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SECRETARY OF LABOR, Complainant, v. CECO CORPORATION, Respondent.	:	OSHRC Docket No. 91-3235

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioner.

BY THE COMMISSION:

On April 26, 1991, Larry Zufelt, a CECO laborer, suffered a fatal 18-foot fall from an improvised scaffold in a stairwell of a building under construction. The scaffold consisted of a narrow aluminum plank, 14 inches wide, running from one landing to a straight ladder positioned on the landing below. The plank lacked guardrails and was used to support two stepladders leaning unopened against the wall, as if they were straight ladders. Following

an inspection, the Occupational Safety and Health Administration ("OSHA") issued two citations, one alleging a serious violation of 29 C.F.R. § 1926.451(a)(4),[1] and the other alleging a repeat violation of 29 C.F.R. § 1926.1053(b)(4).[2]

At issue on review are the sufficiency of the Secretary's proof of CECO's knowledge of the violative conditions,[3] and the propriety of the administrative law judge's exclusion of certain evidence relating to the credibility of the Secretary's witness on the knowledge issue. We reverse the judge's evidentiary ruling and admit the evidence, but based on our examination of the record as a whole, we affirm the judge's credibility finding and his finding of knowledge. Lastly, for reasons differing from those given by the judge, we find that the violative conditions were not the result of unpreventable employee misconduct.

BACKGROUND

April 26th was CECO's last day of work at the site, where it was a concrete subcontractor. J.D. Taylor Company was the general contractor. D.J. Dupont, CECO's district superintendent, and James Weir, CECO's job foreman, were shipping out equipment and materials when Taylor's representative asked Weir to grind some rough areas in the south stairwell of the plant. Weir looked the areas over and assigned a laborer, Michael Crisafulli, to grind them. He told Crisafulli to install temporary lighting, which Crisafulli borrowed

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[1]Section 1926.451(a)(4) provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

[2]Section 1926.1053(b)(4) provides that "[l]adders shall be used only for the purpose for which they were designed."

[3]The other elements of the Secretary's *prima facie* case of violation were established and are not in issue. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (Secretary must establish applicability of cited standard, existence of violative condition, employee exposure thereto, and employer knowledge thereof), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

from the painting subcontractor.[4] In dispute is whether Weir, whose knowledge is imputable to CECO, also told Crisafulli to use the improvised scaffold-stepladders set-up. According to Crisafulli, Weir took him to the north stairwell of the plant, where Zufelt was grinding rough spots, and told Crisafulli to bring Zufelt's equipment to the south stairwell and set it up the same way. According to Weir, he alone went to the north stairwell to get Zufelt to help Crisafulli, and he expected these laborers to use opened stepladders resting on the stairwell landings. The judge, relying on a statement Weir made to the compliance officer, found that Weir did not actually instruct the laborers to use opened stepladders. Based on this finding, on Weir's observation of Zufelt using a plank and straight ladder for grinding work in the north stairwell, and on Crisafulli's testimony, the judge found that CECO had knowledge of the violative condition.

ADMISSIBILITY

At the hearing, CECO sought to discredit Crisafulli through the testimony of Dupont and another CECO official who had questioned Crisafulli after the accident concerning his responsibility for using the unsafe equipment. CECO intended to introduce statements by Crisafulli made during this questioning that were allegedly inconsistent with his testimony at the hearing. Federal Rule of Evidence 613(b)[5] would make evidence of such prior inconsistent statements admissible if, at the hearing, Crisafulli had been "afforded an opportunity to explain or deny" them and if the Secretary could have questioned him regarding them.

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[4]As Weir admitted at the hearing, the full extent of the grinding work could not be seen without temporary lighting.

[5]Rule 613(b) provides the following:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

See United States v. Harvey, 547 F.2d 720, 722-23 (2d Cir. 1976). Crisafulli was afforded such an opportunity. CECO cross-examined him as to whether he had given an inconsistent version of events to the two officials, and thereafter, the Secretary could also have questioned him.[6] Accordingly, we hold the testimony regarding the prior statements admissible.

CREDIBILITY

We find, however, that these prior statements do not establish that Crisafulli's testimony at the hearing was unreliable.[7] Crisafulli explained at the hearing that, although he had followed Weir's instruction to use the unsafe equipment, he was worried D.J. Dupont would catch him on the unsafe equipment and reprimand him; Dupont was "very strict on safety policies." Crisafulli testified that, because he "didn't want to get anybody in trouble or [have] anything happen" in light of "any violations," he was "very tentative" about what he said to CECO and OSHA after the accident. But in a discussion before his first meeting with OSHA, Crisafulli mentioned Weir's involvement to Kevin Peterson, CECO's regional safety manager, who asked Crisafulli "jokingly" or "in a humorous way" not to volunteer that information to OSHA. Crisafulli responded that, if asked, he would have to make a full statement. Consistent with this reply, Crisafulli's first statement to OSHA was abbreviated as Peterson apparently wanted, but when the OSHA compliance officer contacted Crisafulli later and asked him if he had anything more to add, Crisafulli made a full statement. We find that this is a believable explanation for the inconsistencies in Crisafulli's statements.

We also agree with the judge that Weir's testimony "abound[ed] in inconsistencies." The judge noted that at the hearing Weir initially left stepladders out of a list of CECO's on-site equipment. When questioned further, he guessed that CECO owned the two stepladders used by Crisafulli in the south stairwell, only to testify still later that those stepladders

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[6]On review, the Secretary essentially concedes that CECO's evidence was admissible. In ruling against admissibility, the judge overlooked the fact that CECO had followed the requisite procedure. The judge did, however, permit CECO to make a question-and-answer offer of proof, which is in the transcript.

[7]*See Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228 n.15, 1991-93 CCH OSHD ¶ 29,442, p. 39,685 n.15 (No. 88-821, 1991) (Commission authority to make factual findings where administrative law judge did not).

were borrowed. Moreover, Weir testified that he had not seen any stepladders in the north stairwell when he went to get Zufelt. Whether CECO still had any stepladders on the site, Weir evidently did not know. In addition, the judge noted that Weir's expectation that Crisafulli would only use stepladders was questionable because Weir admitted having witnessed Zufelt using a similar improvised scaffold in the north stairwell to perform grinding work; this, despite his assertion that grinding work was typically done from stepladders and had been done from stepladders all the previous week. The judge concluded that Weir should have considered the possibility that Zufelt might suggest to Crisafulli that they use the same set-up to perform the same kind of work in the south stairwell.

We therefore find no basis to question the judge's characterization of Crisafulli's testimony as "worthy of credit." *See C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978) (judge's credibility findings entitled to weight because influenced by having heard witnesses and observed demeanor). We find Crisafulli credible and affirm the judge's credibility findings.[8]

KNOWLEDGE AND PREVENTABILITY

Relying on Crisafulli's testimony that Weir instructed the laborers to use the unsafe equipment,[9] Chairman Weisberg and Commissioner Foulke find that CECO had actual knowledge of the violative conditions. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39,129 (No. 85-369, 1991).

Moreover, Chairman Weisberg and Commissioner Montoya find that CECO had constructive knowledge of the violative conditions. Evidently, Weir assumed that the laborers could use stepladders, but his testimony makes plain that he did not know if stepladders belonging to CECO remained on the worksite. Weir assigned the grinding work

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[8]We assign no weight to the two answers Crisafulli gave in his deposition that differed from his testimony because the differences are not material. CECO finds inconsistencies in Crisafulli's testimony about grinding the ceiling spatter, but we find none, given his testimony indicating that he used a stepladder longer than 4-6 feet to reach the ceiling.

[9]Weir claimed there were no stepladders upon the aluminum plank when he saw it being used as a scaffold in the north stairwell. For the reasons stated above, we rely on Crisafulli's testimony that a stepladder was on the plank when Weir took him to the north stairwell.

without being able to see how far it extended towards the ceiling in the dim stairwell, but he neither instructed the laborers on what equipment to use nor checked back during the next 1 to 1½ hours to see what equipment they were using. Weir also saw Zufelt's improvised and unguarded scaffold while getting him to help Crisafulli. Although Weir may not have considered Zufelt's unguarded scaffold unsafe on the north stairway (a single-story stairway that was shorter and narrower than the south stairway), he should reasonably have anticipated that the same set-up would be used, and be unsafe, in the larger south stairwell. *See Southwestern Bell Telephone Co.*, 7 BNA OSHC 1058, 1059-60, 1979 CCH OSHD ¶ 23,278, p. 28,153 (No. 15841, 1979). A reasonably prudent supervisor would have given more specific instructions regarding how to do such a job on the last day at the worksite when the necessary equipment belonging to the company had been removed. *See Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,902, p. 40,811 (No. 90-2668, 1992).

We also find that CECO has failed to establish that the violation was an instance of unpreventable employee misconduct by Weir. CECO had a comprehensive safety program of instruction and discipline requiring fall protection. However, we have found that a supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax. *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). Here, as we have found, Weir knew or should have known of the violations. Moreover, Dupont and Weir were involved in the process of removing equipment from the worksite, including the fall protective devices, and there is no evidence that CECO officials took feasible steps to ensure compliance with their rules by making the requisite fall protective devices available through the last day on the worksite. In view of the fact that CECO's safety program had been, in effect, aborted on the last day on the worksite, we find the company liable for the two violations.

ORDER

Accordingly, we affirm the citation items, as well as the judge's penalty assessment of $23,000, which is not disputed by the parties.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: April 12, 1995

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-3235
CECO CORPORATION,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 12, 1995. **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 12, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-3235

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SECRETARY OF LABOR
Complainant,
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CECO CORPORATION
Respondent.

OSHRC DOCKET
NO. 91-3235

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 August 3, 1993. The decision of the Judge will become a final order of the Commission on September 2, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before August 23, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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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: August 3, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3235

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SECRETARY OF LABOR,	
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v.	OSHRC Docket No. 91-3235
CECO CORPORATION,	
Respondent.	

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For Respondent

Before Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Ceco Corporation (CECO) was cited on October 22, 1991, for alleged serious violation of 29 C.F.R. §1926.1053(b)(4) which provides that ladders shall be used only for the purpose for which they were designed; and for alleged repeat violation of § 1926.451(a)(4) which requires guardrails and toeboards on all open sides and ends of platforms more than 10 feet above ground or floor. The Secretary proposes that a penalty of $4,500 be assessed for the first item and $25,000 for the second.

The two citations stem from an incident which occurred on April 26, 1991, CECO's last day at the worksite where it was engaged by the general contractor, J.D. Taylor Company (Taylor), as a subcontractor to perform concrete form work at an Anheuser-Busch (A-B) waste water treatment plant in Baldwinsville, New York. On that day, three CECO laborers were doing grinding work in the south stairwell when one of them, Larry Zufelt, fell

from a makeshift scaffold to the ground 18 feet below (Tr. 19-20, 273, 275-76, 300-03, 396-99, 463; Exh. C-1).[1] On May 10, 1991, Mr. Zufelt died from the injuries sustained from the fall, and on May 23 an OSHA compliance office began an investigation of the accident (Tr. 273-74).

The makeshift scaffold on which the CECO employees were working consisted of an aluminum "pic" board[2] lain horizontally across the south stairwell with one end resting on the stairs' upper landing and the other on the rung of an unsecured ladder placed on the lower landing and leaned against the wall. It is undisputed that there were no guardrails or toeboards along the pic board's edges, and that the employees used a step ladder while placed on the boards in the closed position.[3] While admitting the existence of the substandard conditions, CECO defends on the grounds that it neither had knowledge of the violations nor failed to exercise reasonable diligence in discovering those violations. CECO pins the blame on one of its laborers, Michael Crisafulli, who had been employed by CECO for 15 years as a laborer and, on prior occasions, as a laborer foreman. CECO contends that the job foreman had assigned Crisafulli, along with two other laborers to do a specified amount of work to be done off ladders, and that it was Crisafulli who rigged up the illegal platform and ladder system in violation of CECO's safety rules. CECO's brief at 4-5.

CECO's foreman at the site was James Weir who testified that he assigned three laborers to the south stairwell project on April 26 to do the grinding work on two seams between the concrete wall panels (Tr. 396-97, 453-56, 477, 491; Exhs. C-16, R-8). Weir stated that grinding work was typically done from step ladders and he had no reason to believe that this particular work could not be performed in the same manner (Tr. 397-98, 478-79). Consequently, he did not tell the men how to perform the work or what equipment they should use. After pointing out the work to be done, he left the stairwell area and did

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[1]Grinding work involves the grounding down and patching of imperfections in the poured concrete (Tr. 11-13, 36-37; Exhs. C-10, C-11).

[2]The "pic" board was borrowed from the painting subcontractor and was light enough for one person to carry (Tr. 488-89, 494, 565).

[3]The "step ladder" was a self-supporting, foldable, portable ladder.

not return until he was called to the scene of the accident. Weir maintained that the men acted on their own initiative when they assembled the makeshift scaffold and used the step ladder in a closed position. If he had been aware of the set-up, he would have stopped the procedure immediately (Tr. 401).[4]

Michael Crisafulli, who was one of the laborers assigned to do the grinding work on April 26, testified that Weir instructed the crew to grind not only the seams between the wall panels, but also the concrete ceiling drippings (Tr. 12-13, 43-44; Exh. C-13). Crisafulli stated that when he expressed concern regarding the laborers' ability to reach the area high up on the stairwell's wall and ceiling, Weir took him over to the site's north stairwell where Zufelt was already performing grinding work from a pic board scaffold with a closed step ladder on it and told him to duplicate that set-up in the south stairwell (Tr. 14-15, 43-45, 110-11). According to Crisafulli, the set-up in the north stairwell was then dismantled, carried to the south stairwell, and reassembled (Tr. 15-16, 103; Exh. C-1).

Weir's testimony abounds in inconsistencies. When asked by the Secretary's counsel to identify what equipment owned by CECO remained at the site on the last day, he first indicated that there were only two CECO tool boxes full of hand tools at the site, but subsequently added that there were also a couple of large ladders which belonged to CECO being used in the south stairwell (Tr. 413-16, 420-21). Later, Weir denied that any of the equipment used in the south stairwell belonged to CECO, stating that the pic board had been borrowed from the painters, the straight ladder belonged to Taylor, and the step ladder belonged to either Taylor or the painters (Tr. 488-89). Weir's admission on cross-examination that he could not actually see the extent of the grinding work he assigned that day because the lighting in the south stairwell was poor, seriously undermines his assumption that the work could have been successfully performed from step ladders (Tr. 458-59, 465-66). Thus, even if it were true that he did not direct the workers to go so far as to grind ceiling

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[4]Weir did not observe the actual set-up even when he was called to the scene of the accident. In his written statement given to the compliance officer, Weir stated that by the time he arrived, the equipment "had been moved out of the way for clear passage of medical/rescue personnel" (Exh. C-16). This information was confirmed by CECO's own witness, D.J. Dupont (Tr. 534). However, during the hearing Weir testified that Crisafulli had removed the makeshift scaffold because: "He was just scared. He wanted to get it out of there" (Tr. 489-90).

drips, it is possible that the imperfections of the two seams he claims to have assigned extended further up the wall than he realized and could not possibly be reached from a step ladder alone. Indeed, Weir conceded at the hearing that the work on these seams "ran up aways" and Crisafulli indicated that he was grinding *seams* from the pic board when Zufelt fell, not ceiling drips (Tr. 19-20, 458-59).

Although Weir denied ever taking Crisafulli over to the north stairwell, he did admit to having checked on Zufelt there the morning of April 26th as he performed grinding work from the same pic board set-up ultimately used in the south stairwell (Tr. 400-01, 429, 499-500; Exh. C-17).[5] More telling is Weir's acknowledgement that the set-up used by Zufelt in the north stairwell posed a fall hazard (Tr. 499-500).[6] There is no indication from Weir, however, that upon witnessing the use of this hazardous set-up, he ordered Zufelt to take the necessary safety precautions or come down from the scaffold.[7] Moreover, Weir testified that *he* was the one who sent Zufelt to the south stairwell to assist Crisafulli and Fratto, the third member of the crew, with the grinding work (Tr. 465). Therefore, assuming that he himself did not direct Crisafulli to utilize the pic board set-up, Weir certainly should have considered the possibility that Zufelt might suggest that the workers utilize the same set-up he had just successfully, and apparently without reprimand, used in the north stairwell to perform the same kind of work. Clearly if, as Weir conceded, the set-up employed in the narrow north stairwell posed a fall hazard, it was equally, if not more, dangerous to utilize it in the wider south stairwell. Although there is no indication in the record that Zufelt actually made such a suggestion on that morning, one must wonder just how Crisafulli ended

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[5]Weir's admission that he witnessed the use of this set-up in the north stairwell to perform grinding work weakens not only his prior assertion that grinding work was typically done from step ladders and had, in fact, been done from step ladders all that last week, but also his contention that he had no reason to believe that the work would be performed any differently in this case (Tr. 397-98, 478-79).

[6]The north stairwell was a narrow, single stairwell with a height of over six feet; in contrast, the south stairwell was a higher, double stairwell (Tr. 111-12, 343-44, 499-500). Although the compliance officer testified that he was told by CECO that there was *not* a fall hazard in the north stairwell, he also indicated that he had not actually seen either the stairwell or the set-up in question (Tr. 343-44).

[7]Clearly, Weir's apparent failure to act upon an obvious safety infraction directly contradicts any claim on CECO's part in connection with its allegation of unpreventable employee misconduct discussed *supra* that its supervisors seriously enforced safety work rules at the site.

up using the very same set-up that Zufelt had just used in the north stairwell if, as Weir contends, Crisafulli was never taken to the north stairwell and told to duplicate the set-up being used there.

As was noted during the hearing, it seems incredible that on their last day at this site, a Friday no less, as materials and tools were being packed up and sent off-site, three experienced laborers would take it upon themselves to set up an elaborate makeshift scaffold in order to perform work which far exceeded their assigned duties. (Tr. 486-87, 496-97, 552-53). That such an effort would have been undertaken by these workers without some direction from Weir that this was what was expected of them just doesn't make sense.

CECO challenges Crisafulli's credibility by pointing to a written statement he gave to the compliance officer in May 1991 (Exh. C-13) "where he admitted that he decided how to set up the pic board and ladder". CECO's brief at 5-6. This statement which was neither signed nor dated by Crisafulli in the designated spaces provided on the OSHA standard statement form, was repudiated by Crisafulli at the hearing (Tr. 52-56). His testimony was worthy of credit.

EXCLUSION OF EVIDENCE

At the hearing, CECO sought to admit the testimony of two CECO employees, D.J. Dupont and Kevin Peterson, regarding prior statements made by Crisafulli, who was on the pic board with Zufelt when he fell and who served as a primary witness for the Secretary in this case (Tr. 536-540, 563). CECO contends that these prior statements are inconsistent with those made by Crisafulli at the hearing and therefore, impeach his testimony. The Secretary objected to the admission of these statements on the grounds that they are hearsay. After citing to several Federal Rules of Evidence which he claimed supported admission, CECO's counsel made offers of proof and it was agreed that the matter would be briefed by the parties (Tr. 540-44, 563-64).

CECO has presented several different arguments in support of the admission of this testimony. One is that the statements are admissible as prior inconsistent statements under Federal Rule of Evidence 801. Indeed, according to Rule 801(d)(1), under certain conditions, the prior inconsistent statements of a witness are *not* hearsay and therefore, can

be admitted for the truth of the matters they assert.[8] *See also* McCormick, *Evidence* § 251 at 12-21 (4th ed., 1992). This rule has no application here, however, because the out-of-court statements made by Crisafulli were not made under oath and he was not questioned about them during cross-examination.

CECO also contends that the prior statements may be admitted for the limited purpose of impeaching the credibility of the witness. *See* McCormick, § 34 at 113; Louisell & Mueller, *Federal Evidence*, vo. 3, § 356 at 546 (1979 & Suppl. 1992). In such a case, however, the prior inconsistent statements of a witness may not be proven by extrinsic evidence unless the witness is given the opportunity to explain or deny the statements and the opposing party is given the opportunity to examine the witness on them. Fed. R. Evid. 613(b). *See also* McCormick, § 37 at 121-22; Louisell & Mueller, § 358 at 561. The record shows that CECO has met neither one of these two requirements.

Two other rules cited by CECO in support of admission are also inapplicable here. Rule 804(b)(3) governs statements made against interest, but applies only to instances where the declarant is unavailable as a witness. Crisafulli was never "unavailable" within the meaning of the Rule. Rule 803 sets forth exceptions to the hearsay rule and subsection (24) provides a catch-all exception for cases where the judge determines, among other things, that the statement possesses some guarantee of trustworthiness. The rule provides, however, that a statement cannot be admitted pursuant to this exception

> "...unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

CECO did not comply with this requirement.

UNPREVENTABLE EMPLOYEE MISCONDUCT DEFENSE

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[8]Rule 801(d)(1) provides that a prior statement by witness is not hearsay if:

> (1)...The declarant testified at the trail or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition...

Although CECO's defense of employee misconduct is grounded on the alleged actions of Crisafulli who was employed at the site as a laborer, the evidence clearly points to Weir, the job foreman, as the person mainly at fault. In cases involving improper conduct by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy. *Brock v. L.E. Myers Co., High Voltage Div.* 818 F.2d 1270, 1277 (6th Cir. 1987). The proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program and not on whether the employee misconduct is that of a foreman as opposed to an employee. *Id.*

In *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-0351, 1991), the Commission set out the applicable rule as follows:

> Under Commission case law, the supervisor's knowledge of the violations, both actual and constructive, is imputable to the employer for the purpose of proving employer knowledge of the violations *unless* the employer establishes that it took all necessary precautions to prevent the violations, including adequate instruction and supervision of its supervisor.

The compliance officer essentially conceded that CECO's safety rules were adequate to deal with fall hazards, The fall prevention section excerpted from CECO's supervisor's safety manual specifically states in the manual's section on ladders that "step ladders should always be used in a fully opened position" (Tr. 508-09; Exh. R-9). The manual also contains three sections that deal with guardrails, toeboards, and scaffolds, and each references the need for such precautions when the scaffold being used is six feet or more in height (Exh. R-9). Finally, both the supervisor's manual and the employee safety rules contain what was referred to at the hearing as the "six foot rule", a rule which requires that employees "tie off" with a safety belt when working at heights of six feet or more and no other fall protection is present (Exhs. R-5 & R-9). Compliance with this rule would have prevented the incident on which the citations are based.

Both Crisafulli and Weir testified convincingly to their knowledge of these rules (Tr. 42-43, 72-72, 77-78, 90-91, 118-19, 363-65.) Crisafulli even admitted that he knew the use of the unguarded scaffold and closed step ladder violated CECO safety rules as he

understood them (Tr. 77, 118-19). Moreover, Weir presided over weekly toolbox meetings at the site during which these work rules, as well as general safety concerns, were discussed; from January to April 1991, approximately 14 toolbox meetings were held and attended by all of the employees involved with the April 26th incident (Tr. 42-42, 46, 80-83, 366-69; Exh. R-10). Fall protection appears to have been discussed at every one of these meetings and ladders were specifically noted on two of the meetings' reports (Exh. R-6). Monthly foreman safety meetings were also held to review safety performance for the month as well as the rules contained in the supervisor's manual (Tr. 83-88, 370-73, 507-10).[9] In addition, the employee work rules were distributed to all new hires as part of a safety materials package and were reviewed with employees at that time (Tr. 361-66).[10] It would appear, therefore, that CECO's safety rules were being effectively communicated to its employees.

CECO argues that it conducted regular inspections at the A-B site in order to monitor compliance with safety rules and also, that it effectively enforced these rules when violations were found. CECO conducted several inspections of the A-B site during the months leading up to the accident. CECO submitted several weekly safety inspection reports completed by Weir from January to April 1991, and two reports completed by Dupont in connection with inspections he performed in January and February of 1991 (Tr. 378-79, 387-89, 510-11; Exhs. R-7 & R-10). In addition to these formal inspections, Dupont testified that he would informally inspect the site any time he was there which, near the end of the project, was almost every day (Tr. 510-12). Likewise, CECO's regional safety manager, Kevin Peterson, testified that he conducted a safety audit on each of the three occasions he visited the A-B site prior to his investigation of the accident (Tr. 560-610).

In addition to CECO's own inspection and control procedures, safety inspections were also conducted by Risk Technical Management Company (RTM), an organization hired by A-B to facilitate the administration of a safety program for the project's insurance company.

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[9]Evidently Crisafulli also attended some of the foreman safety meetings in the four moths preceding the accident since he worked as a foreman for CECO on previous projects; at the A-B site, though, he worked as a laborer (Tr. 9-10, 72, 85-88, 370-71, 510).

[10]It is unclear how the supervisor's manual was distributed, but Crisafulli did indicate that a copy of the manual was kept in the "office" (Tr. 87-88).

RTM had a full-time inspector on-site to ensure safety compliance on the part of all contractors and subcontractors (Tr. 129-33, 231-32).

Three RTM employees were called as witnesses for the Secretary. The Secretary maintains that their testimony supports the contention that CECO's safety program, while comprehensive, was poorly implemented. Although the RTM witnesses offered somewhat varying views on this issue, their overall assessments were not fundamentally at odds. On the one hand, Robert Grosso, RTM's safety and loss control representative at the A-B site until early 1991 who visited the site on a daily basis, testified that CECO was one of the more cooperative subcontractors at the site regarding safety procedures (Tr. 129-31, 142-43, 152, 157-58, 169-74). The other two RTM employees, James Goss and John Coniglio, stated respectively that CECO's safety program lacked follow-through and was poorly implemented (Tr. 202, 240-41). Goss and Coniglio, however, were not on-site as often as Grosso and had less contact with CECO personnel than he did (Tr. 179-80, 231-33, 236-37, 385-86, 528-29).

Despite the good things Grosso had to say about CECO, the contrast between his testimony and his two colleagues disappears when we direct our attention to the following relevant evidence: Several "safety service reports" Grosso recorded from November 1990 to February 1991 indicate that CECO was frequently cited for safety infractions (Tr. 132-50, 152-56; Exh. C-14). On many occasions Grosso brought these matters to the attention of CECO's various crew foreman so that the conditions could be corrected. He regarded Weir as one of the "more cooperative" foreman (Tr. 136-37, 139-40, 144, 172-74; Exh. C-14). Although Grosso gave CECO a "B+"for its managers' efforts to maintain a safe work environment relative to the other trades on the construction project (Tr. 174), he made it clear that CECO as well as the other contractors was remiss in its enforcement of safety policy (Tr. 163), and that it was not unusual to encounter CECO employees working without necessary fall protection (Tr. 165-66).

It is, concluded that CECO has failed to demonstrate that its efforts to monitor and enforce compliance with its rules were adequate. Accordingly, the affirmative defense of unpreventable employee misconduct is rejected.

VALIDITY OF REPEAT VIOLATION CHARGE

The parties have stipulated that a 1989 final order exists against CECO for violating the platform guarding requirement set forth in 29 C.F.R. § 1926.500(d)(1) at a construction site in Massachusetts (Tr. 5-7).[11] On the basis of this final order, CECO's violation of the scaffold standard at § 1926.451(a)(4) at the A-B site in New York has been classified as a repeat violation. CECO challenges the validity of the policy under which this repeat violation was issued, arguing that changes made in December 1990 to OSHA's repeat policy were made in violation of § 553 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706.

Prior to December 31, 1990, OSHA's policy required that in order to serve as the basis for a repeat violation, a prior violation had to have been issued in the past three years to the same employer for the violation of the same or a similar standard within the geographical area or jurisdiction of the Area Office issuing the current violation; in other words, if the prior citation occurred outside the geographical area in which the current violation occurred, then the current violation could not be considered a repeat violation (Exh. R-1). OSHA changed this requirement in a December 31, 1990 directive, CPL 2.45B CH-1, which provided that high gravity serious violations could be issued as repeat violations regardless of the geographical area in which the prior violation occurred; thus, any prior violation of the same or a similar standard issued to an employer within three years of the current violation can serve as the basis for a repeat violation (Exhs. R-2 & R-3).[12]

CECO contends that this policy change constitutes a change in rule-making and therefore, is subject to the notice and comment requirements of the APA. Specifically, § 553 requires an agency to give general notice of any proposed rule-making and to give interested parties an opportunity to participate in the rule-making by allowing them to

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[11]§1926.500(d)(1) 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....

[12]A July 22, 1991 memorandum from OSHA's Director of Compliance Programs clarifies this change in the repeat policy and allows for the use of an employer's nationwide citation history to support a repeat violation whether the violation is high gravity serious or not (Exh. R-3).

"comment" on the issue either orally or in writing. These notice and comment provisions do not apply, however to "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice...". 5 U.S.C. § 553(b)(A). The Supreme Court has stated that agency actions can be distinguished as either one of these enumerated exceptions or as "substantive rules". *Chrysler Corp. v. Brown*, 441 U.S. 281, 301, 99 S.Ct 1705, 1717 (1979) (footnote omitted). Because "substantive" or "legislative" rules are those which affect individual rights and obligations and "have the force of law", i.e. are binding upon a court, they are always subject to notice and comment requirements of the APA. *Id.* at 1718, 1723-24. *See also United States Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1152-53 (5th Cir., 1984) ("*Kast Metals*"); *Phoenix Forging Corp.*, 12 BNA OSHC 1317, 1323, 1985 CCH OSHD § 27,256 (No. 82-398, 1985) ("*Phoenix Forging*").

The Secretary correctly argues that the OSHA directive at issue here cannot be considered a substantive rule because it imposes no new legal obligations on employers and does not alter an employer's duty to comply with the requirements of the OSH Act. Indeed, on its face, the OSHA directive constitutes a rule of agency *procedure* in that it addresses the administrative requirements involved in citing an employer for a repeat violation. *See Kast Metals* at 1149 (OSHA directive governing the selection of employers of inspections a rule of procedure under § 551(4) of the APA).[13] As noted above, rules of agency procedure are specifically excluded in § 553(b)(A) from notice and comment requirements. This exemption, however, "does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated". *Brown Express, Inc. v. United States,* 607 F.2d 695, 702 (5th Cir. 1979). *See also Kast Metals* at 1153; *Phoenix Forging* at 1323. As the Fifth Circuit has stated, "an agency rule that modifies substantive rights and interests can only be nominally procedural and the exemption [from notice and

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[13]Section 551(4) of the APA defines a "rule" as:

> "...the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency..."

comment] for such rules of agency procedure cannot apply". *Kast Metals* at 1153 (footnote omitted).

CECO has failed to provide any evidence of the ways in which this directive "substantially impacts" upon it or other employers. Moreover, as has already been noted, the change in OSHA's repeat policy does not impose any new obligations upon employers or affect their legal rights under the Act; indeed, a repeat violation under the new policy can still be contested by an employer in the same manner as before and the Secretary still carries the burden of proving the violation. Furthermore, the directive should have no affect on the manner in which an employer complies with the Act; as the Secretary points out, CECO surely cannot be claiming that it relied on OSHA's prior geographical limitation for repeat violations to dictate its safety enforcement practices.

In *Phoenix Forging*, the Review Commission rejected the argument that an OSHA directive altering the manner in which workplaces are selected for inspection had a "substantial impact" upon employers even though the directive implicated issues involving the Fourth Amendment and the issuance of warrants. Certainly a directive which simply expands the geographical area in which a prior violation can serve as the basis for a repeat violation has less of an impact upon employers than the directive in *Phoenix Forging*. It is concluded that the change in OSHA's repeat policy was *procedural*, not substantive, and therefore, was exempt from the notice and comment requirements of the APA pursuant to § 553(b)(A). Because the standard for which CECO was previously cited is sufficiently similar to the standard cited here in that both address fall hazards from open platforms or scaffolds and require the use of guardrails or railings to protect employees, the Secretary has properly characterized the current violation as a repeat violation.

The hazardous conditions for which CECO was cited posed a substantial threat of death or serious physical harm to its employees and therefore, the characterization of these violations as serious was justified. Accordingly, the alleged violations are affirmed as cited. Applying the penalty criteria of 29 U.S.C. § 666(j), a penalty of $3,000 is assessed for violation of the ladder standard at § 1926.1053(b)(4), and $20,000 for repeat violation of the platform standard at § 1926.451(a)(4).

Based upon the foregoing findings and conclusions, it is

ORDERED that the citations are affirmed and penalties totalling $23,000 are assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: July 28, 1993
Boston, Massachusetts