SECRETARY OF LABOR, Complainant, v. GEM INDUSTRIAL, INC., Respondent.	:	OSHRC Docket No. 93-1122

DECISION

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

BY THE COMMISSION:

At issue is whether Administrative Law Judge Michael H. Schoenfeld erred in vacating a citation for a violation of 29 C.F.R. § 1926.105(a)[1] issued to GEM Industrial, Inc. ("GEM") on the grounds that the violative condition was the result of unpreventable employee misconduct. For the reasons that follow, we reverse the judge and find a violation. We also find that the Secretary failed to establish that the violation was repeated, as alleged.

Background

On February 26, 1993, GEM was engaged as a subcontractor to perform structural steel erection on a single tiered building in Holland, Ohio. As compliance officer Christy Matthewson from the Occupational Safety and Health Administration ("OSHA") drove onto

[1]Section 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

the worksite, he noticed several employees performing detailing work[2] on the beams without any fall protection. The compliance officer took pictures of the ironworkers before getting out of his car and dressing for the cold. This process took approximately 10 to 15 minutes.

The compliance officer observed three employees on the ground who were watching these unprotected ironworkers. When he went into the company's trailer, he formally met the foreman, Mark Trace. When told that employees were working without fall protection, Trace exclaimed either "Oh, they're not?" or "They better not be!" and accompanied the compliance officer out of the trailer. As they exited the trailer, someone yelled "OSHA's here." The employees came down from the beams, obtained safety belts, and went back up onto the steel with safety belt protection.

Relying on blueprints in the foreman's trailer, the compliance officer determined that the beams on which the employees were working were more than 25 feet above the ground. The compliance officer later returned to the site and actually measured the beams to be approximately 31 feet high. As a result of the inspection, GEM was issued a citation alleging a repeat violation of section 1926.105(a) and proposing a penalty of $25,000.[3]

Judge's Decision and Issues on Review

The judge found that the Secretary established all the elements of a violation. He found that the employer could have known of the violative condition, the standard applied to the cited condition, GEM failed to meet the terms of the standard, and employees had access to the condition. *E.g., Astra Pharmaceuticals Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The judge then found that GEM had established the affirmative defense of unpreventable employee misconduct and vacated the citation. The case was directed for review on the issue raised by the Secretary: whether the judge erred in finding that GEM

---

[2]Detailing work involves straightening and squaring the iron work that had already been erected.

[3]Another item in the citation, which alleged a violation of 29 C.F.R. § 1926.20(b)(2) for not conducting regular inspections by a competent person, was vacated by the judge. The Secretary has not petitioned for review of this item, and we need not review it.

established the affirmative defense. In its brief on review, GEM also raises two objections to the judge's finding that the Secretary established a prima facie case. Although the Commission ordinarily does not decide issues that are not directed for review, *see Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p.40,097 n.4 (No. 86-360, 1992) (consolidated), these two issues merit discussion.[4] We discuss them first.

The first objection on GEM's part concerns the applicability of the standard. We agree with the judge in rejecting GEM's claim that the standard does not apply due to insufficient height. The compliance officer gave *unrebutted* testimony that the height of the beams upon which the employees were working was over 25 feet based on his reading of the blueprints in GEM's control, and GEM failed to object at the hearing to the compliance officer's testimony that he measured the beams' height at about 31 feet on a later visit. We

---

[4]Our dissenting colleague discusses at great length the questions raised by the Second Circuit in *New York State Electric & Gas v. Secretary of Labor*, 88 F.3d 98 (2d Cir. 1996), and in earlier Commission precedent concerning the role that evidence pertaining to an employer's safety program may play in proving both knowledge as an element of the prima facie case of a violation and the employer's affirmative defense of unpreventable employee misconduct. She also concludes, based on her discussion of these questions, that the judge here erred in finding knowledge on the part of *Gem*. This case was directed for review based on the Secretary's petition for review of the judge's finding that *Gem* had established its affirmative defense. *Gem* itself prevailed before the judge and did not petition the Commission for review. It raised in its briefs on review, however, and we consider above, several objections to the judge's decision. Nevertheless, despite ample opportunity to do so, *Gem* has failed at any time to except to the judge's finding of knowledge. Accordingly, our colleague is, in essence, introducing an issue into this case which the parties themselves have chosen not to address.

We agree with our dissenting colleague that the Commission may, if it deems it appropriate, consider issues not raised by the parties. We also agree with our colleague that *New York State Electric & Gas* raises significant issues which we will address in other cases now pending before the Commission in which the finding of employer knowledge has actually been challenged on review. However, we think it unwise to further delay the issuance of this case in order to address, at this late date, complex issues neither raised nor addressed by the parties here.

find the company's challenge to the applicability of the standard particularly troubling where GEM simultaneously proffered (in connection with the affirmative employee misconduct defense) the affidavits of three employees to the effect that they were, indeed, working at "approximately 25 feet above the ground" and that they knew that by failing to tie off they "failed to comply with GEM's mandatory policy"---which required employees to tie off when working 25 feet above the ground.

The second objection concerns GEM's argument that the cited standard does not require safety belt use. It is well-settled that a prima facie case of a violation of section 1926.105(a) is made by showing that none of the protection listed in the standard, including safety belts, was used. *E.g.*, *John H. Quinlan*, 17 BNA OSHC 1194, 1195, 1993-95 CCH OSHD ¶ 30,749, p. 42,715 (No. 92-756, 1995). Therefore, because its employees were not using safety belts, or any other form of fall protection, GEM did not meet the terms of the standard.

Unpreventable Employee Misconduct Defense

An employer can defend against the Secretary's showing of a violation by establishing the affirmative defense of unpreventable employee misconduct, which requires the employer to prove that: (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *E.g.*, *Capform, Inc.*, 16 BNA OSHC 2040, 2043, 1993-95 CCH OSHD ¶ 30,589, p. 42,358 (No. 91-1613, 1994); *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578, 1993-95 CCH OSHD ¶ 30,345, p. 41,841 (No. 91-237, 1994); *accord Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1276 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987).

There is no dispute that GEM has a work rule that requires employees to wear and tie off safety belts when working more than 25 feet above the ground,[5] and that the work rule

[5]GEM argues that at the time of the inspection the steel industry considered OSHA steel (continued...)

was adequately communicated. Foreman Trace testified that, when he was there, he warned employees every time they went up that they had to tie off their safety belts when working more than 25 feet above the ground, and that fall protection was the number one topic at their weekly safety meetings. It is not disputed that, as the three employees involved acknowledged in their identically-worded signed "Employee Statements" in evidence, GEM's employees were aware of the work rule.

However, the defense fails because GEM did not establish that it adequately enforced its safety rule; the context of the violation also indicates that GEM failed to prove that it took adequate steps to discover violations. To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred. *See Capform*, 16 BNA OSHC at 2043, 1993-95 CCH OSHD at p. 42,358 (evidence that only one of the two employees in violation was "chewed out"); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2008, 1991-93 CCH OSHD ¶ 29,223, pp. 39,129-30 (No. 85-369, 1991) (evidence showed "no set policy on enforcement"); *see also Brock v. L.E. Myers Co.*, 818 F.2d at 1277-78 (safety "program *in practice* . . . was not only ignored but actively disregarded"); *Precast Services, Inc.*, 17 BNA OSHC 1454, 1456, 1995 CCH OSHD ¶ 30,910, p. 43,034 (No. 93-2971, 1995), *petition for review filed*, No. 96-3031 (6th Cir. Jan. 9, 1996) (no evidence of enforcement prior to the start of the job cited).

The record indicates that GEM had a program that included both verbal warnings and

---

[5](...continued)
erection standards to be in a "state of flux." However, GEM's work rule establishes that it was fully aware that its employees were required to wear safety belts when working more than 25 feet above the ground.

The record is unclear whether the work rule was written or only oral. However, the Commission has not required safety rules to be written as long as the safety rule is clearly and effectively communicated to employees. *See Capform, Inc.*, 16 BNA OSHC at 2043, 1993-95 CCH OSHD at p. 42,358; *Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366, 1368, n.5, 1981 CCH OSHD ¶ 25,216, p. 31,141 n.5 (No. 77-3021, 1981).

increasingly severe disciplinary measures for repeated instances of misconduct. GEM ironworker Jerome Laub testified that the first time that an ironworker is caught not tied off, GEM would issue a verbal reprimand; for the second offense, GEM would issue a written warning; and for further offenses, dismissal could result. Included in GEM's safety manual is a copy of GEM's "Employee Written Warning of Disciplinary Action." GEM argues that it effectively enforced its work rule by this disciplinary program.

The judge agreed with GEM that it had effectively enforced the rule. He relied particularly on his findings that "there is no evidence that other violations of the rule occurred or that any of the employees involved had been disciplined for such violations in the past[,]" and "[t]he unrebutted, uncontradicted testimony and evidence on this record is to the effect that the employees . . . were . . . subject to more stringent discipline for future violations."

We determine that those findings by the judge are contrary to the evidence. The foreman gave unrebutted testimony that there were three instances of noncompliance with GEM's safety belt work rule in the month prior to the inspection, and that he had orally reprimanded each of those ironworkers. One of those employees, Rick Cole, was among the three employees that the compliance officer observed without fall protection during the inspection. Yet, instead of receiving a written reprimand after this second infraction of GEM's safety belt rule, as required by GEM's own progressively more stringent disciplinary program, Cole declares in his signed "Employee Statement" in evidence that he received only a verbal warning.[6]

Foreman Trace testified that the only type of reprimand issued for violations of this

---

[6]Post-inspection discipline may be considered in determining if a work rule was effectively enforced, provided that it is viewed in conjunction with pre-inspection discipline. *See, e.g., R. Zoppo Co.*, 9 BNA OSHC 1392, 1396 & n.7, 1981 CCH OSHD ¶ 25,230, p. 31,184 n.7 (No. 14884, 1981); *Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 2080, 1980 CCH OSHD ¶ 24,147, p. 29,347 (No. 16162, 1979); *see also Precast Services*, 17 BNA OSHC at 1456, 1995 CCH OSHD at p. 43,034.

work rule were verbal ones, and there is no evidence otherwise in the record of more stringent enforcement. While there is no express regulatory requirement that second infractions must result in more than a verbal reprimand, evidence of verbal reprimands alone suggests an ineffective disciplinary system. *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2218-19, 1991-93 CCH OSHD ¶ 29,333, pp. 39,428-29 (No. 86-758, 1991); *see Precast*, 17 BNA OSHC at 1455, 1995 CCH OSHD at p. 43,034. Only in a rare case, like *Alabama Pwr. Co.*, 13 BNA OSHC 1240, 1986-87 CCH OSHD ¶ 27,892 (No. 84-357, 1987), where an employer has a long, near-unblemished safety and health history, despite frequent opportunities for violations, can that employer establish that its work rule was effectively enforced by only oral reprimands. *See Precast*, 17 BNA OSHC at 1456, 1995 CCH OSHD at p. 43,034.

The record here shows that this is not such a rare case. Instead of a long, near-unblemished history, here there were three violations of the same work rule in the month prior to the inspection. This fact indicates that the oral reprimands were ineffective in preventing employees from violating the work rule. *See, e.g., Pace Constr. Corp.*, 14 BNA OSHC at 2218-19, 1991-93 CCH OSHD at pp. 39,428-29) (fact that oral warnings given to every employee on the job shows work rule ignored on widespread basis); *Wallace Roofing Co.*, 8 BNA OSHC 1492, 1495, 1980 CCH OSHD ¶ 24,515, p. 29,974 (No. 76-4844, 1980) (employer aware that particular employee persisted in failing to comply with rule following oral warnings). Moreover, foreman Trace seemed to recognize the ineffectiveness of oral reprimands when he agreed there was "a problem getting the employees to tie off on this job" and therefore he had to keep reminding the ironworkers to use safety belts each time they went up. In addition, GEM's failure to issue to ironworker Cole a written reprimand, although it was his second violation of the work rule, demonstrates that GEM did not follow its own safety program, as outlined in employee Laub's testimony. This fact undermines GEM's claim that its oral reprimands provided adequate enforcement, as does the fact that GEM, as employer of about 500 employees overall (fifteen at this site), failed to introduce

any evidence that it had ever taken any more stringent measures to enforce this work rule than oral reprimands.[7]

Finally, we note that none of the three employees on the beams were using the required fall protection. Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule. *E.g.*, *Falcon Steel Co.*, 16 BNA OSHC 1179, 1194, 1993-95 CCH OSHD ¶ 30,059, p. 41,343 (No. 89-2883, 1993) (consolidated); *Daniel Intl. Corp.*, 9 BNA OSHC 1980, 1983 n.9, 1981 CCH OSHD ¶ 25,492, p. 31,790 n.9 (No. 15690, 1981).

As the facts discussed above suggest, the evidence that GEM did not enforce its plan goes hand in hand with the evidence that GEM did not take adequate steps to discover violations of its work rule. As noted above, contrary to the judge's finding, the evidence shows (and GEM acknowledges) that employees had been orally reprimanded in the weeks prior to the inspection. Moreover, in defense of the violation at issue, GEM relies in its brief on review on the premise that ironworkers maintained a large degree of discretion in the use of fall protection "and in fact did not use such devices most of the time." While this context should have been cause enough for careful monitoring, the circumstances of the day of the inspection provided further cause. It had snowed earlier in the day. After deciding at 7:30 a.m. that the beams were too slippery, foreman Trace assigned the employees other work. He left it to their discretion as to when they would go up on the beams. Despite knowing of the ironworkers' reluctance to use safety belts, the foreman did not follow up by observing the employees later, and therefore he was uncertain when they went up. *See generally Gary*

---

[7]We note that while the compliance officer testified that GEM's *overall* enforcement program was "above average," he specifically testified that GEM's enforcement program *for safety belts* was *not*. Even foreman Trace seemed to acknowledge the relative weakness in safety belt enforcement by characterizing employee compliance before the inspection as "probably good," while at the time of the hearing it was "excellent." The compliance officer gave other important aspects of GEM's safety program (comprehensiveness of safety and health program, communication of program to employees, and safety and health training) no more than an "average" rating on the evaluation form in evidence.

Concrete Prods., Inc., 15 BNA OSHC 1051, 1056, 1991-93 CCH OSHD ¶ 29,344, p. 39,453 (No. 86-1087, 1991).

In this case, the violation arose in the context where GEM had special reason to be concerned that ironworkers would not be abiding by the work rule at issue. We find that GEM failed to prove this element of the unpreventable employee misconduct defense as well.

In sum, for the reasons stated above, we find that GEM failed to establish that the violation was the result of unpreventable employee misconduct.[8]

---

[8]Chairman Weisberg notes that his dissenting colleague analogizes the Commission's rejection of recognized affirmative defenses to Lucy pulling the football away as Charlie Brown is about to kick it. In light of her stated misgivings then, he wonders why, with the exception of this case and one other case in which the majority vacated the citation on other grounds, she has consistently voted with the majority in rejecting the recognized affirmative defense at issue here, the unpreventable employee/supervisory misconduct defense. *See Superior Elec. Co.*, 17 BNA OSHC 1635, 1637, 1996 CCH OSHD ¶ 31,060, p. 43,321 (No. 91-1597, 1996), *petition for review filed*, No. 96-3824 (6th Cir. July 29, 1996); *Precast Serv., Inc.*, 17 BNA OSHC at 1456, 1995 CCH OSHD at p. 43,034; *Ceco Corp*,, 17 BNA OSHC 1173, 1176, 1995 CCH OSHD ¶ 30,742, p. 42,703 (No. 91-3235, 1995); *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-851, 1994); *Capform, Inc.*, 16 BNA OSHC at 2043, 1993-95 CCH OSHD at p. 42,358; *Wheeling-Pittsburgh Steel Co.*, 16 BNA OSHC 1780, 1784, 1993-95 CCH OSHD ¶ 30,445, pp. 42,039-40 (No. 91-2524, 1994); *Nooter Constr. Co.*, 16 BNA OSHC at 1578, 1993-95 CCH OSHD at p. 41,841; *Kraft Food Ingredients Corp.*, 16 BNA OSHC 1393, 1401, 1993-95 CCH OSHD ¶ 30,213, pp. 41,588-89 (No. 88-1736, 1993); *Foster-Wheeler Constr.*, 16 BNA OSHC 1344, 1349, 1993-95 CCH OSHD ¶ 30,183, p. 41,526 (No. 89-287, 1993); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1194, 1991-93 CCH OSHD ¶ 30,059, pp. 41,342-44 (No. 89-2883, 1993)(consolidated); *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164, 1993-95 CCH OSHD ¶ 30,041, pp. 41,216-17 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994); *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042, 1993-95 CCH OSHD ¶ 30,016, pp. 41,127-28 (No. 90-945, 1993); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992); *Mosser Constr.*, 15 BNA OSHC 1408, 1415, 1991-93 CCH OSHD ¶ 29,546, pp. 39,905-6 (No. 89-1027, 1991); *A.P. O'Horo Co.*, 14 BNA OSHC at 2008, 1991-93 CCH OSHD at pp. 39,129-30. In his view, perhaps a more

(continued...)

Classification of Violation

The allegation that the present citation was repeated is based on a previous citation issued in August 1992 for a serious violation of the general duty clause, 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 ("the Act"). The Secretary introduced into evidence only the first page of that citation, which describes the violation as follows:

> Outside, south side of building employee performing miscellaneous iron work at the roof edge was exposed to a fall hazard of approximately 21 ft. Among others, some feasible and useful methods to correct this hazardous condition would be to use [. . .]

The remainder of the citation was not introduced into evidence. The citation resulted in a settlement agreement.

When the Secretary alleges a repeated violation, the Secretary has the burden of establishing that the violations were substantially similar. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Where the citations involve the same standard, the Secretary makes a *prima facie* showing of "substantial similarity" by showing that the prior and present violations are for failure to comply with the same standard. The burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). However, where, as here, the citations involve different standards, the Secretary must adduce sufficient evidence to show substantial similarity of the violations. *Monitor*, 16 BNA OSHC at 1594, 1993-95 CCH OSHD at pp. 41,825-26.

To meet this burden, the Secretary must show that the two violations involve similar

---

[8](...continued)
apt football analogy for his dissenting colleague might be that one can't play on both sides of the line of scrimmage at the same time. He notes further that his dissenting colleague was part of the majority in the Commission's decision in *New York State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶ 30,745 (No. 91-2897, 1995), *rev'd*, 88 F.3d 98 (2d Cir. 1996), another fact which appears to have entirely escaped her.

hazards. *Id.* The Secretary argues that the fall hazards involved in the current and earlier citations are substantially similar based on the heights involved--26 to 31 feet and 21 feet, respectively--and the fact that a fall from those heights could have resulted in death or serious physical harm.

That the possible fall differences varied somewhat does not mean that the hazards are not substantially similar. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). Indeed, the Commission has held that the difference between fall distances of 15 and 30 feet was not so dissimilar as to preclude a finding of repeated. *J.L. Foti Constr. Co., Inc.*, 8 BNA OSHC 1281, 1284, 1980 CCH OSHD ¶ 24,421, p. 29,782 (No. 76-4429, 1980)(consolidated). Moreover, a violation of a standard can be repeated even though based on a previous violation of the general duty clause. *Potlatch*, 7 BNA OSHC at 1064, 1979 CCH OSHD at p. 28,172. However, the Secretary must show more than just that the fall distances are similar to establish that the violations are substantially similar; he must show substantial similarity based on the circumstances surrounding the hazard. *See Monitor Constr.*, 16 BNA OSHC at 1594, 1993-95 CCH OSHD at p. 41,826 (hidden hazard of falling into manhole when its cover breaks or shifts is not substantially similar to hazard of stumbling into a beam trough).

In this case, we conclude that the evidence regarding the particular circumstances of the first citation is insufficient to establish that the violations were substantially similar. The 1992 citation indicates only that an employee doing ironwork at the roof edge was exposed to a 21-foot fall. The record fails to disclose the circumstances surrounding the hazard, such as whether the employee was standing on a roof with a substantial floor, or whether the employee was working from a roof sufficiently unfinished to require walking across and straddling the beams. Even the method of abatement suggested by the Secretary for the section 5(a)(1) citation is not in the record, because the next page of the citation is not in evidence. On this record, we cannot conclude that the citations for the standard and section 5(a)(1) of the Act were substantially similar merely because they both involved fall hazards.

Although we find that the violation was not repeated, we classify this violation as serious under section 17(k) of the Act, 29 U.S.C. § 666(k), because GEM did not dispute

the compliance officer's testimony that any fall could have resulted in death or serious physical harm. *See generally, Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1597, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985).

Penalty

GEM is a large employer with approximately 500 employees. The gravity of the violation was high because severe injury could have resulted from falling over 25 feet, and the probability of injury was high because three employees were exposed to such falls on a day when it had snowed, therefore increasing the likelihood that the beams were wet and slippery. Although the compliance officer agreed that the sun would have melted the snow, he also noted that once an area fell into shadow, any water on the steel would have turned to ice.

While GEM does have a good overall safety program and, therefore, is entitled to some credit for good faith, we are not unmindful that the work rule violations did suggest a pattern of misconduct that should have been addressed by the company prior to this citation. Finally, GEM's safety history reveals a prior serious violation of the Act involving fall protection, the section 5(a)(1) item discussed above. Based on the statutory criteria in section 17(j) of the Act, 29 U.S.C. § 666(j), discussed above, we find that a penalty of $5000 is appropriate.

Order

Accordingly, we find a serious violation of section 1926.105(a) and assess a penalty of $5000.

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: December 6, 1996

MONTOYA, Commissioner, dissenting:

For the reasons stated below, I disagree with the majority's decision to reverse Judge Schoenfeld's finding that the alleged violation of 29 C.F.R. § 1926.105(a) resulted from unpreventable employee misconduct. Furthermore, unlike the majority, I consider the recent decision of the Second Circuit Court of Appeals in *New York State Electric & Gas Corporation v. Secretary of Labor*, 88 F.3d 98, 107-78 (2nd Cir. 1996), *rev'g & remanding* 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶ 30,745 (No. 91- 2897, 1995) to be significant enough to justify discretionary review on the closely-related issue of whether the Secretary has established a basis upon which GEM can be properly charged with knowledge of this violation, even though this issue was neither directed for review nor briefed by the parties. *See Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1803, 1986-87 CCH OSHD ¶ 27,576, p. 35,825 (No. 83-308, 1986) (issue not directed for review remains within Commission's jurisdiction and may be reviewed after parties are afforded any necessary opportunity to brief issue). *Cf. John T. Brady & Co.*, 10 BNA OSHC 1385, 1386, 1982 CCH OSHD ¶ 25,941, p. 32,502 (No. 76-2894, 1982), *rev'd on other grounds*, No. 82-4082 (2d Cir., Oct. 14, 1982) (due to issuance of controlling precedent after direction for review, case was decided on grounds other than those specified in direction for review).

In this case, GEM has followed the line of Commission authority that requires an employer to plead "unpreventable employee misconduct" as an affirmative defense, thereby assuming the burden of proving: (1) it had workrules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were discovered. *Marson Corp.*, 10 BNA OSHC 1660, 1662, 1982 CCH OSHD ¶ 26,075, p. 32,804 (No. 78-349, 1982). In support of this affirmative defense, GEM has offered certain facts to demonstrate that it did in fact have an adequate safety program. However, as Chairman Rowland's dissent in *Marson* made clear, the Commission's practice up to that point had been to accept the same evidence as rebuttal of the Secretary's *prima facie* proof of employer knowledge. *Marson Corp.*, 10 BNA OSHC 1660, 1663-67 1982 CCH OSHD ¶ 26,075, pp. 32,805-58 (No. 78-349, 1982) (Rowland dissent). In Chairman Rowland's opinion, the majority had impermissibly shifted the burden of proof by requiring the

employer, as part of an affirmative defense, to establish the adequacy of its safety program.[9]

Indeed, an employer's responsibility under the OSH Act is invariably tied to the adequacy of its safety program. However, as two Justices of the Supreme Court have recognized, the Commission and the courts have taken a "confusing patchwork of conflicting approaches" when deciding which party bears the burden of proof on this most important element of any employer contest. *Brock v. L.E. Meyers Co.*, 484 U.S. 989 (1987) (White, J., with whom Justice O'Connor joined, dissenting from denial of certiorari), 818 F.2d 1271 (6th Cir. 1987). The Second Circuit Court of Appeals recently confronted these historical inconsistencies in *New York State Electric & Gas Corporation v. Secretary of Labor*, 88 F.3d 98 (2nd Cir. 1996), arriving at what must surely be the correct resolution. In that case, the Commission had charged an employer with knowledge of a violation based on its failure to provide a supervisor at the worksite. After a comprehensive review of the decisions of its sister circuits, the court held that when an employer's knowledge is based upon its failure to establish an adequate safety program, those inadequacies must be proven by the Secretary as part of his case-in-chief. *Id*. at 108. Relying specifically on precedent from the Sixth Circuit, the circuit where this case arose, the court reasoned that:

> [c]ontrary to the Secretary's suggestion, the view of the majority of the Circuits -- that unpreventable employee misconduct is an affirmative defense -- does not compel a holding that the employer bears the burden on the adequacy of its safety policy in this case. The Secretary must first make out a *prima facie* case before the affirmative defense comes into play. *See L.E. Myers*, 818 F.2d at 1277.

Id at 108. The court ultimately found that the Commission had acted arbitrarily and capriciously:

> first, by departing without explanation from its prior decisions placing the burden regarding knowledge on the Secretary and, second, by impermissibly misconstruing the Act and applying a *per se* rule that a safety policy is inadequate if employees are not constantly monitored for safety violations.

---

[9]For a more recent case that considers the misconduct analysis both for rebuttal of *prima facie* knowledge and as an affirmative defense, see *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814-1816, 1991-93 CCH OSHD ¶ 29,807, pp. 40,583-86 (No. 91-1395, 1992)

Id at 109.

The majority here avoids this issue by limiting its step-by-step assessment of GEM's safety program to the affirmative defense of unpreventable employee misconduct. Looking at the record, however, it is clear that the Secretary has not shown that GEM's supervisors had actual knowledge of this violative condition. Furthermore, the only theory of constructive knowledge would be, as the judge found, that a GEM supervisor exercising reasonable diligence would have seen that these ironworkers were violating the fall protection standards. By imputing knowledge to GEM on this basis, the judge appears to have applied the very *per se* rule that the Second Circuit Court of Appeals disallowed in *New York Gas and Electric*. Even if one where to accept that *prima facie* knowledge has been shown, the proof that GEM has offered in support of its unpreventable employee misconduct defense is more than sufficient to rebut this theory of constructive knowledge. GEM's supervisor, foreman Trace, testified without contradiction that he warned employees to use fall protection every day, and that fall protection was the number one topic at the weekly safety meetings. This was confirmed by the ironworkers themselves, all of whom testified that they were well aware of GEM's fall protection requirements, and that they had been verbally reprimanded for not using fall protection. Even OSHA's compliance officer rated the overall enforcement of GEM's safety program as "above average." Based on the above, the judge plainly erred in charging GEM with knowledge of this violative condition.[10]

---

[10]The principle upon which proof of an adequate safety program was shifted from rebuttal of *prima facie* knowledge to support of an affirmative defense has entirely escaped me, just as it escaped Chairman Rowland in *Marson Corporation,* 10 BNA OSHC 1660, 1663-67, 1982 CCH OSHD ¶ 26,075, pp. 32,805-8 (No. 78-349, 1982)(Rowland dissent) and the Second Circuit Court of Appeals in *New York State Electric & Gas Corporation v. Secretary of Labor,* 88 F.3d 98 (2nd Cir., 1996). Indeed, I can think of no case in which evidence of an adequate safety program would fail to rebut the Secretary's *prima facie* proof of knowledge, yet would still support an affirmative defense. It occurs to me that there have been only two practical effects of the Commission's treatment of "unpreventable employee misconduct" as an affirmative defense: first, it shifts to the employer the burden of proving that its safety program *is* adequate and, second, by encouraging the employer to come forward with the details of its safety program, it increases the likelihood that the employer

(continued...)

Repeating again the words of the Second Circuit Court of Appeals, "[t]he Secretary must first make out a *prima facie* case before the affirmative defense comes into play. *See L.E. Myers*, 818 F. 2d at 1277." *New York Electric & Gas*, 88 F.3d at 108. I have stated my position that the safety program evidence offered by the employer here is properly considered as rebuttal of the Secretary's *prima facie* case. However, even if I were willing to concede that the Secretary has established employer knowledge, this same evidence supports Judge Schoenfeld's decision to grant the unpreventable employee misconduct defense as pleaded by GEM in this case. The majority has not taken issue with the judge's findings on the first two elements of this defense (workrules designed to prevent the violation and adequate communication of those rules to employees). There is no dispute that GEM had workrules regarding fall protection that would have prevented this violation. Though it is unclear whether the workrules were reduced to writing and included in GEM's "Safety Program," the Commission has not, as the majority recognizes, required such workrules to be written so long as they are clearly and effectively communicated to the employees. *Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366, 1368 n.5, 1981 CCH OSHD ¶ 25,216, p. 31,141 n.5 (No. 77-3021, 1981); *Capform, Inc*., 16 BNA OSHC 2040, 2043, 1993-95 CCH OSHD ¶ 30,589, p. 42,358 (No. 91-1613, 1994). Again, GEM's foreman testified without contradiction that he warned his ironworkers to use fall protection every day, and that fall protection was the number one topic at the weekly safety meetings. This was confirmed by the employees, all of whom testified that they were well aware of GEM's fall protection requirements.

As for the final two elements, the majority has concluded that GEM failed to establish either that its foreman took adequate steps to discover violations of the company's fall protection rules or that the rules were adequately enforced when violations occurred. The record, on the other hand, indicates that GEM's foreman did in fact monitor the ironworkers on this job. The record also shows that certain of these ironworkers were found

---

[10](...continued)
will offer proof against itself on the issue of due diligence.

to not be wearing fall protection and that oral reprimands were issued.[11] As recognized by the Third Circuit in *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984), *rev'g* 11 BNA OSHC 1321, 1983-84 CCH OSHD ¶ 26,517 (No. 79-5194, 1983), "[t]he courts of appeals have consistently held that the adequacy of an employer's safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable." Though GEM's contention that its disciplinary program is strictly enforced may appear self-serving, OSHA's own compliance officer rated the overall enforcement of GEM's safety program as "above average." It is true that GEM's safety manual includes a form of a written disciplinary notice that threatens employees with future dismissal, and that GEM offered no evidence that it had ever resorted to discipline stronger than the verbal reprimands given the ironworkers at this jobsite. Nonetheless, the Commission has previously accepted oral warnings as proof of adequate enforcement. *Alabama Power Co.*, 13 BNA OSHC 1240, 1245 1986-86 CCH OSHD ¶ 27,892 p. 36,580 (No. 84-357, 1987). The ironworkers who testified confirmed that they had been verbally reprimanded for not using fall protection, and I see no practical purpose in requiring greater proof of enforcement from GEM here. To find that the violation here was preventable, and then penalize that violation as repeated, simply because GEM's reprimands to these ironworkers were not reduced to writing, seems an officious exercise serving merely to place the defense beyond the facts of record.[12]

The Secretary has also argued that GEM's foreman was watching the unprotected employees when the compliance officer first arrived. If he was, the employee misconduct alleged here would probably fail to establish an affirmative defense because (1) a foreman's

---

[11]While Judge Schoenfeld concluded that there was no evidence that earlier violations occurred, GEM's foreman admitted that he had previous problems with the ironworkers not using fall protection. From the record, it appears that there were three instances of noncompliance during the month prior to the inspection, including an instance involving one of the three employees observed by the compliance officer during this inspection.

[12]Indeed, the Commission's treatment of employer attempts to establish recognized affirmative defenses has often reminded me of the treatment that Peanuts character Charlie Brown receives from his sometime friend Lucy when he attempts to place-kick a football.

knowledge is ordinarily imputed to his employer (*Marson,* 10 BNA OSHC at 1661, 1982 CCH OSHD at p. 32,803) and (2) the failure of the workers to use fall protection was not so "idiosyncratic and implausible in motive and means" that the foreman could not have prevented it had he actually been watching. *National Realty and Constr. Co.,* 489 F.2d 1257, 1266 (D.C. Cir. 1973). The compliance officer testified that he saw three employees on the ground looking up at the ironworkers. One of these men then walked into GEM's trailer. The compliance officer further testified that when he went up to the remaining two employees and asked them where the foreman was, he was told "he just went into the trailer." GEM's foreman testified that he was in the trailer during this entire time. His testimony was supported by that of two employees. Without explicitly assessing the credibility of these witnesses, the judge concluded that a preponderance of the reliable testimony established that the foreman was not watching. As a Commissioner sitting in review of this record, I am obviously unable to judge the demeanor of these witnesses for myself. I am therefore unwilling to disturb the judge's resolution of this direct conflict in testimony.

/s/
Velma Montoya
Commissioner

Dated: December 6. 1996