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SECRETARY OF LABOR, Complainant, v. L & M LIGNOS ENTERPRISES, Respondent.	OSHRC Docket No. 92-1746

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

L & M Lignos Enterprises ("L&M"), a bridge painting and sandblasting firm, was hired to remove the paint from the underside of a bridge in downtown Cleveland, Ohio. On November 22, 1991, while removing paint, L&M employee Emmanuel Kleoudis fell from a scaffold[1] onto a barge floating beneath the bridge and later died from his injuries. Following an inspection of the worksite by the Occupational Safety and Health Administration ("OSHA"), L&M was cited for a violation of 29 C.F.R. § 1926.21(b)(2) for failing to instruct employees in the recognition and avoidance of hazardous conditions.[2]

[1] The scaffold that the employees stood on was 28 inches wide and 32 feet long, and was suspended from the bridge by cables. This form of scaffolding is known as a "pic system."

[2] On review, the Secretary withdrew his allegation that Respondent violated 29 C.F.R. § 1926.451(a)(4) by failing to install guardrails and toeboards on the scaffold.

Administrative Law Judge Paul L. Brady affirmed a serious violation of the standard.[3] For the reasons that follow, we affirm the judge's decision.

The cited standard, section 1926.21(b)(2), requires that the employer "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." It is undisputed that L&M told its employees to wear safety belts and lifelines when working at heights over 10 feet.[4] The compliance officer acknowledged that the employees "had been told to tie off, had been told to wear belts." When employees apply for a job with L&M they are required to sign a form which states that "I have read and agree to abide by the company safety rules and understand the wearing of personal protective equipment is a condition of employment." Employees also are given a memo which states in part:

> Section 360-[Lifelines] and safety belts shall be provided by the employer and it shall be the responsibility of the employee to wear such equipment . . . by all workmen exposed to the hazards of falling when the operation being performed is more [than] 10 feet above solid ground or above permanent floor or platform.
>
> The management of this Company hereby provides you a safety belt with the [lifeline] attached. It is the desire and order of the management that you use

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[3] The hearing was conducted by Administrative Law Judge Edwin G. Salyers, who retired prior to the issuance of a decision.

[4] The Secretary also cited L&M for violating 29 C.F.R. § 1926.451(a)(4) but withdrew the citation on review. That standard requires a platform to have guardrails and toeboards if it is more than 10 feet above the ground or floor. L&M contends that it required its employees to use tied-off safety belts because it could not place guardrails on the scaffold due to the configuration of the bridge deck. The Secretary does not dispute this, but instead focuses on L&M's alleged inadequate instruction on safety belts and lifelines.

Lignos claims that the evidence does not establish that the scaffold was 10 feet high. As Judge Brady noted, while there are varied estimates for the distance from the scaffold to the barge, the compliance officer was the only person to actually attempt to measure the height based on where the scaffold hung and that, even if weighted with personnel and equipment, the scaffold would have been at least 10 feet high. L&M does not cite any evidence to disprove this.

> a safety belt and [lifeline] for your personal protection at all times. We expect our employees to comply fully with Section 360 . . . .

These instructions provide an adequate workrule but are not enough alone to meet the terms of the standard. "An employer complies with section 1926.21(b)(2) when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards." *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619, 1991-93 CCH OSHD ¶ 29,681, p. 40,243 (No. 89-2019, 1992). Nowhere else does the memo explain the hazards that respondent's employees may encounter at various worksites that require the use of lifelines and safety belts when working over 10 feet. L&M's vice-president Michael Lignos and its foreman Peter Enzor may have discussed with its employees the wearing of safety belts and lifelines, but employee Steven Lortos, who was working with Kleoudis on the scaffold, did not recognize that a hazard existed at that height. He believed that "even if you jump [from the scaffold], you are not going to [get] hurt." When questioned when he "need[s] to put a safety belt on," Lortos testified "after 25 feet you have to wear it no matter what, 30 feet" and that "[a]ctually, on that particular thing, I think it is a little embarrassing, 15 feet to wear a belt." L&M complains that the compliance officer limited his investigation to one employee, Lortos. However, L&M had ample opportunity to present its own witnesses to rebut Lortos' testimony. There is no evidence in the record that L&M offered any instruction whatsoever to its employees about hazards present when working ten or more feet above the ground.[5] For these reasons, we find that the Secretary has proved that L&M violated 29 C.F.R. § 1926.21(b)(2). Judge Brady found that the violation was serious as alleged. L&M does not challenge that characterization on review. We therefore conclude that the violation was serious.

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[5] To support his finding of a violation, Judge Brady held that L&M did not enforce the instruction it gave to employees to wear safety belts and lifelines when working 10 feet above ground. Under Commission precedent, section 1926.21(b)(2) only requires that the employer instruct its employees of hazards, and does not require enforcement of those instructions. *Dravo Engrs. & Constructors*, 11 BNA OSHC 2010, 1984-85 CCH OSHD ¶ 26,930 (No. 81-748, 1984). Chairman Weisberg finds it unnecessary to reach the question of whether enforcement of the instructions is required under this standard inasmuch as the record establishes that L&M failed to properly instruct employees within the meaning of the standard.

The Secretary had proposed a combined penalty of $1500 for items 1(a) and 1(b) of Serious Citation No. 1. The judge assessed the proposed amount. L&M did not dispute the appropriateness of the penalty the judge assessed. On review, the Secretary withdrew item 1(b) and argues that a penalty of $750 is appropriate for the remaining item, 1(a). Accordingly, we affirm the serious violation and, based on the statutory criteria in 29 U.S.C. § 666(j), assess a total penalty of $750.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: February 14, 1995

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NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 14, 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.

February 14, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-1746

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
L & M LIGNOS ENTERPRISE
Respondent.

OSHRC DOCKET
NO. 92-1746

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 January 3, 1994. The decision of the Judge will become a final order of the Commission on February 2, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 24, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Review Commission
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Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKH

Date: January 3, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1746

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SECRETARY OF LABOR,
Complainant,

v.

L & M LIGNOS ENTERPRISES,
Respondent.

OSHRC Docket No.: 92-1746

Appearances:

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

Richard Hayes, President
Hayes Environmental Services, Inc.
Toledo, Ohio
For Respondent

Before: Administrative Law Judge

DECISION AND ORDER

On November 22, 1991, Emmanuel "George" Kleoudis, a sandblaster employed by L & M Lignos Enterprises (L&M), fell off of a scaffold as he was sandblasting the underside of a bridge in Cleveland, Ohio. Kleoudis fell onto a barge floating beneath the bridge. He sustained severe injuries from the fall and died a few weeks later.

As a result of the fatality, the Occupational Safety and Health Administration (OSHA) assigned compliance officer Richard M. Hanula to investigate L&M. Following Hanula's inspection, the Secretary issued two citations to L&M alleging violations of the Occupational Safety and Health Act of 1970 (Act). L&M contested the first citation, which charged L&M with serious violations of four standards: § 1926.21(b)(2) for failing to instruct its employees in the recognition and avoidance of hazardous conditions (Item 1a); § 1926.451(a)(4) for failure to install guardrails and toeboards on all open sides and ends of platforms more than 10 feet above the ground or floor (Item 1b); § 1926.59(h) for failure

to provide employees with information and training on hazardous chemicals in their work area (Item 2); and § 1910.244(b) for failure to provide a support on which an abrasive blast cleaning nozzle may be mounted when it is not in use.

Judge Edwin G. Salyers held a hearing in this matter on January 13, 1993, in Cleveland, Ohio. At the time of the hearing, Steve Lortos, a former employee of L&M's who had been working with Kleoudis when Kleoudis fell from the scaffold, could not be located. Following the hearing, the Secretary was able to find Lortos and on March 28, 1993, moved to reopen the record in this case in order to take Lortos's deposition. Judge Salyers granted the Secretary's motion on July 9, 1993. On August 10, 1993, the parties deposed Steve Lortos.

Background

L&M specializes in bridge painting and sandblasting. L&M was hired along with American Bridge Company to sandblast the coating off of the Carter Road Bridge in downtown Cleveland (Tr. 19). Peter D. Enzor was the foreman for L&M on the project. He had been with L&M for 10 years (Tr. 108). Michael Lignos, vice-president for L&M, visited the site every day (Tr. 164-165). L&M's work crew on the project consisted of Kleoudis and Lortos.

Kleoudis and Lortos were working off of a scaffold suspended by two wires from the bridge. The scaffold, referred to as a "pic," was an aluminum platform that was 28 feet wide and 32 inches wide. The platform was inserted into two brackets which were hooked onto the two wires. The platform was not equipped with guardrails or toeboards (Tr. 7-8, 10, 21). Hanula estimated that the distance from the pic to the rebar on the bridge above it was 5 feet 10 inches to 6 feet (Tr. 25-26). Michael Lignos disagreed with this estimate, but did not offer his opinion as to what the distance was (Tr. 190).

The distance from the pic to the barge below was the subject of an array of estimates. Hanula did not arrive at the bridge site until January 8, 1992, by which time the pic was down and L&M was no longer working on the bridge (Tr. 18-19). Hanula measured from the brackets in which the pic was inserted (Tr. 127). With the help of an American Bridge Co. employee, Hanula measured the distance to be 16½ feet (Exh. C-3; Tr. 27). No one from L&M was present when Hanula took this measurement (Tr. 86). A report filed by an

inspector from the Ohio Department of Transportation estimated the pic to be "about 10 to 12 feet" from the barge below (Exh. C-5). Enzor estimated at the hearing that the pic was "roughly 10 or 11 feet" above the barge (Tr. 126). Enzor stated that it was possible that with the weight of two men and their equipment on the scaffold, the pic could be lowered below 10 feet. Enzor acknowledged, however, that he did not measure the distance and that 10 to 11 feet was "just a guess" (Tr. 127). Enzor's ability to judge distances is indicated in a statement given by Enzor on November 27, 1991, five days after Kleoudis's death (Exh. C-8, p. 14):

Q. About how high up is that scaffold?

A. Twenty-five, thirty, I don't know.

Q. Is it ten or twelve feet off the ground?

A. That sounds good.

Lignos testified that the pic was 10 to 12 feet high when it was empty, and 9 to 10 feet high when people and equipment were on it (Tr. 177-178). In his August 10, 1993, deposition, Lortos (for whom English is a second language) expressed his opinion regarding the pic's height (Deposition of Steve Lortos, p. 80):

Q. When you were erecting the pic, going back to the erection the day before the accident, how high was the pic?

A. About 15 feet or 17 feet.

Q. Could it be lower than that?

A. No.

Q. You have testified 12 feet in previous depositions.

A. I didn't take a ruler to measure it. I figure.

Q. You did not measure it?

A. They don't be 100 feet or 50 feet or 30 feet. I know 15, 17, 18, 21, around there I estimate.

The estimates of the height of the pic ranged from 9 to 30 feet. Hanula, however, was the only witness who actually measured the distance. Even though the actual scaffold was not there, the brackets that held it were. Hanula measured the brackets at 16½ feet above the barge. Enzor and Lignos testified that the scaffold was lowered when weighted

down by workers and equipment. Lignos put the scaffold at 12 feet at its highest, and 9 feet at its lowest, allowing for a 3 foot "give" in the wires. Allowing for 3 feet of "give" applied to Hanula's measurement, the scaffold would still be higher than 10 feet, at 13½ feet. Based on the record, it is determined that on the day of Kleoudis's accident, the scaffold with Kleoudis and Lortos and their equipment on it, was at least 10 feet high.

The other area of dispute involved Kleoudis's and Lortos's use, or nonuse, of safety belts. Enzor testified that on the day of the accident, he observed Kleoudis and Lortos wearing safety belts, but he could not tell whether or not they were tied off once they began work on the scaffold (Tr. 118, 120, 122). Lortos testified, however, that he and Kleoudis discussed whether or not they would wear safety belts at the scaffold's height, and had decided against it (Tr. 78-79). Kleoudis and Lortos were not wearing safety belts on the day of the accident, but, Lortos testified, the next day when he returned to the site, someone had placed a safety belt next to where Kleoudis had fallen and one up on the scaffold where Lortos had been working (Deposition of Steve Lortos, p.43). Lortos, who was in the best position to know, stated consistently on several occasions that he and Kleoudis were not wearing safety belts and were not tied off on the day of the accident (Exhs. C-4, R-3, p. 54; Deposition of Steve Lortos, p. 43).[1] It is determined that Kleoudis and Lortos were not wearing safety belts and were not tied off on November 22, 1991.

Item 1a: Alleged violation of § 1926.21(b)(2)

The Secretary alleges that L&M violated § 1926.21(b)(2), which provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

L&M had a written safety program which requires its employees to use a safety belt and life line when "exposed to the hazards of falling when the operation being performed is more that [sic] 10 feet above solid ground or above permanent floor or platform" (Exh. R-1). Employees are required to sign a sheet acknowledging the receipt of certain

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[1] In his original statement, Lortos said that when the paramedics arrived, they took Kleoudis's belt off, removed the hose, and disconnected the air compressor (Exh. R-3, p. 41-42). Lortos explained that he was speaking of the belt on Kleoudis's helmet that held the air hose, not a safety belt (Deposition of Steve Lortos, p. 46).

safety equipment, including a safety belt and harness (Exh. R-2). Lignos explained L&M's safety training for new employees: "I give them all the paperwork, his W-4 form, they sign all this stuff. We explain through all the requirements on some of these people, their education is low. A lot of them are broken up English they speak, and I have to explain it to them in Greek personally" (Tr. 170).

Foreman Enzor also testified as to L&M's safety training. Each new employee was told to wear safety belts. L&M conducted weekly safety meetings, and sometimes more often than that if problems arose (Tr. 109). Enzor explained L&M's three-step disciplinary procedure, in which a safety infraction draws first a verbal warning, then a written warning, and finally suspension (Tr. 112-113).

Enzor's testimony on L&M's safety training was undercut, however, by his later testimony upon cross-examination (Tr. 147-148):

Q. Have you ever been exposed to the OSHA standards, the OSHA safety standards?

A. I have no idea what you're talking about.

Q. The standards contained in 29 C.F.R. § 1926, have you ever - -

A. That don't mean nothing to me.

Q. So, what exactly is it that you discuss with employees, then if it's not safety standards or any standards that might be applicable to the work environment? What safety things do you talk about?

A. Common sense things when they're up there to try and save their life.

Furthermore, despite Enzor's explanation of L&M's three-step disciplinary process, and his assertion that he had never seen Kleoudis and Lortos fail to tie off (Tr. 155), Enzor stated that he did not usually check on the men to see if they were tied off (Tr. 153-154).

The efficacy of L&M's safety program was further undermined by Lortos's testimony. Lortos explained why he and Kleoudis did not wear safety belts that day (Deposition of Steve Lortos, pp. 25-26):

> We don't wear it because it was fifteen feet above the ground, and even if you jump, you are not going to hurt. Each individual makes up his mind. If you want to wear it, you wear it. If you don't want to wear it, you don't wear it. Nobody going to tell you nothing. It is your choice. If it was strictly

regulations you have to wear it, you are going to have to wear it. After George fell down, it was strictly law you have to wear it no matter what.

Lortos's perception of choice regarding the wearing of the safety belt was probed by the Secretary's counsel (Deposition of Steve Lortos, pp. 26-27):

Q. On the morning that Mr. Kleoudis fell, did you think that the Lignos's [sic] required you to wear a belt?

A. No.

Q. Did you think you would be punished if you didn't wear a belt that morning?

A. No.

Q. Where were your belts?

. . .

A. In the trailer.

Lortos was asked during his deposition to read from his signed application for employment (Deposition of Steve Lortos, pp. 68-69; Deposition Exh. 2):

"I certify that the answers to the above questions are true. I have read and agreed to abide by the company safety rules and understand the wearing of personal protective equipment is a condition of employment." I don't understand what that means. "Certify." What does that mean, "certify"? What does that mean, that word, "certify"?

Lortos also signed a copy of L&M's safety program (Deposition Exh. 3). He stated that no one explained it to him, and that he knew he had to sign it along with all of the other forms in order to work (Deposition of Steve Lortos, pp. 125-126).

When asked how high an employee has to be working before he needs to put on a belt, Lortos guessed 25 to 30 feet (Deposition of Steve Lortos, p. 109). Lortos believed it was "a little embarrassing" to wear a belt at 15 feet (Tr. 110). Lortos testified that painters and sandblasters will sometimes not wear a belt because of pride: "They think they are going to laugh at you, the other painters" (Tr. 111). But, Lortos stressed, if wearing a safety belt is made a condition of employment, employees will wear it (Deposition of Steve Lortos, p. 112):

If they give it to you, you have to wear it. If you work for me, and I tell you you have to wear your belt, and you go up there and you don't wear your belt,

> the next news is you are going to go home. If you want to lose your job, you are going to go home. If you want to keep your job, you put the belt on.

The Secretary has established that L&M failed to instruct its employees in the recognition and avoidance of unsafe conditions and the regulations applicable to their work environments. Enzor, the foreman, was completely unfamiliar with the OSHA regulations and did not check on his employees to see if enforcement of L&M's safety program was needed. Lortos and Kleoudis felt free to disregard L&M's written work rule requiring them to tie off above 10 feet. Any safety training given by L&M was negligible, and enforcement of its safety program was nonexistent.

The hazard created by L&M's failure to train its employees in the recognition and avoidance of the fall hazard was serious, as evidenced by Kleoudis's death. The Secretary has proven that L&M committed a serious violation of § 1926.21(b)(2).

Item 1b: Alleged Violation of § 1926.451(a)(4)

The Secretary alleged that L&M violated § 1926.451(a)(4), which provides in pertinent part:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor . . .

The parties stipulated that the scaffold platform was not guarded with guardrails or toeboards (Tr. 8). L&M raises the infeasibility defense with regard to this allegation. L&M argues that the configuration of the bridge deck prevented the placement of guardrails on the scaffold because of the beams and steel supports under the bridge deck (Tr. 129).

To prove the affirmative defense of infeasibility, the employer must show that "(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure." *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1416, 1992 CCH OSHD ¶ 29,546, p.39,907 (No. 89-1027, 1991), citing *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226, 1228, 1991 CCH OSHD ¶ 29,442, pp. 39,682 & 39,685 (No. 88-821, 1991). *Westvaco Corporation,* No. 90-1341 (1993).

The Secretary does not really dispute L&M's contention that it could not place guardrails on the scaffold because of the configuration of the bridge deck. L&M has

established the first element of the infeasibility defense. The second element, however, requires the employer to use an alternative protective measure or that there was no feasible alternative measure. L&M asserts that there was a feasible alternative measure and that it was using it. L&M contends that it required its employees to wear safety belts and tie off when working on its scaffolds. Hanula testified that, had the evidence shown that the employees were wearing safety belts and tying off, he would not have cited L&M for a violation of § 1926.451(a)(4) (Tr. 96). As noted previously, however, L&M did not enforce its work rule requiring employees to tie off when working above 10 feet. Kleoudis and Lortos ignored L&M's written work rule and worked without fall protection. Lortos testified that Lignos and his father, L&M owner Louis Lignos, came up to talk with them about 9:00 or 9:30 the morning of the accident. Lortos stated that they saw Kleoudis and himself working without safety belts, and that they did not say anything about it (Tr. 32-33).

The Secretary has established that L&M failed to guard the scaffold platform on which Lortos and Kleoudis were working and that it failed to require use of alternative fall protection. The hazard created by L&M's failure to comply with § 1926.451(a)(4) was serious, exposing the employees to a fall of at least 10 feet. The violation of § 1926.451(a)(4) is affirmed as serious.

Item 2: Alleged Violation of § 1926.59(h)

The Secretary alleged a violation of § 1926.59(h), which provides:

> Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Lignos testified that he sat down with employees and discussed hazardous substances on the worksite with them (Tr. 173-174).

Lortos told Hanula that he had never received any safety training, including hazard communication training (Tr. 59-60). L&M had diesel fuel, sandblast grit, carboline, and various paints at the site. Enzor testified that he did not provide any safety training to employees regarding hazardous substances (Tr. 113). When asked why he did not provide training on hazardous chemicals, Enzor replied, "I usually take care of it. . . . They aren't involved with the chemicals on the diesel as much as I am" (Tr. 138). Enzor stated that he

was the only one who handled diesel fuel, and that he had gotten it on his clothing while handling it (Tr. 140).

The employees do not need to handle hazardous chemicals on a daily basis in order for hazard communication training to be warranted. All that is required is that the hazard substances be present in the employees' work area.

The hazard associated with lack of training in hazardous substances is that employees may not know the proper steps to take in an emergency if they or their co-workers are exposed to the hazardous materials. L&M was in serious violation of § 1926.59(h).

Item 3: Alleged Violation of § 1910.244(b)

The Secretary alleged that L&M violated § 1910.244(b), which provides in pertinent part:

> A support shall be provided on which [an abrasive blast cleaning] nozzle may be mounted when it is not in use.

L&M had no nozzle support on the scaffold, although Lignos testified that when a painter finishes using a blasting nozzle, he will tie the nozzle to the scaffold with manila rope (Tr. 63, 198).

Hanula testified that it is not apparent from the standard why a nozzle support is required. He discussed the standard with other compliance officers, who offered one possible reason for § 1910.244(b): "[I]f the hose would not be supported and for some reason would not shut off, it would be difficult for the employee to handle under those circumstances without having something to hold it down" (Tr. 63). This is not a convincing rationale. The standard does not require "something to hold it down"; it requires a "support," which implies something to hold it, period. Lortos testified that the blasting nozzle is under quite a bit of pressure, and if no one holds on to it, "it flaps around everywhere it wants to go" (Deposition of Steve Lortos, p. 36). Merely resting the nozzle in a support will not keep the nozzle in place if it fails to shut off for some reason.

The Secretary's case is complicated by Hanula's inability to explain exactly what kind of support the standard requires. When asked what would constitute a support within the meaning of the standard, Hanula replied, "Sir, I'm not very familiar with the construction standards, and I have never actually been involved in this situation prior to this. I'm not

sure what the design parameters would be for a nozzle support" (Tr. 64). When asked if all the standard required was "some place to put the nozzle when it's not in use?," Hanula responded, "That's a way of describing it, I guess. I'm not sure that in this brief period of time if that's enough description of what it is, but I guess in general terms, that fits it" (Tr. 64).

The problem presented by the standard and Hanula's explication of it is that an employer is provided with very little guidance as to what is required. From Hanula's description, a minimal effort would be required to comply with the standard. The Secretary gives no reason why tying a nozzle to the scaffold cannot be considered providing a support for the nozzle. The Secretary has failed to establish that L&M was in violation of § 1910.244(b).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.,* 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act, in determining the appropriate penalty the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Upon consideration of the relevant factors, it is determined that an appropriate penalty for Items 1a and 1b combined is $1,500.00, and that an appropriate penalty for Item 2 is $600.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Items 1a and 1b of the citation alleging violations of 29 C.F.R. § 1926.21(b)(2) and § 1926.451(a)(4) respectively, are affirmed and a total penalty of $1,500.00 is assessed;

2. Item 2 of the citation alleging a violation of 29 C.F.R. § 1926.59(h) is affirmed and a penalty of $600.00 is assessed; and

3. That Item 3 of the citation alleging a violation of 29 C.F.R. § 1910.244(b) is vacated.

PAUL L. BRADY
Judge

Date: December 21, 1993