United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-0984
GEORGE CAMPBELL PAINTING CORP.,	:	
Respondent.	:	

DECISION

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

BY THE COMMISSION:

At issue is the Secretary's willful characterization and proposed maximum penalty ($70,000) for a section 5(a)(1) violation[1] alleging that George Campbell Painting Corporation ("Campbell") should not have permitted a "swing" scaffold to be repositioned in the air instead of on a safe surface at ground level. Robert Smith, a bridge painter employed by Campbell, was killed when he fell more than 300 feet from a swing scaffold that he was repositioning in the air instead of on the bridge surface. Review Commission Administrative

[1]Section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, states that an employer must "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Law Judge Richard DeBenedetto found a serious violation of section 5(a)(1), for which he assessed a $5,000 penalty. For the following reasons, we affirm his decision.[2]

I. Background Facts

A. The Project and Safety Policy in General

The Delaware River Port Authority ("DRPA") hired Campbell to repaint the main suspension cable on the Walt Whitman Bridge between Philadelphia, Pennsylvania, and Gloucester City, New Jersey. Campbell suspended nine 2-point swing scaffolds from the bridge's main suspension cable for the painters. Before the four scaffolds located on the lower part of the cable (nearer the automobile traffic) were moved laterally along the cable to the next segment to be painted, they were lowered to a safe surface, either the bridge's maintenance walkway or a traffic lane that DRPA had closed. When there were no closed traffic lanes, however, Peter Morris, Campbell's general superintendent at the worksite, planned to use "mid-air transfers" to move the five scaffolds located on the higher part of the bridge cable (nearer the 390-foot bridge towers). A mid-air transfer involves suspending the scaffold platform with steel chokers and shackles while the wire ropes that normally support it are slackened and moved.[3]

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[2]Campbell briefed other issues that we will not address because they are not on review. *See Trico Technologies Corp.,* 17 BNA OSHC 1497, 1505 n.17, 1996 CCH OSHD ¶ 31,009, pp. 43,226-27 n.17 (No. 91-110, 1996).

[3]Morris believed that such transfers for the five higher scaffolds would be safer than bringing them down onto the maintenance walkway because the slackened wire ropes might blow into the adjacent 60-mph traffic and endanger the painters. However, Campbell completed the job without mid-air transfers, and Judge DeBenedetto found that Campbell could have either required all scaffolds to use the maintenance walkway when a closed traffic lane was unavailable or restructured the painting work to fit into the schedule of closed traffic lanes: "With [these] safer options available to it, Campbell clearly did not have to use

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Douglas J. Adams, a district manager for Sky Climber, manufacturer of Campbell's scaffolds, and John H. Dougherty, scaffold salesman for Sky Climber and Spider Staging, testified that swing scaffolds should be lowered to a safe surface for repositioning when one is available, although mid-air transfers are permissible when no safe surface is available.[4]

Sean Wilson, Campbell's safety director and a certified OSHA instructor, testified that company foremen conducted weekly safety meetings using OSHA safety standards and other written information that he provided. Wilson also testified that Campbell had a program of progressive discipline, *i.e.,* a verbal warning for a first infraction, a written warning and a one-day suspension for a second infraction, and automatic firing for an "imminent danger situation," such as failure to use a tie-off safety belt. Wilson testified to the effect that employees are informed of the company's disciplinary program prior to commencing work for the company. He also testified that he had issued some warnings (on matters other than unnecessary mid-air transfers) during his inspections of the Walt Whitman Bridge jobsite. According to Wilson, the foremen and supervisors have "first level" responsibility for training, detecting and reporting safety violations, and carrying out enforcement actions; the safety director visits the jobsites to monitor compliance with the company's safety program. Wilson gave no testimony, however, regarding any training provided by Campbell to its foremen or supervisors. Prior to the accident in this case, Wilson had not read the 1992 Sky

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[3] (. . . continued) mid-air transfers for this project."

[4]The manufacturer's manual for Campbell's scaffolds prohibits mid-air transfers without exception, but the Secretary acknowledges on review that they are permissible when there is no alternative. ANSI (American National Standards Institute) prohibits mid-air transfers "except when a scaffold has been specifically designed for such use." ANSI A10.8-1988, *Scaffolding — Safety Requirements,* § 4.7. Campbell's scaffolds were designed for such transfers, according to Adams and Dougherty, who nevertheless testified that any available safe surface should be used instead.

Climber manual (customarily provided with the scaffolds that Campbell was using) and was not aware of the relevant ANSI standard. However, Wilson testified that he did sometimes consult manufacturers' manuals and industry standards and that, were he to notice a recommendation against mid-air transfers, he would "consider it and look into it."

B. The General Superintendent's Role

Morris, the general superintendent or "production manager" of the Walt Whitman Bridge project, testified that his responsibility was "to get the project done in a timely and safe fashion." He was responsible for overall job safety. He pre-planned the job and set up the phases of construction. He further testified that he met with the foremen on a weekly basis to ensure that the project was being carried out in a safe and productive manner and that he visited the site to look for obvious safety hazards. Morris was solely in charge of hiring the painters, which "gave me the ability to check a man when he came onto the job," and "[i]f I did not feel a man was comfortable and had knowledge with working with a Sky Climber, he would not have been assigned to that crew to work in that particular operation."[5]

Morris testified that moving a scaffold in the air is less safe than setting it down on a safe surface. He testified that the mid-air transfer procedure is more hazardous "if you're not knowledgeable in what you're doing." He did not entirely prohibit the practice of making transfers in the air, however, because "[w]ith the restrictions and the time frames that we had, yes, it had to be done." Insofar as his testimony indicates, Morris was not familiar with Sky Climber's prohibition on mid-air transfers, *see supra* note 4. According to him, the rented Sky Climber scaffolds involved in this case came from corporate headquarters without "brochures" (presumably the 1992 manual). However, Morris testified that he had referenced earlier versions of the manufacturer's manual at various times during his career.

Morris did not testify specifically that he instructed Otis Reid, the foreman in charge of the Walt Whitman Bridge painters, that mid-air transfers were only authorized when a closed traffic lane was unavailable.[6] Morris further testified, however, that he had worked

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[5]Similarly, Patrick McMonegal, an experienced journeyman painter, testified that Campbell did not give him training in scaffold operation, but instead asked him when hiring him, "did you work off them before, used them before?"

[6]Morris only testified that "we had discussed" that mid-air transfers supported by steel chokers and shackles "would take place" and that "the only time we permitted in-air transfers

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with Reid for many years and did not have any reason to believe that Reid was not competent or properly trained to supervise the painters' work. Morris further testified that his policies were being followed, to the best of his knowledge, based on his weekly meetings with foremen and his visits to the jobsite. Morris did not observe any unauthorized mid-air transfers.

C. The Foreman's Role

Reid stated[7] that he and the painters brought the scaffolds down to closed traffic lanes "for two or three months" before "we decided to walk [a scaffold] over instead of bringing it down." He also stated the painters "[l]owered them more — 98% of the time" and that it was "possible that some painters never made an in air move" because he would "rather see the scaffold come down."[8] These statements indicate that he did not perform mid-air transfers during the first months of the Walt Whitman Bridge project.

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[6](...continued)
was if we did not have a lane closure below us at the time of the transfer." Possibly Morris was referring to Reid, but the testimony does not make this clear.

[7]Reid's evidence consists of four written question-and-answer statements made to the Secretary's compliance officers. Judge DeBenedetto accepted Reid's statements as evidence. We rely on them because they constitute admissions whose reliability is unrefuted. *See Beta Constr. Co.,* 16 BNA OSHC 1435, 1442, 1993-95 CCH OSHD ¶ 30,239, p. 41,649 (No. 91-102, 1993), *aff'd,* 52 F.3d 1122 (D.C. Cir. 1995). For reasons undisclosed in the record, Campbell did not call Reid as a witness.

[8]One week before the fatal accident, Smith informed Reid that a support rope had broken during a mid-air transfer that he was performing. However, there is no evidence that this mid-air transfer was unnecessary because a closed traffic lane was available. The same is true of an incident two weeks before the fatal accident, when materials fell from a scaffold into the automobile traffic on the bridge.

Reid admitted that "[t]he reason we slid scaffolds was to save time." Reid stated that "it was faster than the [procedure of] going to the ground because you could move [the scaffold] six feet at a time" and that "[t]he men wanted to do it" in order "[t]o save time."[9] Reid stated that he required the painters to use tied-off safety belts "all the time." Smith was not wearing a tied-off safety belt at the time of his fatal accident, however, which occurred when Reid allowed Smith to save time by proceeding with a mid-air transfer even though a closed traffic lane was available.

Some of Reid's statements indicate an awareness that transferring in the air is less safe than setting down on a safe surface. For example, Reid stated that it would be "stupid" to undertake a transfer in the air without using a tied-off safety belt and that any painter who did not feel safe in making a transfer in the air could set down in a closed traffic lane instead.[10] However, Reid also emphasized in his statements that mid-air transfers can be performed safely: "I've transferred like that all my career doing smoke stacks and that." He also asserted that mid-air transfers "seemed safe to me" and that "[u]nder the right conditions, I don't think" that they are more hazardous than lowering to a safe surface.

Reid stated that he had never examined any written material (such as manufacturers' safety manuals or brochures) on scaffold transfer safety. He also stated that Campbell did not give him any training on safety requirements for swing scaffolds.

II. Discussion

[9]Also, painter McMonegal testified to the effect that Reid assisted the painters in performing mid-air transfers to save time. Judge DeBenedetto essentially found from Reid's statements that he only permitted one unnecessary mid-air transfer, the fatal one. However, McMonegal's testimony and Reid's statements sufficiently indicate otherwise.

[10]This is confirmed by painter McMonegal, who testified that Reid permitted him to set down when he informed Reid that he did not want to do mid-air transfers.

The issue before us is whether Campbell's section 5(a)(1) violation for the mid-air transfer that killed painter Robert Smith was willful. The judge's finding that Campbell violated section 5(a)(1) by permitting Smith to perform the mid-air transfer despite the availability of a closed traffic lane is not before us.

A willful violation is differentiated from a serious one by a "heightened awareness" or a "state of mind" that the Commission and the majority of the federal circuits have characterized as an "intentional disregard" for a standard or a "plain indifference" to its requirements. *See, e.g., A.Schonbek & Co. v. Donovan,* 646 F.2d 799, 800 (2d Cir. 1981) (listing virtually all major court cases); *Williams Enterp., Inc.,* 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). The Third Circuit, the jurisdiction in which this case arises, has held that a willful violation is characterized by an "obstinate refusal to comply" with safety and health requirements that "differs little from" the Commission and majority-circuit test. *Universal Auto Radiator Mfg. Co. v. Marshall,* 631 F.2d 20, 23 (3d Cir. 1980) (quoting *Babcock & Wilcox v. OSHRC,* 622 F.2d 1160, 1167-68 (3d Cir. 1980)). Where a section 5(a)(1) violation is involved, there must be evidence, apart from establishing knowledge of the hazard, from which it may be concluded that the employer intentionally disregarded or was indifferent to the safety of its employees. *See General Dynamics Land Systems Div., Inc.,* 15 BNA OSHC 1275, 1287-88, 1991-93 CCH OSHD ¶ 29,467, pp. 39,759-60 (No. 83-1293, 1991), *aff'd,* 985 F.2d 560 (6th Cir. 1993); *United States Steel Corp.,* 12 BNA OSHC 1692, 1703-04, 1986-87 CCH OSHD ¶ 27,517, p. 35,675 (No. 79-1998, 1986).

Our analysis of whether a willful violation was committed in this case focuses on general superintendent Morris as a representative of Campbell at the Walt Whitman Bridge worksite and on foreman Reid as the one supervisor in charge of the painting operations including mid-air transfers. For a willful violation to be found, there must be either a heightened awareness or indifference on the part of Campbell as represented by general

superintendent Morris or a heightened awareness or indifference on Reid's part that is imputable to Campbell in light of his supervisory position. We turn first to Reid.

A. Foreman Reid

Judge DeBenedetto declined to find that the section 5(a)(1) violation for the fatal mid-air transfer was willful because "there is nothing in the record to suggest that the foreman [Reid] who was in charge of mid-air transfers at the site understood exactly what he was 'authorized' to do or not do." The judge reasoned that, "if he was unaware that transfers . . . were not 'authorized' unless a lane was not available below, the foreman's alleged conduct cannot be interpreted as an intentional disregard of any duty." The judge found that Reid, in contrast with Morris, clearly believed that mid-air transfers were safe if performed correctly with tied-off safety belts. The judge also noted that Reid was not indifferent to employee safety inasmuch as he did not require a painter to perform a mid-air transfer if the painter indicated that he did not want to do so. We agree with Judge DeBenedetto's analysis of the record regarding Reid.

As Morris' testimony establishes, Morris planned mid-air transfers to take place at the site whenever a closed traffic lane was unavailable. However, it is not clear from his testimony how the policy was communicated to Reid. Reid's statements only establish that he did not allow any mid-air transfers during the first two or three months of the project and that, although he thereafter allowed some of the painters to perform mid-air transfers despite the availability of closed traffic lanes, the scaffolds were lowered to closed traffic lanes 98% of the time. Reid's statements also establish that he required tied-off safety belts for mid-air transfers and that he permitted any painter who preferred not to do a mid-air transfer to descend to a closed traffic lane instead. However, according to Reid's statements, he believed that mid-air transfers can be safely performed. This evidence is not enough to establish Reid's actual awareness that he lacked authority from Morris on this jobsite to permit mid-air transfers when closed traffic lanes were available or that Reid intentionally disregarded or was indifferent to employee safety. Similarly, his failure to inform Morris that the painters were attempting to save time with mid-air transfers when closed traffic lanes were available in itself does not demonstrate a willful state of mind. *Compare Kent Nowlin Constr. Co. v. OSHRC,* 593 F.2d 368 (10th Cir. 1979) (willful violation where company

representatives' concern about getting job done within city-imposed restriction on closing traffic lane was more important than their *known* safety duty).

B. General Superintendent Morris

As Judge DeBenedetto found, "the project superintendent readily admitted that it is more dangerous to move a scaffold in mid-air than to do so from a level surface because it extends the amount of time a worker must spend suspended at these heights." However, Morris' failure to restructure the painting work to fit into the schedule of closed traffic lanes does not demonstrate willfulness because there is no evidence that the abatement method came to Morris' attention prior to the fatality. Also, we do not regard Morris' failure to use the bridge maintenance walkway as a willful act because Morris did not know until after the fatality that DRPA supervisor Alesandro Bonavitacola thought that all nine scaffolds could use the walkway. Additionally, as Morris testified, "I felt it was far more dangerous to put someone in that sidewalk, lowering down with traffic going by," inasmuch as "you have a three-inch curb between the sidewalk and the traffic going by in the lane next to you at 60 miles an hour."

The Secretary argues that Morris' involvement in mid-air transfers on other projects demonstrates "previous experience of [a] supervisor[] with violative conditions." However, as the Secretary acknowledges on review, mid-air transfers are permissible when there is no alternative, and here there is no evidence that Morris' previous projects presented safe alternatives that he ignored. There is also no merit to the Secretary's reliance on Morris' awareness of industry and OSHA requirements and his knowledge that mid-air transfers can be hazardous. In *Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-264, 1994), *aff'd,* 73 F.3d 382 (D.C. Cir. 1995), which the Secretary cites, the supervisor who had OSHA training also knew that a violative activity was taking place on the worksite. That is not the case here, however, for Morris did not know that any impermissible mid-air transfers had taken place. For the same reasons, Morris' concern

about job progress, by itself, does not taint his decision to authorize mid-air transfers when there was no safe surface.

The Secretary argues that Morris was "intimately familiar with the timing and procedures for the mid-air transfers" and was "in a position to see" impermissible mid-air transfers, but there is no evidence regarding Morris' observations of or contacts with the painters that supports the Secretary's argument. Also, there is no evidence that Morris had reason to question Reid's ability to correct violative conduct. The Secretary refers to the "frequency of the violative conduct," but the record does not show that it was frequent. On the contrary, Reid stated that the painters came down 98% of the time. The Secretary also argues that Morris should have stopped permitting mid-air transfers after "materials fell onto the bridge, damaging three vehicles." However, there is no evidence that a painter's failure to descend to an available safe surface on the bridge caused the materials to fall; insofar as this record shows, the incident is largely irrelevant to the matter at hand, *i.e.,* the willfulness of permitting unnecessary mid-air transfers.

We are concerned that the record in this case is poorly developed regarding the communication between Morris and Reid. We are unable to determine whether or not Morris instructed Reid that mid-air transfers were unauthorized when closed traffic lanes were available. Thus, in view of Morris' testimony that he had previously worked successfully with Reid and in view of the lack of evidence that Reid ever demonstrated a lack of knowledge or competence to supervise scaffold transfers, we cannot find that the record establishes an actual awareness on Campbell's part that Reid lacked the knowledge and competence to supervise the painters on this worksite. *Compare Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1540-41, 1991-93 CCH OSHD ¶ 29,617, p. 40,103 (No. 86-360, 1992) (failure to develop and implement procedures to prevent *known* hazard constitutes willful violation). In sum, while Campbell's performance here appears to have been far from exemplary, the Secretary has failed to establish on this record that it was willful.

III. Penalty

In assessing penalties, the Commission gives due consideration to the size of the employer's business, the employer's prior history and good faith, and the gravity of the cited violations. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993).[11] Campbell was a large employer, with more than 250 employees. It had a prior history of serious and other-than-serious citations. The gravity of the serious mid-air transfer violation in this case was high. Campbell, however, exhibited some good faith. Morris only authorized mid-air transfers for five out of the nine scaffolds and only in event that a closed traffic lane was available. His decision was based on the good faith belief that the five higher scaffolds could not safely use the bridge walkway. Also, before the inspection Morris attempted to persuade DRPA to grant more extensive lane closures, and he thereafter completed the project without any more mid-air transfers.[12] Reid also instructed the painters to use safety belts. On balance, therefore, we give Campbell

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[11]The Secretary's arguments that we must defer to his penalty proposals were essentially rejected by the Commission in *Hern Iron Works, Inc.,* 16 BNA OSHC 1619, 1621-23, 1993-95 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994).

[12]*See RGM Constr. Co.,* 17 BNA OSHC 1229, 1236, 1993-95 CCH OSHD ¶ 330,754, p. 42,731 (No. 91-2107, 1995) (pre-inspection efforts toward satisfying safety duty); *Pitt-Des Moines, Inc.,* 16 BNA OSHC 1429, 1434, 1993-95 CCH OSHD ¶ 30,225, p. 41,608 (No. 90-1349, 1993) ("voluntary post-citation abatement" can "enhance the good faith factor"); *DaNite Sign Co.,* 16 BNA OSHC 1402, 1404, 1993-95 CCH OSHD ¶ 30,245, p. 41,658 (No. 91-2123, 1993) ("safety concerns" can demonstrate good faith); *Peterson Bros. Steel Erection Co.,* 16 BNA OSHC 1196, 1205, 1993-95 CCH OSHD ¶ 30,052, p. 41,305 (No. 90-2304, 1993) (substantial concerns about time and expense of compliance can demonstrate good faith).

credit for some good faith. We therefore assess the penalty of $5,000 that the judge imposed.[13]

/s/
Stuart E. Weisberg
Chairman

/s/
Velma Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: April 25, 1997

[13]We find no merit in Campbell's claim that it deserves a second hearing regarding the Secretary's proposed maximum penalty. The citation gave Campbell due notice of the proposed penalty, Campbell had adequate opportunity to address it at the first hearing, and Campbell does not contend that prejudice or any other issue warrants a second hearing. *See Frank Irey, Jr., Inc. v. OSHRC,* 519 F.2d 1200 (3d Cir. 1974) (due process satisfied by administrative hearing and judicial review provisions of the Act), *aff'd en banc,* 519 F.2d 1215 (1975), *aff'd sub. nom. Atlas Roofing Co. v. OSHRC,* 430 U.S. 442 (1977). Our review of an administrative law judge's decision is only a continuation of a single proceeding. *See S.A. Healy Co.,* 17 BNA OSHC 1145, 1148-49, 1993-95 CCH OSHD ¶ 30,719, pp. 42,636-37 (No. 89-1508, 1995), *rev'd on other grounds*, 96 F.3d 906 (7th Cir. 1996) (absent double jeopardy concerns, civil statutory penalties may be assessed in administrative proceeding).