SECRETARY OF LABOR, Complainant, v. GEORGE CAMPBELL PAINTING CORPORATION, Respondent.	OSHRC Docket No. 94-3121

DECISION

Before: ROGERS, Chairman, and VISSCHER, Commissioner.

BY THE COMMISSION:

At issue is an alleged willful violation of fall protection requirements under the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678. The specific issues are whether Commission Administrative Law Judge Irving Sommer erred in: (1) granting the Secretary of Labor's post-hearing motion to amend an alleged willful violation by substituting the standard at 29 C.F.R. § 1926.105(a) for the guardrail standards originally cited; and (2) finding the violation willful. For the reasons that follow, we find that the amendment was appropriate but that the Secretary failed to establish willfulness on this record.[1]

[1]The judge also affirmed the Secretary's citation for two serious violations. That citation was not directed for review.

FACTS

Ante Martinovic, a painter employed by George Campbell Painting Corp. ("Campbell"), fell 35 feet to the ground from the 59th Street Bridge ("Queensboro Bridge") in New York City on April 23, 1994, and suffered severe injuries. Compliance Officer Robert Stewart of the Secretary's Occupational Safety and Health Administration ("OSHA") inspected the worksite ten days later, and OSHA later issued a citation to Campbell for willfully failing to protect the painter "by a guardrail or equivalent protection, safety belt and lanyard."

Campbell was the painting subcontractor for rehabilitation work on the bridge, which connects the boroughs of Queens and Manhattan. To get to their work area, the painters used a catwalk that ran under the bridge's roadway and along the north edge of the bridge at the Manhattan end. There was an opening in the wall on the north side of the catwalk, 3 to 5 feet high and 10 feet long and about 35 feet above the adjacent ground. The opening was partially guarded with ropes except when the painters had to pass equipment and tools through it.[2] Those materials were lowered by rope from the bridge deck and then were hoisted back up when the work was finished.

Ante, an 18-year veteran with Campbell who supervised crew members when other foremen were not present, was assisting in hoisting a 60- to 70-pound spray pump through the opening at the time of the accident. Eduardo Jimenez was working with him. Ante had tied the pump to rope that had been lowered from the bridge deck, as Slobodan Marinkovic, Campbell's assistant foreman on the scene, had directed him.[3] Campbell's general foreman on the site, Robert Pereira, termed Slobodan an assistant foreman and "my closest assistant."

---

[2]The wall opening was the only available way to transfer those materials at the time. The alleged violation relates only to the period when equipment and tools were being passed through the opening.

[3]To avoid confusing Martinovic with Marinkovic, they will be referred to by their first names.

Pereira testified that although Ante was in charge of Jimenez for the work at issue, Slobodan was overseeing Ante's work and was responsible for the employees' safety, including their use of safety belts when necessary.[4]

The pump had to clear an overhang between the catwalk level and the bridge deck, so Ante had to maneuver the pump so it would swing out and clear the overhang as it was pulled up. Ante stepped out onto a ledge that extended about 18 inches outside the opening. He was not using fall protection equipment. While the pump was suspended in air, it suddenly dropped several inches because a bracket or rope attached to it came loose. Ante reacted -- Campbell's investigation concluded that he either "tried to get away from it, or he was trying to hold it." He lost his balance at that point and fell to the ground.

Slobodan knew that Ante had his safety belt in a bag when he went "in the hole," before work began at the opening. When they reached the wall opening, Slobodan told Ante and Jimenez to tie the pump to the rope, and then Slobodan left to get other materials. He returned before the accident and saw the pump tied up on the catwalk, but he testified that he was "not so close. I was at least 10, 15 feet away from Tony [Ante] inside the bridge." Neither Ante nor Jimenez was wearing a safety belt, but the record does not establish that Slobodan noticed that fact. Slobodan did acknowledge that he didn't tell them to put their belts on. He further testified, however, that his practice was that "[i]f I see they [the employees] don't have a belt" when exposed to hazards, "I gonna tell them to tie up." Slobodan admittedly had limited familiarity with English and testified that he had problems understanding the questions he was asked both at his deposition and at the hearing.

---

[4]Pereira testified that Slobodan was "overseeing" both that work and the work on the roadway above. Pereira testified at one point that Ante did not report to Slobodan -- everyone reported to Pereira. But then Pereira repeated that Slobodan "was overseeing what was going on there" and was responsible for seeing that the employees worked safely. Thus, Slobodan had a supervisory role over Ante for the work at issue, including safety responsibility.

Ante had stood within a foot or two of the wall opening while tying the ropes to the spray pump. Slobodan testified that Ante did not have to "push" the pump out in order for it to be hoisted up -- Ante only had to "lift it up" and "then smooth it out of the wall."

Campbell had issued Ante and its other employees a safety belt and lanyard for the bridge job. Campbell also had a written fall protection rule. It stated:

> Fall protection equipment will be used by all employees working more than 6 feet above the ground or water on work platforms and scaffolding, more than 10 feet on pipe staging and 25 feet on structures (e.g., bridges) where properly guarded platforms or temporary floors are not practical or feasible.

Campbell provided new employees with a copy of its entire written safety program. Pereira held weekly safety meetings on the job and emphasized repeatedly that all employees should tie off when working more than six feet above ground.[5] There were steel uprights near the middle and each side of the wall opening involved here. Each upright would have provided a secure anchor for a safety belt system.

Slobodan testified, however, that he had not always used a safety belt when he stood by the wall opening.

> I know one time I [was not] tied off, but a couple times I was tied off. [If] I feel this is not safe, this is dangerous, I tied up, that's it. . . . I come close to the wall, but I don't go all the way to the edge[,] there is a pole and I hold my hand against the pole. I don't need a safety belt because that's my job, you know.

Slobodan never told an employee to put on a safety belt when working at the wall opening. He apparently believed that the employees had safety belts, were repeatedly told to use them when exposed to falls of more than six feet, and could make their own decisions. "[I]f they feel unsafe, they got a safety belt, they put them on." On the other hand, as mentioned, Slobodan also testified that if he saw an employee not using safety belt protection when

---

[5]Pereira was fluent in Spanish and was able to communicate the rule to the Spanish-speakers. Slobodan's and Ante's first language was Croatian, but Slobodan testified that "every Thursday [Pereira] told everybody, even me, make sure everybody is tied off."

exposed to a fall hazard, he would instruct the employee to use it. He added that Ante, the more experienced employee and Slobodan's countryman from Croatia, had been his mentor when Slobodan joined Campbell about 15 years before the accident. Slobodan trusted Ante to do the job right and to tie off when necessary.

DISCUSSION

1. Amendment to the complaint

OSHA cited Campbell for noncompliance with two guardrail standards -- the former 29 C.F.R. §§ 1926.500(c)(1) and (d)(1)[6] – based on Campbell's alleged failure to protect Ante "by a guardrail or equivalent protection, safety belt and lanyard." In a motion

---

[6]Those standards provided in pertinent part:

§ 1926.500 Guardrails, handrails, and covers.

. . . .

> © *Guarding of wall openings.* (1) Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:
>
> (I) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, . . . on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . . .

Those provisions were replaced on August 9, 1994. 59 Fed. Reg. 40730 (1994), as amended by 60 Fed. Reg. 39225 (1995). *See* 29 C.F.R. §§ 1926.501(b)(1) and (14) (fall protection provisions for open-sided floors and wall openings).

accompanying her post-hearing brief, however, the Secretary moved to amend the cited standard to section 1926.105(a),[7] again focusing on the alleged failure to protect Ante by means of a safety belt system. Under long-standing Commission and court precedent, "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." *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd without published opinion*, 149 F.3d 1183 (6th Cir. 1998) (Table); *See, e.g., Brock v. L. R. Willson & Sons, Inc. ("Willson III")*, 773 F.2d 1377, 1383 (D.C. Cir. 1985) (discussing "long line of judicial and Commission decisions holding that § .105(a) is violated if none of the listed safety devices is being used.")[8]

The key consideration regarding the propriety of a post-hearing amendment is whether the unpleaded issue was "tried by express or implied consent of the parties." Federal Rule of Civil Procedure 15(b).[9] The Commission has held that amendment is proper where

---

[7]That standard 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." (Emphasis added.)

[8]Section 1926.105(a) no longer governs the conditions cited here. *See Fall Protection: Final Rule*, 59 F.R. 40,672, 40,729 (Aug. 9, 1994) (removing and reserving section 1926.105(a), and replacing it with the new Subpart M); *Fall Protection: Amended Final Rule*, 60 F.R. 39,254,39,255 (Aug. 2, 1995) (reinstating section 1926.105(a) as to steel erection only).

[9]That rule provides:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the

(continued...)

the parties "squarely recognized that they were trying an unpleaded issue, and consent to try the unpleaded issue may be implied from the parties' conduct." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995). Also, "[a]mendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation." *A. L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994) (post-hearing *sua sponte* amendment by judge).

The United States Court of Appeals for the Second Circuit, whose jurisdiction includes New York City, reiterated its position recently:

> In an administrative proceeding . . . pleadings are liberally construed and easily amended. And, because such matters are conducted informally, the form a pleading takes does not loom large. . . . In assessing whether the pleadings should conform to the proof, the pivotal question is whether prejudice would result.

New York State Electric & Gas Corp. ("*NYSEG*") *v. Secretary of Labor*, 88 F.3d 98, 104 (2d Cir. 1996) (citing *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 907 (2d Cir. 1977)). "Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue." 6A Wright, Miller, *et al.*, *Federal Practice and Procedure* § 1493, pp. 39-40 (1990), and cases cited therein.[10]

---

[9](...continued)
result of the trial of these issues. . . .

[10]*See, e.g., Morrison Knudsen Co.*, 16 BNA OSHC 1105, 1123, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993) (in assessing prejudice due to amendment, "it is proper to look at whether the [aggrieved] party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried.") (citations omitted). *See NYSEG*, 98 F.3d at 105 ("imprecise pleading is only tolerated where it does not prejudice the employer and has no effect on the outcome of the case.")

The only factual issue relevant to this case which is raised by section 105(a) but not by the originally-cited standards is the adequacy of Campbell's safety belt program. As the judge found:

> Not only did Campbell not object to the litigation of the issue of safety belts, it made the issue the cornerstone of its defense. Campbell was not denied an opportunity to confront witnesses on this issue. Amending the citation would not alter the essential factual allegations contained in the original citation. Amendment of the citation would conform the pleadings to the evidence and would cause no prejudice to Campbell.

Indeed, Campbell knew that the adequacy of its safety belt program was being tried. It raised the issue itself. It pled,[11] and attempted to prove, that no violation of section 1926.500(d)(1) or (c)(1) existed because its safety belt program was adequate. Campbell argues that it would be prejudiced by amendment of the citation to section 105(a) because it could have presented further evidence on the adequacy of its belt program. By raising the issue itself, however, Campbell was on notice that it should present all the evidence that would support the adequacy of its safety belt program.

In any event, none of the evidence Campbell claims it could have presented would affect the outcome, even if credited. Campbell argues that it could have "sought to elicit testimony" to establish three propositions. The first proposition is that Campbell's standard procedure for moving equipment out of the archway was for the employees to stay inside the structure and not step onto the ledge. The second, and related, proposition is that Ante's fall

---

[11]Campbell expressly raised the sufficiency of its safety belt program in its Answer to the Complaint. First, it argued that guardrails were infeasible at the time of Ante's exposure due to the equipment transfer, and that it used a feasible alternative means of protection -- an effective safety belt program. Second, it argued that because the fall hazards resulted from noncompliance with its safety belt rule, they constituted unpreventable employee misconduct. Thus, the issue of the sufficiency of Campbell's safety belt program was in fact pleaded. *See Safeway Store No. 914*, 16 BNA OSHC 1504, 1516-17 1993 CCH OSHD ¶ 30,300, pp. 41,749-50 (No. 91-373, 1993) (amendment permissible where factual *issues* involved were pleaded, even though amended standard was not).

was an isolated occurrence "because one of the ropes holding the spray pump became loose," leading to that fall.

With respect to those propositions, however, a violation still would exist if both of them were proven. This is because fall protection is required whenever, as here, a fall hazard is *accessible* to employees. *E.g., Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1995-97 CCH OSHD ¶ 31,228, p. 43,789 (No. 92-3684, 1997) (violation of section 1926.105(a) existed where foreman stood only a few feet from edge of substantially demolished wall about 35 feet above the adjacent ground), *aff'd on other grounds per curiam*, 131 F.3d 1254 (8th Cir. 1997). *See also Brennan v. OSHRC (Underhill Constr. Co.)*, 513 F.2d 1032, 1035-36 (2d Cir. 1975) (employer is responsible for requiring fall protection whenever hazard is *accessible* to an employee, including, for example, where employees using ceiling sanding machine worked 10 feet from unguarded edge of floor high above ground). The evidence here clearly shows that this fall hazard was accessible to Campbell employees, inasmuch as Ante and Jimenez worked on the catwalk adjacent to the unguarded opening, and Ante fell through the opening.

The third proposition on which Campbell apparently relies is that Ante was a supervisor (which might affect the burden of proof regarding its responsibility for his actions). But the evidence already in the record establishes that Ante was a supervisor at least some of the time. Accordingly, none of the additional evidence Campbell asserts it would offer would change the outcome, even if offered and credited. Campbell suffered no prejudice from the amendment. Thus, we affirm the amendment to section 105(a).[12]

---

[12]Even where post-hearing amendments are permissible, as here, the Secretary should make every effort to avoid them, because they create extra legal issues for the parties, the judge and the Commissioners to address.

2. Merits of the alleged violation

To establish a violation of an OSHA standard, the Secretary must show that: 1) the standard is applicable, 2) the employer failed to comply with it, 3) employees had access to the violative condition, and 4) the employer had actual or constructive knowledge of the condition. *E.g.*, *Halmar Corp.*, 18 BNA OSHC 1014, 1016, 1995-97 CCH OSHD ¶ 31,419, p. 44,409 (No. 94-2043, 1997), *aff'd without published opinion*, 152 F.3d 918 (2d Cir. 1997) (Table). It is undisputed that section 105(a) is specifically applicable, because: (1) it requires fall protection such as safety belt systems for "workplaces that are more than 25 feet above the ground," and (2) the Secretary concedes that guardrails were not feasible for the work being done here. Campbell admitted that its employees used no fall protection, so noncompliance with the terms of section 105(a) also is undisputed. As to employee access to the hazards, Ante's fall proves that element.

We also find that with the exercise of reasonable diligence, Campbell could have known of the violative conditions -- that employees were not being protected by the use of safety belts at times when they were required. The test of knowledge is "whether the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Halmar*, 18 BNA OSHC at 1016, 1995-97 CCH OSHD at p. 44,410. "Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent." *NYSEG*, 88 F.3d at 105. The testimony of Slobodan, who was overseeing the work as Pereira's assistant foreman, indicates that he did not actually see that either Ante or Jimenez was not wearing a safety belt.[13] However, if Slobodan had been

[13]As mentioned, Slobodan testified that if he saw employees not tied off when he felt it was necessary, "I gonna tell them to tie up." Hence, had he realized that Ante or Jimenez was not wearing a safety belt and was going to be in danger, Slobodan indicated he would have instructed him to tie off. As further discussed below, that testimony is not contradicted by other evidence in this case and, given Slobodan's limited familiarity with English, we will not infer from his testimony that he had *actual* knowledge that Ante or Jimenez were

(continued...)

diligent, he could have known that Ante was not wearing his safety belt during the spray pump operation, because by his own admission, Slobodan stood on the catwalk looking at Ante, before Ante pushed the pump outside. Campbell gives no reason for not imputing Slobodan's constructive knowledge to it. Therefore, we will impute that knowledge to Campbell[14] whether or not Ante was acting as a supervisor at the time of the violation.[15]

---

[13](...continued)
not tied off before Ante fell.

[14]*NYSEG* raised questions about the Commission's allocation of the burden of proof of knowledge and unpreventable employee misconduct, where "the Secretary can assert no grounds for [employer] knowledge other than the inadequacy of the employer's safety policy." 88 F.3d at 108. Here, however, Campbell's constructive knowledge is established by the actual presence of Slobodan, a supervisor, during the spray pump operation. *See id.* at 102, 110 ("lead man" of work crew (Webb) "would have known" of the OSHA violation "had he exercised reasonable diligence," so if he was a supervisor, "NYSEG may not . . . avoid liability" by claiming lack of knowledge).

In any event, the evidence affirmatively establishes that Campbell *did not* have an adequate safety belt program, because Campbell did not take adequate steps to enforce its safety belt rule. Slobodan testified that he did not adhere strictly to that rule himself, and that as a supervisor he allowed employees to use their own judgment about it. Ante, who had been with Campbell longer, also violated the rule. As the judge noted, "a supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Ceco Corp.*, 17 BNA OSHC 1173, 1176, 1993-95 CCH OSHD ¶ 30,742, p. 42,703 (No. 91-3235, 1995). Hence, the inadequacy of its safety belt program supports our finding that Campbell reasonably could have known that OSHA violations were occurring.

[15]Campbell raised the affirmative defense of unpreventable employee misconduct as to Ante. In order to establish that affirmative defense, the employer must show: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps calculated to discover whether violations are occurring, and (4) that it has effectively enforced the rules when violations are discovered. *E.g.*, *D. A. Collins Constr. Co. v. Secy. of Labor*, 117 F.3d 691, 695 (2d Cir. 1997). As noted above (note 14), the evidence affirmatively establishes that Campbell's safety belt program was inadequate because enforcement of its rule on the
(continued...)

To establish a violation of § 1926.105(a) for failing to require a listed fall protection device other than a safety net, the Secretary must also show that the device was practical in the cited employer's circumstances. *Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1632, 1999 CCH OSHD ¶ 31,758, p. 46,421 (No. 97-250, 1999) (citing *Century Steel Erectors Inc. v. Secy. of Labor*, 888 F.2d 1399, 1403 (D. C. Cir. 1989)). The evidence here clearly is sufficient under that test. *Both* parties presented abundant evidence that safety belts were practical and should have been used by Campbell's employees. Thus, the parties tried, and the Secretary proved, all the elements of a violation of section 1926.105(a). The violation obviously was serious. We therefore find a serious violation of that provision.[16]

---

[15](...continued)
subject was lax.

[16]Even if the originally-cited standards had been more specifically applicable than section 1926.105(a), a serious violation existed. The Secretary's *prima facie* case under those standards consists of showing, in addition to their applicability, that the employer failed to use standard guardrails (or "the equivalent" under section 1926.500(d)(1)); that an employee had access to the resulting hazards, and that the employer had the requisite knowledge of the noncomplying conditions. *E.g., Halmar*. It is appropriate to refer to the hazard in this case as *both* a wall opening (regulated by section 1926.500(c)) and an open-sided floor (regulated by section 1926.500(d)). Campbell failed to provide guardrails as required by both of the originally-cited standards, and it did not provide equivalent protection. Employee access and employer knowledge were shown for the same reasons given above regarding section 105(a). Thus, the Secretary showed all the elements of a violation of the guardrail standards.

Campbell defended on the ground that compliance with those standards was infeasible. To make out the affirmative defense of infeasibility, however, the employer must show that it used a feasible alternative means of protection, or that none was available. *See, e.g., Bancker Constr. Corp. v. Reich*, 31 F.3d 32, 34 (2d Cir. 1994); *Andrew Catapano Enterp.*, 17 BNA OSHC 1776, 1785, 1995-97 CCH OSHD ¶ 31,180, p. 43,612 (No. 90-50, 1996) (consol.)). Because Campbell did not adequately inspect for violations of its safety belt rule or adequately enforce it, Campbell failed to show that it used a feasible alternative means of protection -- an *effective* safety belt program. Thus, its defense is insufficient. A serious violation would exist even if the originally-cited standards were the most specifically-
(continued...)

3. Alleged willfulness

> A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. . . . A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. . . . A willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Valdak Corp., 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995) (citations omitted), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). *See, e.g., A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d. Cir. 1981) (approving "intentional disregard or plain indifference" test in case involving disregard of known OSHA requirements).

A supervisor's willful actions may be imputed to an employer. *E.g., Tampa Shipyards, Inc.* 15 BNA OSHC 1533, 1537, 1990-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992). The key to whether a supervisor's actions are willful is the supervisor's *state of mind*. *E.g., Monfort of Colorado, Inc.*, 14 BNA OSHC 2055, 2062, 1991-93 CCH OSHD ¶ 29,246, p. 39,186 (No. 87-1220, 1991). The Secretary bears the burden of proving her case by a preponderance of the evidence. *See, e.g., Astra Pharmaceutical Prods. v. OSHRC*, 9 BNA OSHC 2126, 2129-31, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *vacated in part on other grounds*, 681 F.2d 69 (1st Cir. 1982).

There is no evidence that Ante or Slobodan was aware that failure to require use of a safety belt during this kind of operation violated the cited standard or any provision under the Act. Disregard of the company's rule does not automatically establish willful disregard of an OSHA requirement.[17]

---

[16](...continued)
applicable ones.

[17]Further, the Secretary does not argue, and we do not find support for the conclusion, (continued...)

As discussed above, Slobodan was supervising both Ante and Jimenez at the time of the violation. The record does not indicate that Slobodan intentionally disregarded the requirement that they use safety belts when working near the edge of the wall opening. Nor does the record indicate that Slobodan showed plain indifference to employee safety.[18] Employees, including Ante, were issued safety belts and instructed to use them. Slobodan testified that generally he left it to the individual employees to decide whether and when to use their safety belt. He also testified, however, that if he saw an employee not using safety belt protection when exposed to a fall hazard, he would instruct the employee to use it, and that testimony is not contradicted by other evidence. Nor did the judge make credibility findings one way or the other regarding Slobodan's testimony. This leaves the Commission in as good a position as the judge to determine the facts. *E.g., Waste Mgt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10, 1995-97 CCH OSHD ¶ 30,841, p. 42,891 (No. 93-128, 1995).

Thus, the record does not establish that Slobodan was aware that Ante had failed to tie off before stepping out onto the ledge while transferring the pump. Although the employees has access to the hazards even when they worked from the catwalk, the evidence

---

[17](...continued)
that Campbell or any of its supervisors harbored a reckless state of mind such that, if informed that the work in question actually violated the law, he or she would not care. *See C.E.M. Plumbing, Inc.*, 17 BNA OSHC 2080, 2082, 1995-97 CCH OSHD ¶ 31,242, p. 43,821 (No. 95-676, 1997) (citing *Morrison Knudsen Co.*, 16 BNA OSHC at 1123, 1993-95 CCH OSHD at p. 41,281.

[18]Commissioner Visscher concurs that plain indifference to employee safety was not shown. In his view, the relevant inquiry is whether Slobodan acted "with an intentional disregard of, or in plain indifference to, the statute." *A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981). *See also S. Zara & Sons Contracting Co.*, 10 BNA OSHC 1334, 1338, 1982 CCH OSHD ¶ 25,892, p. 32,398 (No. 78-2125, 1982, *aff'd without published opinion*, 697 F.2d 297 (2d Cir., 1982); *D.A. & L. Caruso, Inc.*, 11 BNA OSHC 2138, 2142, 1984-85 CCH OSHD ¶ 26,985, p. 34,694 (No. 79-5676, 1984); *Intercounty Construction Co. v. OSHRC*, 522 F.2d 777, 780 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976) (citing *United States v. Illinois Central Railroad*, 303 U.S. 239, 243 (1938)).

does not show that Slobodan knew at the time that anyone would have to leave the protection of the catwalk to finish the job.[19] Given the lack of evidence that Slobodan actually realized that the employees were not tied off or that one of them might step out beyond the catwalk, we do not find that Slobodan's actions reflected either intentional or knowing disregard or plain indifference to the requirement that employees use a safety belt when exposed to a fall hazard.[20]

Nor can we find that Ante consciously disregarded or was plainly indifferent to his safety or that of Jimenez. Ante did not testify and there is no evidence in this record of his past practices or general attitude regarding fall protection.

4. Penalty

The Act mandates that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The maximum penalty the Commission may assess for the serious safety belt violation found here is $7,000. 29 U.S.C. § 666(b).

As to size, Campbell is a substantial company and had between 200 and 250 employees when the accident occurred. We decline to give credit for good faith. Although

---

[19]The pump was on the catwalk when it was being tied up, and Slobodan testified that Ante did not have to "push" the pump out in order for it to be hoisted up -- Ante only had to "lift it up" and "then smooth it out of the wall."

[20]Nor does Campbell's failure to "fire" Ante for his safety belt violation suggest willfulness. Ante did not return to work following his fall. Pereira testified that he fired three other workers for safety violations at the 59th Street Bridge site and sent numerous employees home for a day for lesser violations. He further testified that if he had seen Ante not wearing his safety belt while working at the wall opening, he would have dismissed him then and there. Asked why he did not fire Ante, Pereira responded that "the guy's laying in the hospital, I mean, I'm going to go and fire the guy?" The company's Vice President, Gregory Campbell, testified that Ante would have been terminated based on the imminent danger he created for himself by not tying off, based on the company's safety program. We find that Campbell's failure to fire Ante in the circumstances here does not indicate that Campbell willfully violated the cited standard.

Campbell had a written safety belt rule on the 59th Street Bridge site and communicated the rule to its employees there, inspection and enforcement by Ante and Slobodan were quite inadequate. Although we found insufficient evidence that the violation was willful, this is a close case.

In regard to history, the record shows Campbell had at least two prior fatalities involving falls from bridges. In 1993, a Campbell employee was killed when he fell more than 300 feet from a swing scaffold during a project on the Walt Whitman Bridge, which connects Philadelphia, PA, and New Jersey. *George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1995-97 CCH OSHD ¶ 31,293 (No. 93-984, 1997). Campbell was found in serious violation of the General Duty Clause for permitting that employee to reposition a swing scaffold in the air instead of on the bridge surface, and the company was assessed a $5000 penalty. *Id.* In 1990, a Campbell employee suffered a fatal fall from a bridge during a project at Perth Amboy, NJ. Citations were issued as a result of the ensuing investigation, and although the penalties were reduced, the citations were affirmed.

As to gravity, that generally is the primary element in penalty assessment. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993) (gravity "depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and likelihood that any injury would result.") Here, one employee was seriously injured as a result of exposure to the hazards, and at least one other employee (Jimenez) could have been seriously injured or killed. In light of the four penalty factors, the maximum penalty of $7000 is appropriate.

Thus, we affirm a serious violation of 29 C.F.R. § 1926.105(a) and assess a penalty of $7,000. SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: September 29, 1999

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

Phone: (404) 347-4197 Fax: (404) 347-0113

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 94-3121
GEORGE CAMPBELL PAINTING CORPORATION, Respondent.	:	

Appearances:

Dennis H. Kade, Esquire
Office of the Solicitor
U. S. Department of Labor
New York, New York
For Complainant

Anthony E. Koester, Esquire
Law Office of William W. Lanigan
Somerville, New Jersey
For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

On April 23, 1994, a painter employed by George Campbell Painting Corporation (Campbell), fell approximately 35 feet from the interior of the Queensboro Bridge in New York City. The painter sustained serious injuries and required hospitalization. Robert Stewart, a compliance officer for the Occupational Safety and Health Administration (OSHA), began investigating the accident on May 3, 1994.

On September 9, 1994, the Secretary issued two citations to Campbell resulting from Stewart's investigation. Citation No. 1 contains two items. Item 1 alleges that Campbell committed a serious violation of § 1926.405(a)(2)(ii)(E) by failing to use protective cages over light bulbs used for temporary lighting along a walkway. The Secretary alleges in item 2 that Campbell seriously

violated § 1926.500(b)(8) by failing to eliminate a tripping hazard on the walkway. Citation No. 2 is a one-item citation that charges Campbell with willfully violating § 1926.500(c)(1) by failing to guard the wall opening through which the painter fell. In the alternative, the Secretary charges that Campbell willfully violated § 1926.500(d)(1) by failing to install guardrails on the open-sided platform.

Subsequent to the hearing the Secretary moved to amend the citation by substituting § 1926.105(a), which requires the use of fall protection, for the two standards cited in the alternative. Campbell opposes the amendment. The Secretary's motion to amend the citation will be ruled on *infra*.

Background

The New York Department of Transportation hired Karl Koch Erecting Company, Inc. (Koch), as the general contractor on a project to rehabilitate the Queensboro Bridge. The bridge (also referred to as the Fifty -Ninth Street Bridge) connects Queens and Manhattan. Koch hired Campbell as the painting subcontractor on the project (Exh. C-4; Tr. 5-8). Campbell had worked under contract on the Queensboro Bridge at least six times for several different general contractors since 1977 (Tr. 244).

In April 1994, Campbell was painting sections of the bridge's interior. To reach the sections of the interior, Campbell's employees traversed a 200-foot long catwalk that spanned a series of bridge arches below it (Tr. 9). Neither Koch nor Campbell constructed the catwalk, which consisted of 10-foot long planks. The planks were not aligned flush with each other. They gapped as much as 3 inches for the length of the planks (Tr. 12-13). The height of the ceiling varied along the catwalk. It was low throughout the length of the catwalk, with its lowest point being between 4½ and 5 feet high (Tr. 11-12).

The catwalk was lighted by bulbs about 20 to 30 feet apart. The height of the bulbs varied with the height of the ceiling. Protective cages covered most of the bulbs, but at least three were not covered (Tr. 12-13, 63).

The catwalk led to the section of the bridge's interior that Campbell was painting in April 1994. The section was 40 to 50 square feet and covered with decking (Exh. C-1; Tr. 15-16). The north wall of the area contained an opening that measured 10 feet long and 3 to 5 feet high. A

vertical steel post bisected the opening (Exhs. C-1, C-2, C-3; Tr. 15, 22, 57-58). The opening was approximately 35 feet above the ground (Tr. 36-37). When Campbell began painting the section, two ropes hung across the wall opening (Tr. 38). A rounded ledge measuring 1 and ½ feet projected outside the base of the opening (Tr. 17-18). The bridge roadway ran directly above the ledge. An overhang jutted out from the exterior wall separating the wall opening from the roadway (Tr. 101-102).

Campbell's employees worked in this area on weekends only (Tr. 99). They had worked at least three weekends before the April 23 accident (Tr. 99). The passageway along the catwalk was too narrow at some points to bring in tools and equipment. Campbell's general foreman on the project, Robert Pereira, and his assistant foreman, Slobodan Marinkovic, decided at the beginning of the job that they would use the wall opening to raise and lower the equipment and tools from the roadway (Tr. 36-38, 100, 146, 184).

At the end of the workday on April 23, 1994, Marinkovic directed the crew, which consisted of four other painters, to remove the painting equipment through the wall opening. Two of the painters stationed themselves on the bridge roadway with ropes, which they lowered to the wall opening. The remaining crew members, Ante Martinovic and Eduardo Jimenez, prepared the equipment for hoisting (Tr. 111-112). Ante Martinovic tied the ends of one of the ropes to a spray pump which weighed 60 to 70 pounds (Tr. 24, 102).

Ante Martinovic maneuvered the spray pump through the wall opening and onto the ledge. Because of the overhang, the equipment could not be hoisted straight up. An employee had to push out on the equipment as the employees on the roadway hoisted it so that the equipment would clear the overhang. This required the employee at the wall opening to stand out on the ledge. Ante Martinovic was not wearing a safety belt while he performed this task. As the employees above hoisted the spray pump, one of the rope ends came loose from the pump. This caused Ante Martinovic to lose his balance and fall 35 feet, sustaining serious injuries . (Tr. 24-26, 103).

Citation No. 1

Item 1: Alleged Serious Violation of §1926.405(a)(2)(ii)(E)

The Secretary alleges that Campbell committed a serious violation of §1926.405(a)(2)(ii)(E), which provides:

> All lamps for general illumination shall be protected from accidental contact or breakage. Metal-case sockets shall be grounded.

Neither Campbell nor Koch installed the lights (Tr. 62). The compliance officer, Robert Stewart testified that the lights were strung overhead (Tr. 13). Campbell's general foreman, Pereira, testified, however, that the lights were hanging from columns on either side of the catwalk, which was three planks wide (Tr. 195). Pereira's testimony is deemed more credible regarding the location of the lights. He walked along the catwalk on a regular basis and was more familiar with the configuration of the lights (Tr. 145).

The Secretary has the burden of proving his case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, © employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Campbell concedes that at least three of the bulbs were unguarded, but argues that its employees did not have access to the violative condition. Campbell argues that because the lights were to the side of the catwalk and not above it, its employees were not exposed to a hazard. Stewart's testimony establishes that anyone walking on the catwalk was exposed to a hazard. The catwalk was narrow and the ceiling was only 4½ feet high at one point. The passageway was so narrow that Campbell could not bring equipment through it. Employees having to crouch down to walk along the crosswalk could easily lose their balance and stumble against the lights. If this happened, an employee could "not only get glass in his face or in his eyes, but now you have a hot electrical circuit there and the worker could get electrocuted" (Tr. 48).

The Secretary can prove that an employer had knowledge of a violative condition by:

> establishing that the employer either knew, or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *E.g.,Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1537, 1992 CCH OSHD 29,617, p. 40,100 (No. 86-360, 1992); *Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD 29,344, p. 39,449 (No.86-1087, 1991). The actual or constructive

knowledge of the employer's foreman or supervisor can be imputed to the employer. *Id.* *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Pereira's testimony establishes Campbell's knowledge of the unguarded lights. He supervised Campbell's employees on the Queensboro Bridge project. As general foreman, his knowledge is imputed to Campbell. Pereira knew that there were unguarded bulbs along the passageway which Campbell's employees used (Tr. 195). Pereira corrected Stewart's assertion that the bulbs were located overhead in the passageway. Campbell knew of the violative condition.

Campbell asserts the multi-employer worksite defense.

> To prove the multi-employer worksite defense, an employer must prove by a preponderance of the evidence that it (1) did not create the hazardous condition, (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard, and (3) took reasonable alternative steps to protect its employees or did not have (and could not have had with the exercise of reasonable diligence) notice that the violative condition was hazardous.

Capform, Inc., 16 BNA OSHC 2040, 2041 (No. 91-1613, 1994).

Campbell did not create the hazardous condition of the unguarded bulbs. But it has failed to prove that it could not control the condition by simply putting protective cages on the unguarded bulbs or that it took reasonable alternative steps to protect its employees. "'It is normally not difficult to assert that the subcontractor could conceivably have done something more to protect [its] exposed employees.' *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273-74 (9th Cir. 1982)." *Capform, Inc.*,16 BNA OSHC at 2042 . Campbell did not take steps to abate the condition, nor did it notify Koch or the New York Department of Transportation that a violative condition existed. Campbell's affirmative defense must fail.

The Secretary has established that Campbell violated § 1926.405(a)(2)(ii)(E). He charges that the violation was serious. A violation is serious under section 17(k) of the Act if "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). The unguarded bulbs exposed Campbell's employees to the possibility of an accident in which they

could have sustained facial cuts or electrocution. The Secretary has established a serious violation of the standard.

Item 2: Alleged Serious Violation of §1926.500(b)(8)

The Secretary charges Campbell with a serious violation of § 1926.500(b)(8), which provides:

> Floor holes, into which persons can accidentally walk, shall be guarded by either a standard railing with standard toeboard on all exposed sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the cover is not in place, the floor hole shall be protected by a standard railing.

The Secretary contends that Campbell should have aligned the planks of the catwalk so that they were flush, eliminating the gaps (Tr. 45-46). The gaps between the catwalk's planks created an irregular surface on which employees could trip (Tr. 40).

Campbell does not dispute that the gaps existed or that Pereira knew of them and that its employees were exposed to tripping on them every time they traversed the catwalk. Campbell again asserts the multi-employer worksite defense, stating that it neither created nor controlled the hazard. Campbell offers no evidence that it attempted to abate the violative condition or notify the general contractor or the New York Department of Transportation of the condition.

The Secretary has established Campbell's violation of § 1926.500(b)(8). Injuries that could be sustained from tripping and falling onto a wooden surface include bruises and fractures. The violation was serious.

Citation No. 2

The Secretary's Motion to Amend the Citation

The Secretary originally cited Campbell for the willful violation of § 1926.500(c)(1), which provides:

> Wall opening(s) from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:
>
> (I) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided;
>
> (ii) The bottom of a wall opening, which is less than 4 inches above the working surface, regardless of width, shall be protected by a

> standard toeboard or an enclosing screen either of solid construction or as specified in paragraph (f)(7)(ii) of this section.

In the alternative, the Secretary charged Campbell with the willful violation of § 1926.500(d)(1), which provides:

> Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(I) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

After the hearing, the Secretary filed a motion to amend the citation, along with its post-hearing brief. The Secretary moved to substitute § 1926.105(a) "in the willful citation as the specific OSHA standard alleged by the Secretary to have been violated by respondent" (Secretary's motion to amend citation).

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 Secretary moved to amend the citation pursuant to Federal Rule of Civil Procedure 15(b), which states:

> **Rule 15. Amended and Supplemental Pleadings.**
>
> . . . .
>
> **(b) Amendments to Conform to the Evidence**. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not effect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits.

The court may grant a continuance to enable the objecting party to meet such evidence.

Campbell objects to the Secretary's motion on the grounds that it "is both grossly out of time and in bad faith . . . . [and] is prejudicial to Campbell and seeks to deny Campbell's right to confrontation almost four months after hearing" (Campbell's response in opposition to the Secretary's motion). Campbell complains that the Secretary moved to amend the complaint two years after the accident and four months after the hearing. The lateness of the Secretary's motion is no grounds for its denial.

> Under Rule 15(b), after a case has been tried, pleadings may be amended to conform the allegations therein to the facts established by the evidence when the record shows that the parties squarely recognized that they were trying an unpleaded issue, and consent to try the unpleaded issue may be implied from the parties' conduct.

RGM Construction Company, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). The fact that the Secretary waited until filing his post-hearing brief does not render it untimely. Rule 15(b) expressly provides that a party may move to amend the pleadings "at any time."

Campbell also asserts that the Secretary moved to amend in bad faith, basing its claim on the lack of notice provided to it by the Secretary. Rule 15(b) contains nothing which would require the Secretary to provide notice to Campbell of his intent to move to amend.

Campbell claims that it will be prejudiced by the Secretary's motion. "To determine whether a party has suffered prejudice, it is proper to look at whether it could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992). A finding of prejudice would require a demonstration that the amendment would change the factual allegations asserted in the citation. "Amendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation." *A. L. Baumgartner Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994).

The two standards originally cited, §§ 1926.500(c)(1) and (d)(1), address fall protection provided by guardrails and toeboards. The standard which the Secretary seeks to substitute for these standards, § 1926.105(a), addresses several forms of fall protection, including safety belts. A review

of the record shows that both parties raised the issue of safety belts. The witnesses testified extensively and without objection from Campbell to the use of safety belts. Stewart testified that he interviewed Campbell's employees regarding the wearing of safety belts and Campbell's rule to tie off when working over a height of 6 feet (Tr. 34-36). Slobodan Marinkovic, the assistant foreman, spoke regarding when he believed it was necessary to tie off (Tr. 104-110, 113, 117, 122). Roberto Pereira stated that wearing a safety belt was "the passport to go to work in the morning. You have to have the safety belt on to go to work in the morning" (Tr. 174). Much of Pereira's testimony focused on Campbell's policy regarding the use of safety belts (Tr. 155-159, 169-179). Campbell introduced sign-up sheets from safety meetings designed to illustrate that the company instructed its employees in the use of safety belts (Exh. R-2). Campbell's attorney elicited testimony from its vice-president, Gregory Campbell, regarding Campbell's safety rules on tying off (Tr. 232-234). Gregory Campbell volunteered that, "Fall protection is one of our most--is one the items we most stringently stress in our--it's a very key item in our safety program. . . . Our policy is that when employees are exposed to heights of greater than six feet, that they are tied off 100 percent of the time" (Tr. 243).

Not only did Campbell not object to the litigation of the issue of safety belts, it made the issue the cornerstone of its defense. Campbell was not denied an opportunity to confront witnesses on this issue. Amending the citation would not alter the essential factual allegations contained in the original citation. Amendment of the citation would conform the pleadings to the evidence and would cause no prejudice to Campbell. Accordingly, the Secretary's motion to amend the citation by substituting § 1926.105(a) for the standards originally cited is granted.

Alleged Violation of §1926.105(a)

To reiterate, § 1926.105(a) states:

> 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.

It is a well-established in Review Commission law that § 1926.105(a) "does not require the use of nets; it requires the use of one of the enumerated methods of fall protection, leaving nets as a last resort if none of the other methods can be used." *RGM Construction Company,* 17 BNA

OSHC at 1232. In the present case, the Secretary and Campbell agree that the most appropriate form of fall protection for the employees working at the wall opening was safety belts and safety lines. The vertical post bisecting the opening would have served well as an anchor point for a safety line. Pereira designated it as "the best spot" to tie off (Tr. 190). Campbell concedes that the accident resulted from the failure of Ante Martinovic to tie off.

Section 1926.105(a) applies to the cited conditions. Ante Martinovic was working at a height of 35 feet, standing on a narrow ledge. He was not tied off or using any other form of fall protection. Campbell's employees had access to the violative condition. Raising the equipment to the roadway above required the employee stationed at the wall opening to step out onto the ledge. Campbell could have known of the violative condition with the exercise of reasonable diligence. Assistant foreman Slobodan Marinkovic had instructed the crew to hoist the equipment. He was 10 to 15 feet away from Ante Martinovic when he fell (Tr. 113). Marinkovic stated that he did not know Ante Martinovic was not tied off while maneuvering the spray pump. A supervisor exercising reasonable diligence would have known that Martinovic was not tied off. Where a cited condition is "readily apparent to anyone who looked," employers have been found to have constructive knowledge. *Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993).

The Secretary has established that Campbell violated § 1926.105(a). Campbell argues that the violation resulted from Ante Martinovic's unpreventable employee misconduct.

Campbell's Unpreventable Employee Misconduct Defense

To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

Campbell had an established work rule designed to prevent the violation. Campbell implemented a written safety and health program. Rule 28.1.1 of the company's safety program states (Exh. C-5, p. 62):

> Fall protection equipment will be used by all employees working more than 6 feet above the ground or water on work platforms and scaffolding, more than 10 feet on

pipe staging and 25 feet on structures (e.g., bridges) where properly guarded platforms or temporary floors are not practical or feasible.

Campbell contends that it adequately communicated this rule to its employees. Campbell provided new employees with copies of its written safety program. The employees were required to sign an acknowledgment form that they had read it (Tr. 187). Campbell also provided employees with an sign-up booklet, which is a condensed version of its safety and health program. Employees receive the sign-up booklets at the time of their initial hire and when they return to work after a season (Exh. R-3; Tr. 233). The sign-up booklet contains an acknowledgment form for the receipt of safety equipment, including a safety belt and lanyard (Exh. R-3). Ante Martinovic had received and signed for a belt and lanyard (Tr. 188). Every employee signs a release indicating that he knows the kind of work Campbell performs. Campbell instructs its employees in the use of safety equipment. The company holds weekly safety meetings. Employees sign attendance sheets at each meeting (Tr. 170). Pereira held the safety meetings on the Queensboro Bridge project. He reiterated that all employees should tie off when working above 6 feet. Pereira held at least ten safety meetings on the project prior to Martinovic's April 23 accident. He discussed the use of safety belts and safety lines at these meetings (Tr. 69, 122, 136, 174, 185-186).

At first blush, it would seem that Campbell had an effectively communicated safety program. But the safety program was written only in English (Tr. 211). Jimenez spoke only Spanish (Tr. 208). Marinkovic and Martinovic spoke Croatian as their first language. Gregory Campbell conceded that not all of Campbell's employees had mastered the English language. "[I]n the bridge painting industry, there are many persons from all different nationalities, so we employ people who both speak English well and who speak English broken or poorly" (Tr. 239). Slobodan Marinkovic testified that he does not read English well (Tr. 127). When the Secretary's counsel asked Marinkovic to read out of Campbell's safety manual, this colloquy occurred (Tr. 128):

Q.: Okay, can you read the second sentence that says, "If it is determined"?

Marinkovic: "If it is determined that these controls are not feasible"--what you mean feasible-- "then fall protection equipment, safety belts must be used."

Q.: Do you know what this means?

Marinkovic: Not too much.

Gregory Campbell stated that he would "like to believe we have a foreman that is fluent in the languages of all our employees" (Tr. 241). Despite Gregory Campbell's hopes, no one at Campbell made certain that Slobodan Marinkovic, who held a supervisory position, understood the safety program.

Nevertheless, Campbell has established that it effectively communicated the specific 6-foot rule at issue here. Pereira emphasized the rule again and again in his safety talks. He was fluent in Spanish and was able to communicate the rule to the Spanish-speaking employees. Marinkovic agreed that "every Thursday [Pereira] told everybody, even me, make sure everybody is tied off" (Tr. 136). Campbell has satisfied the second element of its affirmative defense.

Campbell fails, however, to meet the third element of the defense, that it took steps to discover violations. Pereira relied on Marinkovic and Martinovic to make sure that the crew was tied off. Marinkovic, an assistant foreman, expressed his attitude towards tying off while working at the wall opening (Tr. 110):

> I know one time I don't was tied off, but a couple times I was tied off. . . . If I feel it--that's my judgment, I feel this is not safe, this is dangerous, I tied up, that's it. . . . I come close to the wall, but I don't go all the way to the edge. I come close to the wall, there is a pole and I hold my hand against the pole. I don't need a safety belt because that's my job, you know, I don't know.

At the hearing, Pereira attempted to shift the responsibility for the crew from Slobodan Marinkovic to Ante Martinovic. Pereira testified that Marinkovic was in charge of the employees hoisting the equipment on the bridge roadway while Ante Martinovic was in charge of the employees below preparing the equipment for hoisting (Tr. 157-158). If Ante Martinovic was acting as a supervisory employee at the time of his accident, it only cuts against Campbell's affirmative defense. "[A] supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Ceco Corporation, Inc.*, 17 BNA OSHC 1173, 1176 (No. 91-3235).

Campbell also failed to establish the fourth element of its defense, that it effectively enforced the work rule when a violation was discovered. Pereira described a progressive disciplinary program in which the first violation would result in a day's suspension, the second violation would result in a suspension for several days, and a third violation would result in dismissal of the offending employee (Tr. 184). Gregory Campbell asserted that failure to observe the 6-foot rule was grounds for immediate dismissal (Tr. 234). Pereira believed that Ante Martinovic's failure to tie off was a flagrant violation of Campbell's work rules. Pereira had the authority to fire employees. Yet he stated that Ante Martinovic was "welcome to come back anytime he wants" (Tr. 217, 221-222). (Campbell never formally dismissed Martinovic, but he did not return to Campbell after his release from the hospital and his whereabouts were unknown at the time of the hearing (Tr. 231, 235-236)).

Campbell has failed to establish its defense of unpreventable employee misconduct.

The Classification of the Violation

The Secretary alleges that Campbell's violation of §1926.105(a) was willful.

> A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. . . . A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. . . . A willful charge is not justified if an employer made a good faith effort to comply with a standard even though the employer's efforts are not entirely effective or complete.

Valdak Corp., 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995).

Campbell asserts that it was Ante Martinovic, and not Slobodan Marinkovic, who acted as supervisor over the crew in the bridge's interior on April 23. At the hearing, Slobodan Marinkovic, Roberto Pereira, and Gregory Campbell agreed that Martinovic's failure to tie off was a flagrant violation of its safety rules. Martinovic acted intentionally in not tying off. Despite repeated instructions regarding the 6-foot rule, Martinovic stood on a narrow ledge 35 feet above the surface, within easy reach of a vertical post ideal for an anchor point, and he failed to tie off. Slobodan Marinkovic knew that Martinovic had his safety belt at the site, in a bag (Tr. 113). Martinovic's failure to tie off can only be the result of a conscious disregard for the safety requirements. Martinovic and Marinkovic were both supervisory employees. Regardless of who was supervising that particular operation at that particular time, their actions must be characterized as willful.

Martinovic and Marinkovic's status as supervisory personnel creates a presumption of willfulness. "Willful conduct by an employee in a supervisory capacity constitutes a *prima facie* case of willfulness against his or her employer unless the supervisory employee's conduct was unpreventable. It is the employer's burden to show that the supervisory employee's conduct was unpreventable." *V.I.P. Structures Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). Campbell has offered no evidence that the conduct of either Martinovic or Marinkovic was unpreventable. The record establishes that while Campbell had a well-established work rule regarding the wearing of safety belts, this rule was winked at by the assistant foremen in charge of work crews.

The Secretary has established a willful violation of § 1926.105(a).

The Compliance Officer's Alleged Bias Against Campbell

Campbell asserts that the Secretary's charges against it result from a personal vendetta conducted by compliance officer Stewart. According to Campbell, Stewart's alleged bias against Campbell led directly to the Secretary charging Campbell with a willful violation. In its post-hearing brief, Campbell relates the basis for this assertion (Campbell's post-hearing brief, pp. 2-3):

> Mr. Stewart testified at the hearing that while he was training to be an OSHA inspector, four to five years before the accident which is the subject of this case, he observed a fatality at another Campbell jobsite (Tr. 73, 4-15). Not only did Mr. Stewart personally observe the dead body, a photograph was taken of him standing over it and was later published in the newspaper. Despite his statements that he had previously seen approximately one hundred dead bodies (Tr. 74, 17), Mr. Stewart kept the photograph of the Campbell fatality for years (Tr. 76, 6-8, 77, 7-9). He finally had the opportunity to inspect Campbell in the Spring of 1994 in this case (Tr.5, 12-18), and seized on it by bringing the newspaper photograph with him to Campbell's jobsite and waving it in the face of Campbell representatives (Tr. 77, 7-12). The implication was clear, Mr. Stewart was finally going to have his justice and would punish Campbell for what he felt was an unforgivable incident many years before.

The record of this case does not bear out Campbell's accusation of bias on the part of Stewart. Stewart was assigned to investigate the accident that occurred at Campbell's worksite (Tr. 5). OSHA is obliged to investigate accidents that result in injury. The record suggests nothing that indicates Stewart targeted Campbell for inspection. Stewart conducted his investigation and recommended that the Secretary cite Campbell for the violation of three standards. One of these

violations Stewart recommended as willful. His area director told Stewart that she would not cite the third violation as a willful. When she left on maternity leave, the acting area director reversed her decision and cited Campbell for a willful violation (Tr. 90-94). Campbell has not shown that this was anything other than the type of routine internal discussion that takes place before any citations are issued.

The record supports Stewart's recommendations for both the serious and the willful violations. Nothing in the record reveals overzealousness on Stewart's part. The evidence corroborates Stewart's allegations in every respect. His presentation of the photograph to Campbell's representatives, while questionable, does not give rise to a presumption of bias. No bias or evidence of a personal vendetta by Stewart is found.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 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.

Campbell employed between 200 and 250 employees (Tr. 51). The company has a history of previous violations (Tr. 52). The willful violation undercuts Campbell's good faith. While it had a good safety program on paper, in practice Campbell exhibited a lax attitude toward safety.

The gravity of the violation of § 1926.405(a)(2)(ii)(E), item 1 of citation No. 1, is moderate to high. Five employees were exposed to the unguarded bulbs at least twice a day while they worked on the bridge's interior. The bulbs were not directly in their path, but they were at face level in a narrow passageway. A penalty of $4,000.00 is appropriate.

The violation of § 1926.500(b)(8), item 2 of Citation No.1, is low in gravity. If an employee tripped on a gap in the catwalk, any injuries he suffered would likely be minor. A penalty of $2,000.00 is appropriate.

The gravity of Campbell's willful violation of § 1926.105(a) is very high. Employees working at the wall opening were exposed to a fall of 35 feet. Martinovic's hospitalization after his

fall demonstrates the danger of the hazard. It is determined that the appropriate penalty for item 1 of Citation No. 2 is $56,000.00.

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 hereby ORDERED that:

(1) The citation for item 1 of Citation No. 1, alleging a violation of § 1926.405(a)(2)(ii)(E), is affirmed, and a penalty of $4,000.00 is assessed;

(2) The citation for item 2 of Citation No. 1, alleging a violation of § 1926.500(b)(8), is affirmed and a penalty of $2,000.00 is assessed; and

(3) The citation for item 1 of Citation No. 2, as amended, alleging a violation of § 1926.105(a) is affirmed and a penalty of $56,000.00 is assessed.

/s/
IRVING SOMMER
Judge

Dated: APR 10 1996
Washington, D.C.