover, Jersey neither cites, nor have we found, any support for its position.

Also, there is no merit to the contention that the earlier violations were too remote in time to form the basis of a repeat violation. The Commission has held that, though possibly relevant to the penalty, the time between violations does not bear on whether a violation is repeated. *Potlatch*, 7 BNA OSHC at 1064, 1979 CCH OSHD at p. 28,172.

Finally, Jersey's inadequate attempts to comply with the standard might be relevant to a finding of willfulness, if it were in issue, and may have a bearing on the "good faith" component of the penalty assessment. However, once the violation is established, evidence

of an employer's inadequate efforts to comply are not relevant to whether the violation was repeated.

Accordingly, we find that the violation was properly characterized as "repeated."

V. Penalties

The Secretary proposed and the judge assessed a penalty of $4800.[9] Jersey argues that the judge failed to discuss the appropriate penalty factors and merely rubber stamped the Secretary's assessment. It asks that we remand the case to the judge for the imposition of an appropriate penalty. Jersey's argument overlooks the fact that the Commission, in its discretion, may determine the appropriate penalty. *St. Joe Minerals Corp.*, 10 BNA OSHC 1023, 1024, 1981 CCH OSHD ¶ 25,644, p. 31,982 (No. 78-4423, 1981). Because we find sufficient evidence to enable the Commission to determine an appropriate penalty, we choose to exercise that discretion.

Examining the evidence relevant to the factors in section 17(j) of the Act, 29 U.S.C. § 666(j), we find that a $4800 penalty is appropriate. In our view, a more than 50 percent reduction from the potential maximum $10,000 penalty adequately takes into consideration: the moderate gravity of the violation; Jersey's good-faith in its attempts, albeit incomplete, to enforce the wearing of hard hats; its history of previous violations; and its size.

Regarding Jersey's history of compliance, this repeat violation is based on three prior violations, two of which were also charged as "repeated" violations. Therefore, this is the third time respondent has been cited for repeatedly violating the cited standard. This factor indicates the appropriateness of a higher penalty.

Finally, although the size of Jersey's business does not appear in the record, the compliance officer testified that he gave respondent a 20 percent penalty reduction for its size. This suggests that Jersey Steel is a relatively small business. On balance, we find that a $4800 penalty is reasonable and appropriate.

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[9]At the time the citation was issued, the maximum penalty for a repeated violation was $10,000. The Act was subsequently amended raising the maximum penalties to $70,000 for each repeated violation. Section 17 of the Act. 29 U.S.C. § 666, *amended by* Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990).

VI. Order

The judge's decision is affirmed. Accordingly, it is ordered that the citation for a repeat violation of 29 C.F.R. § 1926.100(a) is affirmed and a penalty of $4800 is assessed.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 26, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 90-1307
JERSEY STEEL ERECTORS,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 26, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 26, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1307

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
Complainant,

v.

Jersey Steel Erectors,
Respondent.

Docket No. 90-1307

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 6, 1991. The decision of the Judge will become a final order of the Commission on September 5, 1991 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 August 26, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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) 634-7950.

FOR THE COMMISSION

August 6, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1307

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 90-1307
JERSEY STEEL ERECTORS,	:	
Respondent.	:	

APPEARANCES:

ALAN KAMMERMAN, Esq.
Department of Labor
Office of the Solicitor
New York, New York
On behalf of Complainant

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Scotch Plains, NJ 07076
On behalf of Respondent

BEFORE: MICHAEL H. SCHOENFELD
JUDGE, OSHRC

DECISION AND ORDER

Background and Procedural History

This is a proceeding before the Occupational Safety and Health Review Commission pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"), to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and the related proposed assessment of penalty.

On March 16, 1990, Mr. Bernard DeZalia, a Compliance Officer ("CO") of the Occupational Safety and Health Administration of the

Department of Labor ("OSHA") conducted an unscheduled inspection of a work site located at the Town and Country Shopping Center on Route 70 in Lakewood, New Jersey at which Respondent had employees engaged in steel erection.

As a result of that inspection, a citation was issued to Respondent alleging that it had committed one repeat violation of the Act. A civil penalty of $4,800 was proposed to be assessed against Respondent.

Respondent filed a timely notice of contest. Following the filing of pleadings and some discovery, the case came on to be heard in Trenton, New Jersey on February 26, 1991. Both parties have filed post-hearing briefs.

Jurisdiction

The complaint alleges, and Respondent concedes, that it is a corporation which has employees and is engaged in the business of steel erection and that in the course of its business it uses equipment and goods which have traveled in interstate commerce.

Accordingly, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act.[1]

Citation 1, Item 1
Alleged repeat violation of 29 C.F.R. § 1926.100(a)[2]

The complaint alleges concerning Citation 1, Item 1, that:

> Two employees connecting steel up to 25 feet above the ground were not wearing any protective helmets. They were working where there was a possible danger of head injury from impact, and/or from falling or flying objects, including steel and bolts. A crane was in use to move steel, which could have impacted with each employee's unprotected head.

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[1] Title 29 U.S.C. § 652(5).

[2] **Section 1926.100 Head protection.**
(a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The following facts are not in dispute. Respondent was in the process of erecting steel at a single story "warehouse type" shopping center. (TR 73).[3] As the CO was driving by a construction site he observed a crane lowering a piece of steel to two employees without hard hats on top of a steel structure. (TR 10). The two employees were identified as Jersey Steel employees. (TR 13-14).

There is a discrepancy regarding whether or not there were tag lines on the steel as it was being raised. According to the CO there were no tag lines on the steel. (TR 61). According to Respondent's President, Mr. James Gill, there was a tag line man present at the site and under Respondent's standard procedure tag lines would have been attached. (TR 75). Tag lines, he opined, offer the tag line man and the connectors who were waiting to receive the steel some protection in that they can grab hold of the line to guide the steel into place without it "swinging wildly." The CO opined that the absence of tag lines increased the potential danger of head injuries. (TR 64). Although the use of tag lines may have been considered by the President to be standard operating procedure, he was not at the site at the time of the inspection. The CO, on the other hand, was an eye witness to the operations at the time of the inspection. The CO's testimony therefore is credited.

Respondent also takes exception to the CO's testimony as to the steel being overhead in relation to the employees. Because the CO was about a tenth of a mile down the road and because he had to turn a corner to park his car, he could not be sure if the steel was directly above the heads of the employees. (TR 25-6).

There is, however, sufficient evidence to find that at some point in time the steel was overhead in the sense that it was at a height greater than the height of the employees. Whether it was

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[3] References to the record to this case are as follows: TR, Transcript of Proceedings; CX, Government Exhibit; RX, Respondent Exhibit.

directly over (that is in a straight line above the heads) of the employees need not be resolved. Mr. Gill, an experienced ironworker, testified that connectors generally do not work beneath the steel. Connectors reach down about three feet to grab hold of the steel (TR 99). This description of the usual position in which connectors work is consistent with the President's description of the common complaint from Respondent's employees as well as others in the industry that the reason they do not wear hard hats is because the hats fall off as they reach down to get the steel. (TR 99-100).

I credit the testimony of the CO. He conceded that because of the angle of his view and the distance, he could not determine whether the steel beam was in a direct line above the heads of the employees. He clearly stated, however, that the beam was at a height which was greater than the head level of the employees (TR 26, 29-32, 34). Even if a particular beam was not directly over the head of an employee at the moment of the CO's observation, as long as the crane lifting the steel had the capability of moving steel beams at or above the head level of employees, or into such a position that either the hook or block of the crane or tag lines attached to steel beams could have been in an area where it could impact the unprotected head of an employee, there existed the precise hazard ("possible" danger of head injury from impact") sought to be eliminated by the cited standard. (Emphasis added.)

The evidence of employee exposure consists of testimony by the CO that two Jersey Steel connectors were working on a steel structure without hard hats. Government exhibit two shows two men on the steel structure without hard hats. Mr. Scott Volk, Respondent's foreman at the site when it was inspected, identified the men in the photograph as Jersey Steel employees. There are no tag lines discernible in the photograph of the steel that was being raised. Even though the steel may not have been directly over the heads of the employees, exposure to a hazard has been proved.

The Secretary does not have to prove actual exposure to a hazard, but need show only that employees had access to an area of

potential danger based on reasonable predictability. The question of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-egress, and their comfort activities." Dic-Underhill, a Joint Venture, 4 BNA OSHC 1489, 1490 (No. 3042, 1976); Adams Steel Erection, 12 BNA OSHC 1393, 1399, (No. 84-3586, 1985).

Applying the reasonable predictability test to the facts of this case, it has been established that the employees worked on the steel structure without hard hats which could have resulted in head injury as the result of impact with steel being moved by crane in their vicinity. These circumstances bring the employees, with reasonable predictability, within a zone of danger from the alleged conditions. See Brennan v. Gilles & Cotting, Inc. & OSHRC, 504 F.2d 1255, 1263 (4th Cir. 1974). Therefore, the Secretary has established employee exposure to the hazards of this condition.

In its Answer, Jersey Steel essentially asserted two affirmative defenses to the alleged violation of 29 U.S.C. § 1926.100(a). Respondent alleged; (1) a greater hazard defense, and (2) an unpreventable employee conduct defense. Respondent did not pursue the greater hazard defense on the record nor in its post hearing brief. Therefore, that defense is deemed to be waived.

To sustain an "unpreventable employee misconduct" defense, an employer must show that (1) work rules designed to prevent the violation have been established, (2) these rules have been adequately communicated to its employees, and (3) adequate steps have been taken to discover violations and these rules have been effectively enforced when violations have been discovered. Jensen Construction Co., 7 BNA OSHC 1477, 1479, (No. 76-1538, 1979). Employees must be properly trained and supervised and must be aware that the work rules will be enforced. See Danco Construction Co. v. OSHRC, 586 F. 2d 1243, 1247 (8th Cir. 1978).

Respondent has fallen far short of proving the elements of unpreventable employee misconduct. In fact, the record evidence indicates that the President was aware that on occasion the employees were not using the hard hats. Respondent's foreman was

present at the site and did not require the cited employees to wear hard hats. Although Respondent introduced evidence to indicate that they did have a safety program consisting of tool box meetings, safety flyers, and safety instruction inserts with payroll checks, enforcement of its safety rules was lacking. (TR 77). This is evidenced by the foreman's lack of enforcement of the use of hard hats and the President's frustrated efforts in effective enforcement of its own safety rules. Even though the foreman was later fired for not properly supervising employees on this occasion, his firing was also attributed to a "few other things." (TR 123). Obviously, Respondent's employees knew they could sometimes get away without using hard hats. The totality of the evidence does not indicate unpreventable employee misconduct.

Finally, Respondent argues that even if there were a violation it is not a "repeated" violation, but "Rather, they are isolated, independent violations." Post Hearing Brief, p. 7. Respondent offered nothing in support of this argument. This argument is without merit.

In order to establish a violation as repeated under section 17(a) of the Act, the Secretary must show that an employer was previously cited for a substantially similar violation and that the prior citation became a final order of the Commission. Potlatch Corporation, 7 BNA OSHC 1370 (No. 77-3589, 1978). Dun-Par Engineering Form Co. v. Marshall, 676 F.2d 1333 (10th Cir., 1982). The Secretary has meet its burden.

The record evidence establishes that Respondent has been cited for a violation of the same standard on three previous occasions. Indeed, Respondent acknowledges that it "has received similar citations in the past which it has paid, even though it might have defended them." Respondent's Brief p. 7. At the hearing, the President admitted he had received three similar citations; (1) April 11, 1985 for which it paid $120; (2) May 20, 1985 for which it paid $180; and (3) October 1, 1987 for which it paid $1,050 based on a settlement agreement. GX 3 and 4; (TR 21, 103-4). This violation is thus repeated.

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. Long Manufacturing Co., 554 F.2d 902 (8th Cir. 1977). In determining the penalty the Commission is required to give due consideration to the size of the employer, the employer's good faith, history of previous violations and the gravity of the violation.

The gravity of the offense is the principal factor to be considered. Nacirema Operating Co., 1 BNA 1001 (No. 4, 1972). The Commission has stated that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury; if any, and (4) the degree of probability of occurrence of injury. Secretary v. National Realty and Construction Co., 1 BNA 1049 (No. 85, 1971).

The CO opined that there was the possibility that the employees could be struck by the steel, wire rope slings or even the hook. He classified the citation as serious because of the possibility of being struck in the head. (TR 19, 21). The situation was further aggravated by the absence of tag lines which increased the danger of head injuries. (TR 64).

Given Respondents' employees ongoing disregard for the use of hard hats coupled with the lack of effective enforcement, and the gravity of this offense, the proposed penalty of $4,800 is reasonable.

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made in the above text. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Jersey Steel Erectors, Respondent herein, was at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

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

3. Respondent was at all times pertinent hereto, required to comply with the requirements of the Act and the regulations issued pursuant the Act.

4. The Secretary established a repeat violation of 29 C.F.R. § 1926.100 (a).

5. A civil penalty of $4,800 is appropriate for the repeat violation.

ORDER

Citation No. 1, Item 1, alleging a violation of 29 C.F.R. § 1926.100(a) with a penalty of $4,800 is AFFIRMED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: AUG 5 1991
Washington, D.C.