
SECRETARY OF LABOR,

Complainant,

v.

CBI SERVICES, INC. ,

Respondent.

OSHRC Docket No. 95-0489

DECISION

Before: ROGERS, Chairman, and EISENBREY, Commissioner.

BY THE COMMISSION:

At issue before the Commission is a citation alleging a willful violation of the Occupational Safety and Health Administration (“OSHA”) standard at 29 C.F.R. § 1926.550(b)(2), based on the employer’s failure to meet the requirements of an American National Standards Institute (“ANSI”) safety code provision that is incorporated by reference into the OSHA standard. Administrative Law Judge Richard DeBenedetto affirmed the citation and assessed the proposed penalty of \$55,000. On review, CBI Services, Inc. (“CBI”) does not challenge the judge’s conclusion that the Secretary established her case by proving: that CBI violated the cited standard and incorporated provision at its workplace in Quincy, Massachusetts, as alleged in the citation;¹ that the cited standard and provision applied to the cited conditions; that the employee identified in the citation had been exposed to those violative conditions; and that CBI had actual knowledge of the violation, through two of its highest-level on-site supervisors (the project superintendent and a foreman). CBI does argue,

¹The citation described the violation as follows: “On or about Tuesday, October 25, 1994, an employee of CBI Services, Incorporated climbed onto and stood on a load (hollow steel ring) which was then swung into position and suspended in place by the Marc Crawler Crane.” None of the other items are on review.

however, that the judge erred in rejecting its two affirmative defenses -- invalidity of the cited standard and unpreventable employee misconduct. It also argues that the judge erred in characterizing the violation as willful. For the reasons that follow, we affirm the judge.

I. Validity of the Cited Standard

A. Background

The standard at issue provides, in pertinent part:

§ 1926.550 Cranes and derricks.

* * *

(b) *Crawler, locomotive, and truck cranes.*

* * *

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements^[2] for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5 - 1968, Safety Code for Crawler, Locomotive and Truck Cranes. . . .

The standard was originally promulgated by the U.S. Department of Labor’s Bureau of Labor Standards (“BLS”) on April 17, 1971, as a standard under the Construction Safety Act, 40 U.S.C. § 333.³ The language of the standard, which at that time was designated as 29 C.F.R.

²The “applicable requirement[.]” of the ANSI Safety Code, as identified in the citation, is Section 5-3.2.3(e), which provides:

5-3.2.3 Moving the Load

* * *

e. The operator shall not hoist, lower, swing, or travel while anyone is on the load or hook.

³The “Construction Safety Act” was enacted on August 9, 1969, as section 107 of the Contract Work Hours and Safety Standards Act. Under the terms of the Construction Safety Act, employees working on covered federal construction contracts are to be protected from exposure to “work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to [their] health or safety, as determined under safety and health (continued...) ”

§ 1518.550(b)(2), was identical to the first sentence of the current section 1926.550(b)(2), as quoted above.

On May 29, 1971, the Secretary adopted and extended “[t]he standards prescribed in [29 C.F.R.] Part 1518 . . . and in effect on April 28, 1971,” including the standard at issue in this case, “as occupational safety and health standards under section 6(a) of the [Occupational Safety and Health] Act [of 1970],” 29 U.S.C. §§ 651-678 (“the OSH Act”).⁴

³(...continued)
standards promulgated by the Secretary [of Labor].” 40 U.S.C. § 333(a).

⁴Section 6(a) of the OSH Act, 29 U.S.C. § 655(a), provides:

Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act [*i.e.*, April 28, 1971] and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard and any established Federal standard, unless he determines that the promulgation of such standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

The key term “established Federal standard” is defined as “any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on December 29, 1970.” Section 3(8) of the OSH Act, 29 U.S.C. § 652(8). The Commission has held that the term “presently in effect,” as used in section 3(8), means in effect on April 28, 1971, the effective date of the OSH Act. *See, e.g., Morrison-Knudsen Co./Yonkers Contrac. Co., a Joint Venture*, 16 BNA OSHC (continued...)

The Part 1518 standards were made applicable, “according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work,” regardless of whether the work is or is not performed under a federal construction contract. 29 C.F.R. § 1910.12(a), as promulgated at 36 Fed. Reg. 10466, 10469 (1971).

CBI argues that the cited OSHA standard is invalid because the Secretary failed to publish in the Federal Register (1) the incorporated ANSI provision and (2) a “significant risk” finding under *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (“the *Benzene Case*”). The Secretary raises the counter-argument that the Commission lacks the authority to rule on either of CBI’s standard validity challenges. We first address the issue of the Commission’s authority.

B. The Commission’s Authority to Decide the Issues

In support of her contention that the Commission lacks the authority to rule on CBI’s standard validity challenges, the Secretary makes two alternative arguments, both of which we reject. First, the Secretary argues that CBI is “foreclosed” under Commission precedent from challenging the procedural validity of section 1926.550(b)(2)’s promulgation in this enforcement proceeding. The precedent she cites is *General Motors Corp., GM Parts Div.*, 9 BNA OSHC 1331, 1981 CCH OSHD ¶ 25,202 (No. 79-4478, 1981) (“*GMC*”), and two cases following the holding of that decision, *American Can Co.*, 10 BNA OSHC 1305, 1309-10, 1982 CCH OSHD ¶ 25,899, pp. 32,412-13 (No. 76-5162, 1982), and *Daniel Constr. Co.*, 9 BNA OSHC 1854, 1856, 1981 CCH OSHD ¶ 25,385, pp. 31,622-23 (No. 12525, 1981), *aff’d*, 705 F.2d 382 (10th Cir. 1983). In *GMC*, the Commission held that challenges to OSH Act standards based on procedural deficiencies in the adoption of their ancestor standards under other statutes may not be made in enforcement proceedings before the Commission. Here, however, both of CBI’s validity challenges allege deficiencies in the adoption of

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1105, 1108-10, 1993-95 CCH OSHD ¶ 30,048, pp. 41,264-66 (No. 88-0572, 1993).

section 1926.550(b)(2) as an OSH Act standard under section 6(a) of the Act. CBI has made no claim at any point in this proceeding that section 1926.550(b)(2)'s ancestor standard was invalidly promulgated as a standard under the Construction Safety Act. The Commission precedent cited by the Secretary is therefore inapposite.

Alternatively, the Secretary “restates her position . . . that the pre-enforcement challenge provision in § 6(f) is the exclusive remedy for questioning the validity of the Secretary’s standards.”⁵ The Commission has consistently rejected this argument, beginning with *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1095-96, 1980 CCH OSHD ¶ 24,979, p. 30,844 (No. 12470, 1980). The Commission and at least two appellate courts have also expressly considered and declined to follow the position taken by the U.S. Court of Appeals for the Eighth Circuit in *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048 (8th Cir. 1978) (“*NIC*”), *i.e.*, that only “substantive” validity challenges and not “procedural” validity challenges may be raised and considered in administrative (enforcement) proceedings before the Commission, as well as in section 6(f) pre-enforcement proceedings before a court.⁶ *See, e.g., Deering Milliken, Inc., Unity Plant v. OSHRC*, 630 F.2d 1094,

⁵In pertinent part, section 6(f) of the OSH Act, 29 U.S.C. § 655(f), provides that “[a]ny person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. . . . The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.”

⁶Contrary to the Secretary’s arguments, neither *NIC* nor the other appellate court decision she relies on, *Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 951-52 (6th Cir. 1990), supports her position that in all circumstances the section 6(f) pre-enforcement judicial
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1098-99 (5th Cir. 1980); *Marshall v. Union Oil Co. of California*, 616 F.2d 1113, 1116-18 (9th Cir. 1980); *Rockwell*, 9 BNA OSHC at 1096-97, 1980 CCH OSHD at pp. 30,844-45. In re-asserting her position in the instant case, the Secretary does not raise any arguments not previously considered by the Commission that would suggest a need for modifying our long-standing position. We therefore adhere to Commission precedent and hold that both of CBI's challenges to the validity of section 1926.550(b)(2) are properly before us in this enforcement proceeding.⁷

C. The Incorporation by Reference of ANSI B30.5 - 1968

⁶(...continued)
review procedure is “the exclusive remedy for questioning the validity of the Secretary’s standards.” Indeed, we are unaware of any Commission or appellate court decision that has adopted that position.

⁷CBI argues on review that its “significant risk” validity challenge is properly before the Commission because it is a “substantive” challenge rather than a “procedural” challenge within the meaning of *NIC*. As indicated, Commission precedent does not distinguish between “substantive” and “procedural” issues in determining whether a validity challenge is properly before the Commission. We note nevertheless that the issue raised by CBI is clearly a “procedural” rather than a “substantive” challenge within the meaning of *NIC*. *See* 583 F.2d at 1052. CBI argues only that the cited OSH Act standard and its incorporated ANSI provision are invalid because OSHA failed to comply with the purported *procedural* requirement that it make and publish in the Federal Register a formal “significant risk” determination at the time it promulgated the standard under section 6(a). CBI has *not* argued before us that the cited OSH Act standard and its incorporated ANSI provision, either as written or as applied in the instant case, fail to meet the *Benzene Case* Court’s “significant risk” test.

It is undisputed that neither at the time she initially promulgated section 1518.550(b)(2) as a Construction Safety Act standard nor at any time since has the Secretary published the incorporated safety code, ANSI B30.5 - 1968, in the Federal Register. CBI challenges the validity of this incorporation by reference based on its interpretation of the rulemaking provisions of three federal statutes: the OSH Act; the Administrative Procedure Act ("APA"), which is referred to in section 6(a) of the OSH Act as "chapter 5 of title 5, United States Code"; and the Federal Register Act, 44 U.S.C. §§ 1501-1511. As indicated *supra* at note 4, section 6(a) of the OSH Act instructed the Secretary that the "established Federal standards" and "national consensus standards" that she adopted and extended as her initial OSHA standards package, shortly after the effective date of the OSH Act (April 28, 1971), were to be promulgated "[w]ithout regard to chapter 5 of title 5, United States Code." CBI argues that this phrase precludes the applicability of any of the provisions of the APA to section 6(a) rulemaking, including the provisions of 5 U.S.C. § 552(a)(1)(D), which permits federal agencies under specified circumstances to promulgate standards and regulations through incorporation by reference.⁸

⁸In pertinent part, the APA section provides:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * *

(D) substantive rules of general applicability adopted as authorized by law[.]

* * *

For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

CBI argues that, since the APA did not apply to the Secretary's section 6(a) rulemaking, that rulemaking was governed solely by the Federal Register Act, which by its terms required publication of ANSI B30.5 - 1968 in the Federal Register. That Act's publication requirement, according to CBI, contains no exception, either in the statute itself or in its implementing regulations, that would have permitted the Secretary to incorporate the ANSI Safety Code into the cited OSHA standard by reference.⁹ Accordingly, CBI argues that the Secretary was required to publish ANSI B30.5 -1968 in the Federal Register but failed to do so. Nor has the Secretary, in CBI's view, established in this proceeding that CBI had actual knowledge of the provisions of section 5-3.2.3(e) of the ANSI Safety Code. CBI contends that the Secretary is therefore barred by the express terms of the Federal Register Act from enforcing against it the prohibition against riding the crane's load. *See* 44 U.S.C. § 1507.

We reject CBI's arguments because there is a critical flaw in CBI's reasoning. ANSI B30.5 - 1968 was *not* incorporated into the cited standard, section 1926.550(b)(2), under the OSH Act on May 29, 1971. Rather it was incorporated by reference under the APA at an earlier time -- when the cited standard's ancestor standard, section 1518.550(b)(2), was initially promulgated on April 17, 1971, under the Construction Safety Act. When the Secretary subsequently adopted and extended the "established Federal standard" at section 1518.550(b)(2) as an OSH Act standard, she did so by re-publishing the text of that pre-existing standard in the Federal Register verbatim.¹⁰

⁹CBI relies on the Federal Register Act provisions at 44 U.S.C. §§ 1505(a) & (b) and its implementing regulations at 1 C.F.R. § 11.2.

¹⁰On May 29, 1971, the Secretary initially adopted Part 1518, and thus section 1518.550(b)(2), as OSH Act standards through incorporation by reference. *See* 29 C.F.R. § 1910.12(a), as quoted in pertinent part, *supra*. On December 16, 1972, the Secretary re-

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CBI has made no claim before us that the incorporation by reference that occurred at the time section 1518.550(b)(2) was initially promulgated rendered that Construction Safety Act standard invalid. Nor could such a claim succeed. In sharp contrast to the OSH Act provisions at section 6(a), as quoted *supra* note 4, the Secretary was expressly required to follow APA notice-and-comment rulemaking procedures when she promulgated standards under the Construction Safety Act. *See* 40 U.S.C. § 333(a) (referring to 5 U.S.C. § 553). The Secretary, therefore, properly relied on the APA incorporation-by-reference provisions at 5 U.S.C. § 552(a)(1)(D). *See supra* note 8.

Under 5 U.S.C. § 552(a)(1)(D), published material that has been incorporated by reference into a federal agency standard or regulation is “deemed published in the Federal Register” if and when the incorporated matter has been made “reasonably available to the class of persons affected thereby” and its incorporation by reference has been “approv[ed by] the Director of the Federal Register.” On review, the Secretary asserts that, when she promulgated 29 C.F.R. § 1518.550(b)(2) under the Construction Safety Act, she “followed” all pertinent “APA and Federal Register Act publication requirements,” including those just mentioned. Strong support for this claim is found in the Federal Register itself and in the Code of Federal Regulations. Thus, at the time she initially promulgated section 1518.550(b)(2), the Secretary also promulgated 29 C.F.R. § 1518.31, which met the APA requirement to inform “[affected] persons” of the “reasonabl[e] availab[ility]” of the

¹⁰(...continued)
promulgated 29 C.F.R. Part 1518, which had been redesignated in the interim (December 1971) as 29 C.F.R. Part 1926. This time, the Secretary published the full text of all of the Part 1518/1926 standards, including section 1926.550(b)(2), as quoted *supra*. The Secretary’s re-promulgation of the standards occurred within the statutory two-year time frame established under section 6(a) of the OSH Act. *See supra* note 4.

incorporated materials.¹¹ Also, a table captioned “Material Approved for Incorporation by Reference” that is located at the end of 29 C.F.R. Part 1926 states that “[t]he Director of the Federal Register has approved under 5 U.S.C. § 552(a) and 1 CFR Part 51 the incorporation by reference of . . . [the publications listed in the table].” The incorporation of ANSI B30.5 - 1968 Safety Code for Crawler, Locomotive and Truck Cranes into 29 C.F.R. § 1926.550 is listed in that table. Indeed, each annual Code of Federal Regulations publication since the table first appeared in 1980 has included ANSI B30.5 - 1968's incorporation into § 1926.550 in the list of approved incorporations by reference.

¹¹The regulation read, in pertinent part:

§ 1518.31 Incorporation by reference.

(a) The specifications, standards and codes of agencies of the U.S. Government and organizations which are not agencies of the U.S. Government, to the extent they are legally incorporated by reference in this part, have the same force and effect as other standards in this part. The locations where these specifications, standards, and codes may be examined are as follows:

(1) Offices of the Bureau of Labor Standards, U.S. Department of Labor, Railway Labor Building, Washington, DC 20210.

(2) The Regional and Field Offices of the Bureau of Labor Standards which are listed in the U.S. Government Manual 1970-71, at page 324.

36 Fed. Reg. at 7347. When the Secretary subsequently adopted the Construction Safety Act standards as construction safety and health standards under the OSH Act, she retained the incorporation-by-reference provisions of section 1518.31, but she substituted references to OSHA offices in place of the prior references to Bureau of Labor Standards offices.

In any event, Commission precedent clearly holds that, because “[m]aterials incorporated by reference are presumed to be reasonably available and to be incorporated with the approval of the Director of the Federal Register in accordance with the limitations on the use of incorporated by reference materials found at 5 U.S.C. § 552(a)(1),” *see* 44 U.S.C. § 1507, it is the employer who “bears the burden of rebutting at least one of these presumptions to prove the invalidity of [a standard containing incorporated materials].” *Charles A. Gaetano Constr. Corp.*, 6 BNA OSHC 1463, 1465-66, 1978 CCH OSHD ¶ 22,630, p. 27,304 (No. 14886, 1978). Yet, here CBI has not claimed that there was any procedural invalidity in the promulgation of 29 C.F.R. § 1518.550(b)(2) as a safety and health standard under the Construction Safety Act.

Nor has CBI provided any support for its assertion that the adoption and extension of 29 C.F.R. § 1518.550(b)(2) as an occupational safety and health standard under section 6(a) of the OSH Act somehow made it “incumbent upon the Secretary to publish the text of ANSI B30.5 - 1968” in the Federal Register, even though that text had already been validly incorporated into the established Federal standard she was adopting and extending. We agree with the Secretary that “[i]t was not necessary for [her] to publish the ANSI standard [at that time] because 29 C.F.R. § 1518.550(b)(2) was already a lawfully promulgated and published standard that had conformed to APA and Federal Register Act requirements at its inception.” We therefore hold that the Secretary’s failure to publish ANSI B30.5 - 1968 in the Federal Register did not render the cited standard, 29 C.F.R. § 1926.550(b)(2), either invalid or unenforceable against CBI.

D. The Absence of a “Significant Risk” Finding

CBI’s second challenge to the validity of the cited standard and its incorporated ANSI Safety Code provision is based on the undisputed fact that the Secretary did not, at the time of the standard’s promulgation under section 6(a) of the OSH Act, make and publish in the Federal Register a “significant risk” determination within the meaning of the U.S. Supreme Court’s 1980 decision in the *Benzene Case*. In that case, the Court upheld a Fifth Circuit

decision invalidating OSHA's benzene standard, which had been promulgated under section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5),¹² and subsequently challenged in a section 6(f) pre-enforcement judicial review proceeding. *See supra* note 5. A plurality of the Court's members concluded that the benzene standard was invalid because, "before he can promulgate *any* permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe -- in the sense that significant risks are present and can be eliminated or lessened by a change in practices." 448 U.S. at 642 (emphasis in the original). They found that the Secretary had failed to make a "significant risk" determination in the challenged rulemaking proceedings.

In its arguments before us, CBI correctly points out that the *Benzene Case*'s plurality based their holding on the statutory definition of the term "occupational safety and health standard"¹³ and that that term is used in both section 6(a) and section 6(b) of the OSH Act. CBI accordingly contends that "[t]here is no reason to believe that the Court's holding is not applicable to the promulgation of standards pursuant to section 6(a) of the OSH Act." We disagree.

At the outset, we take note of the distinct lack of consensus among the federal appellate courts as to the meaning of the *Benzene Case* decision and its impact beyond the context of section 6(f) challenges to section 6(b)(5) standards, *i.e.*, the context in which that

¹²Section 6(b)(5) sets forth several *substantive* criteria that the Secretary must meet in promulgating new standards "dealing with toxic materials or harmful physical agents." The *procedures* for adopting section 6(b)(5) standards are no different than those that must be followed in adopting any other standards under section 6(b).

¹³Section 3(8) of the OSH Act, 29 U.S.C. § 652(8), defines the term "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

particular case was decided. Pointing to such matters as “the lack of a majority opinion” and “the complex overlapping among the five separate opinions” in the *Benzene Case* decision,¹⁴ as well as the Court’s focus on whether “Congress might have unconstitutionally delegated legislative power to the Secretary of Labor by granting the Secretary sweeping authority to set permanent health standards *under section 6(b)(5)*,”¹⁵ at least three appellate courts have directly or indirectly cautioned against placing undue reliance on the “broad dicta”¹⁶ of the *Benzene Case* plurality opinion.¹⁷ Compare *Frank Diehl Farms*, 9 BNA OSHC 1432, 1433, 1981 CCH OSHD ¶ 25,245 (No. 80-0917, 1981) (ALJ).¹⁸

¹⁴*United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1245 n.84 (D.C. Cir. 1980).

¹⁵*Super Excavators, Inc. v. OSHRC*, 674 F.2d 592, 595 (7th Cir. 1981) (emphasis added).

¹⁶*Kelly Springfield Tire Co. v. Donovan*, 729 F.2d 317, 323 n.9 (5th Cir. 1984)

¹⁷CBI’s argument before us is based almost entirely on statements made in the decision’s lead opinion, which was written by Justice Stevens and joined in completely by only two other Justices, neither of whom is still sitting on the Court. As noted by both the D.C. and Fifth Circuits, five of the Justices who participated in the decision (concurring then-Justice Rehnquist and the four dissenters) appear to have actually disagreed with the plurality’s central premise, *i.e.*, that section 3(8) creates a substantive restriction on the Secretary’s authority to promulgate standards under the OSH Act. *See* cases cited *supra* notes 14 & 16.

¹⁸CBI has not cited a single judicial or administrative decision that supports its contention that the Court’s holding in the *Benzene Case* is “applicable to the promulgation of standards pursuant to section 6(a) of the OSH Act.” We are aware of only one prior case in which CBI’s argument has even been raised, and in that case, it was rejected. In *Frank*
(continued...)

To the extent the *Benzene Case* decision can be construed as even addressing 6(a) rulemaking, the Court's views are properly characterized as dicta since no issue relating to 6(a) rulemaking was actually before the Court. We respectfully decline to follow that dicta. As the administrative law judge recognized twenty years ago in *Frank Diehl Farms*, see *supra* note 18, there are significant differences between the procedures established by Congress for adopting and extending pre-existing "national consensus standards" and "established Federal standards" under section 6(a) of the OSH Act and the procedures established for developing and promulgating 6(b)(5) standards and other new, revised or substitute standards under section 6(b) of the OSH Act. Those procedural differences persuade us that, contrary to CBI's arguments, Congress could *not* have intended to impose on the Secretary an obligation to make and publish in the Federal Register "significant risk" determinations with respect to each and all of the numerous pre-existing standards that the Secretary included in her initial section 6(a) OSHA standards package.

The conference report on the legislation that became the OSH Act noted that both the Senate and House versions of the bill had "required the earliest practical promulgation of

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Diehl Farms, which we have cited above, the administrative law judge rejected the argument that 29 C.F.R. § 1910.142 (the "temporary labor camps" standard) is invalid because the Secretary made no finding at the time of promulgation that the regulated working conditions posed a significant health hazard risk. The judge rejected that argument on the ground that section 1910.142 was a national consensus standard that had been adopted by the Secretary under section 6(a) of the OSH Act, while the *Benzene Case* "was dealing with the Secretary's standard setting under section 6(b)(5) of the Act which requires a different procedure from that provided for the adoption of national consensus standards under section 6(a) of the Act." The judge also found that there was "no evidence to support a finding that the Secretary exceeded the authority granted to him under section 6(a)"

national consensus and established Federal standards and permitted use of an informal, shortened rule-making procedure” for the promulgation of these “Interim Standards.” In conference, the House had “receded” to the Senate “as to the time,” agreeing to allow the Secretary only two years rather than three to exercise her authority under section 6(a). Conference Rep. No. 91-1765 at 2-3, 1970 U.S. Code Cong. & Admin. News at 5229-30. The Senate committee report on the bill initially passed by the Senate similarly stated that the “purpose” of the section 6(a) rulemaking “procedure” was “to establish as rapidly as possible national occupational safety and health standards with which industry is familiar” and to “immediately provid[e] a nationwide minimum level of health and safety.” S. Rep. No. 91-1282, 91st Cong., 2d Sess., 6 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5182.

While mandating the adoption and extension of these “national consensus” and “established Federal” standards, Congress fully acknowledged that they “may not be as effective or as up-to-date as is desirable.”¹⁹ *Id.* Nevertheless, it clearly pointed the Secretary (and any interested or adversely affected parties) to the institution of formal rulemaking proceedings under section 6(b) as the appropriate procedure for “improv[ing]” or “replac[ing]” such ineffective or outdated 6(a) standards. *See* S. Rep. No. 91-1282 at 6-7, 1970 U.S. Code Cong. & Admin. News at 5182-83 (concluding discussions of 6(a) and 6(b) rulemaking procedures with observation that “[s]ection 6(b) sets forth the procedures by which the promulgation of new standards, and *the revision and revocation of adopted standards*, are to be accomplished” (emphasis added)). Congress further justified the expedited rulemaking procedures under section 6(a) on the grounds that the national

¹⁹In particular, the Senate committee took note of a Labor Department study that had shown that “a large portion of the voluntary standards are seriously out of date,” and it added that “[m]any” of these standards “represent merely the lowest common denominator of acceptance by interested private groups.” *Id.*

consensus standards had already “been adopted under procedures which [had] given diverse views an opportunity to be considered and which indicate[d] that interested and affected persons [had] reached substantial agreement on [their] adoption,” while the established Federal standards had “already been subjected to the procedural scrutiny mandated by the law under which they were issued” and “in large part” had “represent[ed] the incorporation of voluntary industrial standards.” *Id.*

Based on this legislative history, we conclude that Congress *did not intend* for the Secretary to take the time, conduct the level of exhaustive review, and develop the extensive evidentiary record that would have been necessary to make and support meaningful “significant risk” determinations with respect to each of the standards promulgated under section 6(a). In particular, we reject CBI’s assertion that the Secretary was required to make and publish in the Federal Register a “significant risk” determination with respect to the “established Federal standards” adopted under section 6(a), such as the standard at issue in this case.

Furthermore, the fact that 29 C.F.R. § 1926.550(b)(2) was originally promulgated by the Secretary under the Construction Safety Act also indicates that no “significant risk” determination was needed. This ancestor standard was issued pursuant to a Congressional mandate that the Secretary adopt occupational safety and health standards that would protect the statutorily-covered employees from exposure to “work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to [their] health and safety.” *See supra* note 3. In section 4(b)(2) of the OSH Act, 29 U.S.C. § 653(b)(2), Congress itself declared that the standards promulgated under the Construction Safety Act, *i.e.*, “Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333),” prior to the effective date of the OSH Act, as well as other designated “established Federal standards,” were “*deemed to be* occupational safety and health standards issued under this Act. . . .” (Emphasis added). Given the statutory criteria set forth in the two statutes, we have little doubt that any safety or health standard meeting the Congressional mandate under the Construction Safety Act would also fall within

the definition of “occupational safety and health standard” under the OSH Act. *Compare supra* notes 3 & 13. Since the two statutes were both enacted by the same Congress (the 91st) within a period of less than two years, it seems highly probable that Congress premised its actions on its belief that the occupational safety and health standards adopted by the Secretary under the Construction Safety Act (following the passage of the OSH Act but prior to its effective date) would meet the statutory definition under section 3(8) of the OSH Act.

We therefore hold that the fact that the Secretary did not, at the time she promulgated 29 C.F.R. § 1926.550(b)(2) under section 6(a) of the OSH Act, make and publish in the Federal Register threshold “significant risk” findings within the meaning of the *Benzene Case* decision did not render either the cited standard or its incorporated ANSI safety code provision invalid and unenforceable.²⁰

II. The Alleged Violation

²⁰As indicated *supra* at note 7, CBI’s invalidity challenge is limited to an assertion of procedural error in the promulgation of the cited standard and its incorporated ANSI Safety Code provision. CBI has not claimed that the cited prohibition against riding the load of a crawler crane, either as drafted or as applied to it, addresses conduct that does *not* in fact present “a significant risk of harm” to employees that could be “eliminated or lessened by a change in practices.” *See Benzene Case*, 448 U.S. at 642. Accordingly, our decision in this case leaves intact the Commission’s precedent governing the resolution of such issues when they are presented by the parties in an enforcement action before us. *E.g.*, *Andrew Catapano Enterps., Inc.*, 17 BNA OSHC 1776, 1782-84, 1995-97 CCH OSHD ¶ 31,180, pp. 43,609-10 (No. 90-0050, 1996); *Otis Elevator Co.*, 17 BNA OSHC 1166, 1168, 1993-95 CCH OSHD ¶ 30,730, p. 42,663 (No. 90-2046, 1995); *Anoplate Corp.*, 12 BNA OSHC 1678, 1681-82, 1690-91, 1986-87 CCH OSHD ¶ 27,519, pp. 35,679-80 & 35,688-89 (No. 80-4109, 1986).

As noted above, CBI does not challenge the merits of the cited violation. Some background on the alleged violation is helpful, however, in considering CBI's unpreventable employee misconduct defense and the disputed willful characterization.

A. Background

At the time of the alleged violation, CBI employees in Quincy, Massachusetts, were engaged in the construction of four large, steel-plate "egg-shaped digester tanks" that were to be installed at a sewage treatment plant in Deer Island, Massachusetts. The allegation relates to the first of the tank bottoms completed by CBI, *i.e.*, "the bottom half of the Number 1 Digester" or "Bottom 1." A month or two before the cited incident, CBI discovered that the upper edge of the shell on Bottom 1 did not have a uniform diameter of 84 feet, as planned, but instead was significantly "out of round." It was therefore necessary to use a device called a "spider hub" to "get this top edge round so that when . . . [the tank bottom arrived at] Deer Island, the top half then could be placed on top of it, and it would fit evenly."

Upon learning of this problem, project superintendent Perry Brosius, the highest-ranking CBI management employee at the Quincy worksite, called his supervisor, project manager Art Atherton, at Atherton's office in New Castle, Delaware. He informed Atherton that Bottom 1 was 11 inches out of round and requested the materials needed to assemble four spider hubs.²¹ Brosius testified, however, without contradiction, that he and Atherton did not discuss (either then or later) the problem of how the spider hub was to be assembled.²²

²¹Since Bottom 1 was the first tank bottom completed by CBI, Brosius did not know at that time whether the same problem would arise with respect to the other three. However, Bottom 1 proved to be the only component that needed to be re-shaped by using a spider hub.

²²Due to various scheduling problems, project manager Atherton, who was listed in pre-hearing submissions as a witness for CBI, did not testify. After calling all of his other
(continued...)

The spider hub assembled over the top of Bottom 1 consisted of a central steel ring or “hub,” which was 6 feet in diameter with a 3-foot-wide center opening, and 27 solid steel rods, each of which was 1 inch in diameter and 38 feet long. The rods extended between the hub and the upper edge of the tank bottom shell, just as the spokes of a bicycle wheel extend between an inner hub and an outer wheel. Normally, when CBI’s operations required use of a spider hub, employees were able to assemble the device on the ground and then move it into position over the vessel that was to be re-shaped. In this instance, however, the size of the tank bottom and the way in which it was constructed precluded assembly of the device in the customary manner.

Assembling the device at the Quincy worksite required two employees to work in tandem, one at the hub and the other at the upper edge of the shell. One rod at a time would be installed, with the two employees first guiding the crane-suspended rod to the proper location. The employee at the hub would place his end of the rod, which had approximately one foot of threading on it, through one of the many holes encircling the hub and screw a steel nut onto it. The employee at the shell would then slip “a yoke like a turn buckle” at his end of the rod over a “lug welded on the shell” and secure that end of the rod to the shell by putting a pin bolt through it. Once all of the rods were in place, all of the nuts at the hub end

²²(...continued)

witnesses, CBI’s counsel detailed his prior unsuccessful efforts to obtain Atherton’s testimony and expressly informed the judge that he “would still like to take [that] testimony and have it part of the record.” The judge then advised CBI’s counsel that Atherton’s testimony was unnecessary because “the major actors” involved in “the crane situation” had already testified and he did not “see where [Atherton] would make any significant contribution.” CBI’s counsel responded: “In that case, your Honor, we rest.” Under these circumstances, we agree with CBI that the judge erred in drawing adverse inferences against it in his decision based on Atherton’s non-appearance.

would be hand-tightened. Finally, a pneumatic wrench would be used to selectively tighten the rods so that the wide areas of the shell would be drawn in while the narrow areas expanded outward until “eventually . . . the [upper edge] bec[a]me . . . a nice round circle.”

Since CBI already had scaffolding in place inside Bottom 1 and just below the edge of the shell rim, project superintendent Brosius knew that there was already a safe working surface from which the employee at the shell end of the spider web rods could work. He also concluded that a 150-ton Lima crawler crane could be used to position the hub and hold it in place in midair (at the center of Bottom 1 but at the same elevation as the shell rim, approximately 50 feet above ground). A 30-ton hydraulic cherry picker could be used to lift the rods into position one by one for incorporation into the spider hub.

Brosius accordingly identified the critical problem in assembling the spider hub as being how to get an employee safely into position where he could attach the 27 threaded rods to the suspended hub. Brosius testified that he considered three possible solutions to this problem, two of which -- use of a “man basket” or “crane-suspended work platform,” as it is referred to in CBI’s safety rules, and use of a “jacob’s ladder” or “cable ladder” -- he rejected as infeasible and/or too hazardous. The third possibility considered by Brosius was the plan he selected. Under this plan, a board would be wired onto the hub to serve as a working platform. It would be tested at ground level to ensure that it was stable and secure. A “flag man” stationed at the upper-level interior scaffolding would be used to give hand signals to the Lima crane operator to lift the hub into position. The load and the boom would then be “dogged off” so that they could remain at this constant elevation, with further movement restricted to the horizontal plane. The hub and its attached working surface would then be moved horizontally to the interior scaffolding, where the employee who was to work from the hub during the assembly process would be waiting. After picking up the employee, the crane operator would rotate the load back to the mid-point position, and the assembly operation would begin. The employee would remain seated on the working platform wearing a tied-off safety belt while the crane load was in motion.

Brosius acknowledged knowing that his plan would violate a CBI safety rule that prohibited employees from riding a crane load unless they used a crane-suspended work platform. He also acknowledged that he had violated a second CBI work rule by making the decision on his own (without notifying other CBI officials) to conduct the operation in violation of CBI's "no riding" rule, rather than going through the company's formal procedure for granting field operations personnel an "in-house variance" from its safety rules. Brosius denied knowing, however, that his plan violated any OSHA standard.

Brosius testified that he had proceeded under his plan because he was convinced that the procedure he had devised was the only safe way in which the spider hub could be assembled. He denied knowing of the alternative plan for assembling the spider hub that had been developed by his supervisor, Atherton, and described in a memo faxed by Atherton to project engineer Kevin Hubbard.²³ Under that plan, which involved erecting a central column to hold the hub in place until it could be secured in its position by the installed rods, there would have been no violation of the "no riding" rule.

On the day of the operation, Brosius met with three of the employees who would be involved in carrying out his plan: Harold ("Red") Nichols, who was to ride the hub/board from the upper-level scaffolding to its predetermined position and to work from that position in assembling the spider hub; Harold ("Hal") Smith, who was to operate the Lima crawler crane; and foreman Kenny Coleman, who was to act as the crane operator's flag man and direct the entire operation. Brosius and Coleman both testified that Brosius described his plan

²³Hubbard's duties at the Quincy worksite included the acquisition of construction materials. The fax was sent to Hubbard so that he could purchase some of the materials needed in assembling the previously-requested spider hubs. Additional materials, such as the four central rings or "hubs" and specialized tools used in assembling the devices, were shipped to Quincy, at Atherton's direction, from New Castle and possibly other CBI workplaces.

to the assembled employees for the first time and issued his implementing instructions at that meeting. Like Brosius, Coleman admitted knowing that the plan violated the CBI work rule but denied knowing that it also violated an OSHA standard. He indicated that he had agreed with the plan because he had independently considered the problem of how to safely assemble the spider hub over Bottom 1 and had “pretty much arrived at the same plan that Mr. Brosius had derived.” He also claimed that he had “assumed,” based on Brosius’ reputation for safety-consciousness, that Brosius had gone through CBI’s formal “system” for obtaining approval for “deviat[ions] from the [company’s safety] rules.”

Shortly after the meeting between Brosius and his subordinates, the spider hub was assembled as planned. Brosius testified that he observed the startup of the operation and then left the area “to look at some other things on the project,” while Coleman continued to direct the operation. As Nichols and the crane load on which he was riding moved across the open top of the shell from the scaffolding to the pre-determined mid-point position where the assembly operation would take place, two welders working separately inside of Bottom 1 observed the situation. Each became upset that the operation was being conducted in violation of a firmly-established safety rule. Welder Dominic (“Nick”) Giannone testified that he responded to what he had seen by going to Coleman and demanding that the hub be brought back down and the employee taken off of the load. According to Giannone, even though he told Coleman that “hav[ing] a man riding the load” was “against OSHA regulations,” Coleman “just brushed [him] off.” At roughly the same time, welder Mark Perras went to his union job steward and insisted that the steward take action to halt the operation. In response, the steward went up to the upper-level scaffolding to speak to Coleman. According to Perras, when the steward returned, he informed Perras “that Kenny did acknowledge that . . . there was a problem with the situation but at this point it was too late because they were already attaching rods to the hub.”

Sometime later, Giannone left the work area to find job site safety supervisor Roger Hale, who was in his office, and to inform Hale of the safety rule violation. In response, Hale

and others, including Brosius, went to investigate the hub assembly procedure. When those officials also failed to halt the operation, Giannone, according to his own testimony, “left the job to go to OSHA to report the incident.” OSHA’s subsequent investigation of that incident led to the citation now before us on review.

B. Unpreventable Employee Misconduct Defense

CBI does not deny that the incident described above violated the cited OSHA standard and its incorporated ANSI provision. However, it argues before us, as it argued before the judge, that the citation at issue should be vacated because the violation resulted from the unpreventable misconduct of project superintendent Brosius and foreman Coleman. In response, Judge DeBenedetto pointed to evidence that indicated to him that employees “compris[ing] the entire range of CBI’s construction site hierarchy” had been “directly engaged in the misconduct . . . , to say nothing of safety supervisor Hale actually observing the violation in progress and allowing it to continue.” Based on that evidence, he found that “the sheer pervasiveness and the premeditative nature of the violation [bore] all the characteristics of institutional misconduct” and showed “all the symptoms diagnostic of a systemic disorder.” He therefore concluded that CBI’s unpreventable employee misconduct defense had been “render[ed] . . . inapplicable.”²⁴

²⁴On review, CBI challenges the judge’s conclusion that its defense is “inapplicable,” as well as the judge’s underlying findings. In reply, the Secretary argues, among other things, that we should uphold the judge’s findings of “institutional misconduct” and “a systemic disorder,” as well as the other findings that CBI has expressly challenged on review, because those findings are all based on credibility determinations that are entitled to deference. It is well settled that “[t]he Commission will ordinarily defer to credibility determinations by a judge that are properly explained, but it need not defer to findings that are not based on the demeanor of the witnesses or on other factors that are peculiarly observable by the judge who
(continued...)

Under Commission precedent, to prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., P. Gioioso & Sons Inc. v. Secretary of Labor*, 115 F.3d 100, 109 (1st Cir. 1997); *Propellex Corp.*, 18 BNA OSHC 1677, 1682, 1999 CCH OSHD ¶ 31,792, p. 46,589 (No. 96-0265, 1999). Because supervisory “involvement in . . . [asserted] misconduct is strong evidence that the employer’s safety program is lax” and because “it is the supervisor’s duty to protect the safety of employees under his supervision,” the Commission has made the employer’s burden of proof “more rigorous” and the defense “more difficult to establish” when an employer defends against an alleged violation on the ground of unpreventable *supervisory* misconduct. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1041, 1993-95 CCH OSHD ¶ 30,016, p.41,127 (No. 90-0945, 1993) (citations omitted). “[T]he employer must establish that it took all feasible steps to prevent the [incident], including adequate instruction and supervision of its supervisory employee[s].” *Id.*

²⁴(...continued)
presides over the hearing.” *Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1706 (No. 96-1459, 1999) (not reported in CCH) (citations omitted). Here, the judge did not state that he was basing any of the findings that are at issue on review on the demeanor of any witness or on any other factor concerning a witness that was uniquely observable by him. Instead, in each instance where he either expressly or impliedly credited or discredited particular testimony, he stated that he was doing so based on factors that we are “in as good a position as the judge” to evaluate, *see id.* at 1706-07, such as, whether a witness’ testimony was internally inconsistent or implausible. Under the Commission’s case law, we owe no deference to these challenged findings.

Like the judge, we also reject CBI's unpreventable employee misconduct defense, but for different reasons.²⁵ In his decision, Judge DeBenedetto found that, prior to the time of the alleged violation, Brosius had either received a copy of the materials faxed from Atherton to Hubbard or become aware of the materials' contents through other means and further found that Brosius had deliberately "put aside Atherton's plan and decided to follow his own procedure." We conclude, however, that this finding is not supported by a preponderance of the evidence. Brosius' repeated assertions that he had not received a copy of the faxed materials and had not otherwise been made aware prior to the time of the cited incident of the Atherton plan were firm, direct, and unequivocal. Rather than being internally inconsistent with any other testimony he gave at the hearing, Brosius' denials of knowledge were fully consistent with the remainder of his testimony.

The only other witness who testified concerning these faxed materials was project engineer Hubbard, the addressee and recipient of the fax. When asked if he had "communicate[d]" the "information" in the faxed document to Brosius, Hubbard initially replied, "I don't recall. I . . . didn't have a discussion with him about it. What I did with that fax, I don't recall." He also conceded that he had no knowledge of whether Brosius had ever received a copy of the fax. On cross-examination, he gave testimony that the judge characterized as an admission that "the information" in the faxed materials "*would have been communicated* to Perry Brosius" (emphasis supplied by the judge). However, we conclude that the judge's reliance on this testimony was misplaced. At most, the witness stated on cross-examination that he "could have" and "assume[d]" that he "would have" made a copy

²⁵We need not resolve the parties' dispute over the judge's findings of "institutional misconduct" and "a systemic disorder." Because the challenged findings are not necessary to our resolution of the issues before us and because they do not form any part of the basis of our decision in this case, we set them aside.

of the fax and put it on Brosius' desk. But, when asked directly if he could "remember if you did or not," he answered that "I have no idea what I did with that."

On this record, we find that Brosius' unequivocal denial that he had received a copy of the faxed materials prior to the cited incident is unrefuted. In addition, while we agree with the judge that this testimony is "astonishing," we disagree with his conclusion that it is "simply not credible." On the contrary, there is additional evidence in the record that enhances the credibility of Brosius' claim. For example, the evidence that the fax was sent by Atherton directly to Hubbard, with no indication that Atherton had previously discussed his plan with Brosius, that he was sending a copy of the fax to Brosius, or that he had instructed Hubbard to convey his plan to Brosius, suggests the possibility that Atherton failed to communicate this critical information to Brosius. In addition, Hubbard admitted at the hearing that he failed to follow Atherton's instructions to purchase the 12-inch pipe that was to be used in the supporting column and to resolve a particular technical problem in implementing the plan. These admissions lend credence to Brosius' claim that Hubbard also failed to send him a copy of the faxed materials.

Based on the record evidence, however, we too reject CBI's unpreventable supervisory employee misconduct defense, on the ground that CBI has not shown that the misconduct of Brosius and Coleman was unpreventable. Specifically, it has not shown that "it took all feasible steps to prevent the [incident], including adequate instruction and supervision of its supervisory employee[s]." *L.E. Myers Co.*, 16 BNA OSHC at 1041, 1993-95 CCH OSHD at p.41,127. *See also Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991-93 CCH OSHD ¶ 29,500, p.39,810 (No. 86-0351, 1991). The record establishes that Brosius was faced with an unforeseen and difficult problem that required an innovative solution. At least three CBI supervisory employees, each acting independently, recognized this problem and considered possible solutions. Both Brosius and Coleman concluded that there was no *safe* means of assembling the spider hub that did *not* involve a violation of the "no riding" rule. However, Brosius' immediate supervisor, project manager Atherton, arrived

at a different conclusion, devising a plan that did not require any employee to ride a load. Yet, despite coming up with what seems to have been a novel solution to a novel problem, Atherton failed to convey that solution to his subordinate, Brosius.²⁶ Nor did Atherton, over a period of two weeks, follow up by, for example, picking up a phone to check with Hubbard or Brosius on the implementation of his plan or visiting the site in person. Under these circumstances, we conclude that Atherton's failure to directly convey this critical information to Brosius constituted a failure to provide "adequate instruction and supervision of [CBI's on-site] supervisor."²⁷ *Cf. Mineral Indus. & Heavy Constr. Group, Brown & Root, Inc. v.*

²⁶Brosius made clear that, if he had known of Atherton's plan at the time of the hub assembly, he "would have done it Art's way." He further testified that, if he had known CBI's "no riding" rule was also a legally-enforceable OSHA standard, he would have contacted Atherton before proceeding with his own plan. Contrary to this testimony, Judge DeBenedetto found "that every one of CBI's employees, management and nonmanagement alike, who were involved in one way or another with the spider hub procedure was aware that permitting a man to ride the load was . . . a violation of an OSHA safety regulation." We set aside that finding as it relates to Brosius, noting that it is inconsistent with Brosius' direct and un rebutted testimony that he had not been aware at the time of the OSHA standard.

²⁷We find further evidence of CBI's inadequate supervision and training of Brosius in the project superintendent's testimony to the effect that he had failed to comply with CBI's in-house variance rule because he had been "convinced" that he was "going to do it [*i.e.*, assembly of the spider hub] in a safe way, and that was the object, doing it as safe as possible." By failing to inform its highest-level field supervisor that a decision to deviate from CBI's safety rules, such as its "no riding" rule, might in fact raise issues of legality as well as safety, it appears that CBI may well have contributed to an atmosphere in which Brosius apparently felt free to decide on his own that he would perform the spider hub
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OSHRC, 639 F.2d 1289 (5th Cir. 1981) (management officials' failure to provide training or instructions to implement required safety procedure constituted willful violation); *Capform, Inc.*, 19 BNA OSHC 1374, 1376-77, 2001 CCH OSHD ¶ 32,320, pp.49,477-78 (No. 99-0322, 2001), *petition for review filed*, No. 01-60417 (5th Cir. May 24, 2001) (instructions inadequate where employees had been trained in routine stripping procedures but not been shown any "method that would have enabled them to safely remove an Ellis jack" when it "could not be pulled out in the usual manner").

We also note that the unpreventable employee misconduct defense fails as to crane operator Smith, who engaged in the act that violated the cited standard, and foreman Coleman, who directed Smith to operate the crane with an employee riding on the hub. As indicated, the pertinent incorporated ANSI Safety Code provision was section 5-3.2.3(e), which provides that "[t]he operator [of a crawler crane] shall not hoist, lower, swing, or travel while anyone is on the load or hook" (emphasis added). Accordingly, the violation at issue here occurred when crane operator Smith moved the load of his Lima crawler crane

²⁷(...continued)

assembly operation in a manner that violated the "no riding" rule -- without even discussing the matter with his own supervisor, the project engineer or the job site safety supervisor, let alone following the company's formal in-house variance procedure. Indeed, we find it noteworthy that, aside from generalized testimony to the effect that CBI considered its in-house variance procedure to be a workplace safety rule just like any other, and enforced it accordingly, the record is virtually silent concerning any specific efforts that CBI may have made to communicate and enforce that particular rule. Even the evidence introduced by CBI relating to its post-incident disciplinary actions against Brosius contains no indication that any part of that discipline was imposed for Brosius' violation of the in-house variance rule. CBI's focus appears to have been entirely on the project superintendent's violation of the "no riding" rule.

while another employee (Red Nichols) was on it. CBI has not shown that crane operator Smith's violative conduct was unpreventable.²⁸ *Cf. Capform, Inc.*, 19 BNA OSHC at 1377-78, 2001 CCH OSHD at p. 49,478 (employer could not establish unpreventable employee misconduct defense to an alleged violation of an employee training standard by proving the unpreventability of the untrained employee's misconduct; it had to show that its foreman's failure to provide the required training was contrary to an adequately communicated and enforced company work rule).

The parties' factual dispute over the asserted unpreventability of foreman Coleman's misconduct is properly resolved in the context of determining whether Coleman's actual knowledge of Smith's violation of the cited standard should be imputed to CBI. Under Commission precedent, Coleman's knowledge *is* imputable *unless* CBI "rebut[ted]" the Secretary's "prima facie showing of knowledge through its supervisory employee" by "establishing that the failure of the supervisory employee to follow proper procedures was unpreventable." *Consolidated Freightways Corp.*, 15 BNA OSHC at 1321, 1991-93 CCH OSHD at p.39,810. Coleman's supervisory misconduct cannot be characterized as "unpreventable" unless CBI established that "it took all necessary precautions to prevent [the cited incident], including adequate instruction and supervision of its supervisor." *Id.* CBI clearly did not make such a showing here. Instead of taking "all necessary precautions to prevent" Coleman's supervisory misconduct, project superintendent Brosius, who was Coleman's own immediate supervisor, actually issued the instructions that led him to engage in the misconduct.

²⁸CBI has not even made such a claim; nor could it, since the evidence establishes that Smith was acting at the time under the direct supervision and observation of his immediate supervisor, foreman Coleman, as well as pursuant to the express instructions of Coleman's supervisor, project superintendent Brosius.

Accordingly, we conclude that CBI has not established that Brosius, Smith or Coleman engaged in unpreventable misconduct. Its unpreventable employee misconduct defense therefore fails.

C. Willfulness

“A willful violation is one ‘committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety’” and “is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees.” *Great Lakes Packaging Corp.*, 18 BNA OSHC 2138, 2140-41, 2000 CCH OSHD ¶ 32,094, p.48,186 (No. 97-2030, 2000) (citations omitted). “Where that state of mind is shown by the actions of supervisory employees, it is imputed to the employer like a supervisor’s knowledge.” *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1727, 1999 CCH OSHD ¶ 31,821, p. 46,783 (No. 95-1449, 1999).

In his decision, Judge DeBenedetto found that, notwithstanding the contrary testimony of project superintendent Brosius and foreman Coleman, “every one of CBI’s employees, management and nonmanagement alike, who were involved in one way or another with the spider hub procedure was aware that permitting a man to ride the load was not only a violation of CBI’s own safety rule, but also was a violation of an OSHA safety regulation.”²⁹ Based on this finding, the judge concluded that the Secretary had sustained her allegation of willfulness. On review, CBI challenges both the judge’s conclusion that its violation of 29

²⁹We have already considered and set aside this finding to the extent it relates to the knowledge of project superintendent Brosius, finding (contrary to the judge) that Brosius did *not* have knowledge of the cited OSHA standard. *See supra* note 26. We now address this same finding to the extent that it relates to all other CBI employees who “were involved in one way or another with the spider hub procedure.”

C.F.R. § 1926.550(b)(2) was willful as alleged and his underlying finding. For the reasons that follow, we affirm the judge's factual finding, but only with respect to foreman Coleman.³⁰

At the hearing, OSHA compliance officer ("CO") Barletta testified that, during his on-site investigation of the cited incident, he had discussed the incident with foreman Coleman. During that discussion, he had specifically asked Coleman why Coleman had instructed Nichols to ride on the crane load, rather than using a personnel platform, to which Coleman had responded, "It was the easiest way to do the job. I knew I was breaking the OSHA standards, but I felt it was an easy way to get the job done." The CO asserted that the statements he had attributed to Coleman were an exact quotation of what Coleman had said. In response, Coleman testified that he did not believe that he had made those statements because they were not "true." Thus, for example, he would not have admitted to Barletta that he had known that the spider hub assembly procedure violated an OSHA standard because he had not in fact known at that time that OSHA has a "no riding" rule. Coleman asserted his belief that CO Barletta had been "confused" and that Barletta had misunderstood what he (Coleman) had said. In particular, while the witness conceded that he had said to the CO, "Yes, I knew I committed a violation," he claimed that he had been referring to a violation of CBI's safety rules, not OSHA's. In his rebuttal testimony, however, Barletta denied that he had misunderstood Coleman's statement, repeated the testimony he had given previously, and again asserted that he was directly quoting what Coleman had said to him.

Judge DeBenedetto resolved this factual dispute by implicitly crediting Barletta over Coleman. In particular, he quoted the portion of Coleman's testimony in which Coleman

³⁰We need not resolve the parties' dispute over the judge's finding to the extent it relates to employees *other than* Brosius and Coleman. Because the challenged finding with respect to those other employees is not necessary to our resolution of the issues before us and because it does not form any part of the basis of our decision in this case, we set it aside.

acknowledged that he had told the CO, “Yes, I knew I committed a violation,” but claimed that the CO “could have been confused” and that “there could have been a misunderstanding.” The judge expressly discredited that testimony, finding it to be not only an “ineffectual” response to the CO’s testimony but also contrary to Coleman’s prior testimony that he had directed the crane lift under the assumption that CBI had granted Brosius a variance from the company’s safety rule. For if Coleman assumed that Brosius had a variance, there would have been no violation of CBI’s rules, only a violation of the OSHA standards. Therefore, Coleman’s statement to CO Barletta that he had “committed a violation” could only have been a reference to an OSHA violation.³¹ Having reviewed the testimony of both witnesses, we agree with the judge’s decision to credit Barletta over Coleman, for the reasons stated by the judge. Based on CO Barletta’s testimony, we find that foreman Coleman had actual knowledge at the time of the cited incident of the existence of and requirements of the cited OSHA standard, and that he had a “heightened awareness” of the illegality of the spider hub assembly operation that occurred under his personal supervision and direction.

Our findings of Coleman’s actual knowledge and heightened awareness are further supported by the evidence of welder Giannone’s complaint to Coleman after Giannone observed Nichols riding overhead on the crane load. According to Giannone, he had gone up to Coleman and said, “You know, that’s against OSHA regulations to have a man riding the load.” In his testimony, Coleman neither denied that Giannone had made this statement nor

³¹We find further support for this conclusion in the evidence relating to a prior conversation between Barletta and Coleman during a previous inspection. Particularly in light of that prior conversation with the same CO, we consider it highly unlikely that Coleman’s admission to that CO that he knew he had “committed a violation” could have been a reference to anything other than a violation of OSHA’s standards.

directly asserted that he had not heard the statement. Yet, he corroborated Giannone's claim that he had simply brushed Giannone off.³²

In his decision, Judge DeBenedetto implicitly credited Giannone's testimony by finding that Giannone had "expressed his complaint to CBI personnel in terms that defined the safety violation as an OSHA violation." The judge also expressly discredited that portion of Coleman's testimony in which he had claimed that he had not fully heard and understood what Giannone had yelled up to him. The judge found that Coleman's explanation of this encounter "was unconvincing and self-contradictory." Having reviewed the testimony of both witnesses, we agree with the judge's resolution of this factual issue, drawing the reasonable inference created by the evidence that Coleman had in fact heard and understood Giannone's complaint and that he had simply ignored Giannone because he had previously made the decision to conduct the operation in a manner that violated the cited OSHA standard. Moreover, although Coleman already knew of OSHA's prohibition against riding the load of a crane, Giannone's complaint certainly gave him a "heightened awareness" of the illegality of the particular operation he was in the process of directing.³³ For the reasons

³²Coleman suggested that he had not heard "exactly what Mr. Giannone said" and/or understood "what he was talking about" because he had been busy at the time directing the assembly operation from the upper-level scaffolding while Giannone had been yelling up to him from the bottom of the tank shell. However, Coleman also testified that, to the extent that he had heard Giannone's complaints, he had simply ignored them because he had considered Giannone to be a "hothead" and simply "didn't have time to find out" what Giannone was complaining about.

³³Commissioner Eisenbrey finds further support for the Commission's findings of actual knowledge and heightened awareness in the evidence of a discussion that took place between Coleman and CO Barletta during a prior inspection of another CBI workplace. Both
(continued...)

stated above, we conclude that Coleman acted with conscious disregard of the requirements of the standard and thus acted willfully.

Having found willfulness on the part of the supervisory employee who was not only overseeing the entire operation at the time of the violation but actually directing the movements of the crane operator and his load, we must next determine whether that willfulness is imputable to CBI. Under Commission precedent, it is -- “unless the supervisory employee’s misconduct was unpreventable.” *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p.42,109 (No. 91-1167, 1994). Here, however, we have already found that Coleman’s misconduct was preventable. We therefore affirm the

³³(...continued)

parties testified that their earlier discussion included a detailed review of the specification requirements for “crane or derrick suspended personnel platforms,” as set forth in 29 C.F.R. § 1926.550(g), but no direct reference to the OSHA prohibition against riding a crane load. Coleman testified to the effect that he had not considered that prior discussion to have any relevance to the cited spider hub assembly operation because CBI had not used a crane-suspended personnel platform during that operation. Commissioner Eisenbrey concludes, however, that Coleman could not have failed to understand the relevance of his prior discussion with CO Barletta to the hub-assembly operation here. Having been expressly informed that it was a violation of OSHA standards to lift an employee by crane on a work platform that did not meet several specific requirements designed to protect the employee from a fall, Coleman must also have known that it was prohibited under the OSHA standards to dispense with the personnel platform (“man basket”) altogether. Accordingly, Commissioner Eisenbrey concludes that the prior discussion between Coleman and CO Barletta also gave Coleman a “heightened awareness” of the illegality of the hub assembly operation that he was directing at the time of the cited violation.

Secretary's allegation and the judge's conclusion that CBI's violation of 29 C.F.R. § 1926.550(b)(2) was willful.

D. Penalty

The judge assessed the proposed penalty of \$55,000 for this willful violation. On review, CBI does not specifically take issue with this penalty assessment. Based on our own review of the record in light of the penalty factors set forth in section 17(j) of the Act, 29 U.S.C. § 666(j), we consider \$55,000 to be an appropriate penalty and assess that amount for CBI's willful violation of 29 C.F.R. § 1926.550(b)(2).

Order

We affirm item 1 of citation 2, alleging a willful violation of 29 C.F.R. § 1926.550(b)(2). We assess a penalty of \$55,000.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: October 29, 2001

The Judge's Decision In This Matter Is Available in Hard Copy By
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