United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Office of
Executive Secretary

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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 93-3274
D. M. SABIA COMPANY,	
Respondent.	

NOTICE OF COMMISSION DECISION AND ORDER

The attached decision and order by the Occupational Safety and Health Review Commission was issued on October 16, 1996. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Date: October 16, 1996

Ray H. Darling, Jr.
Executive Secretary

93-3274

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

D.M. SABIA CO.,

Respondent.

OSHRC Docket No. 93-3274

ORDER

In its decision in *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 861 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit vacated the Commission's decision at 17 BNA OSHC 1413, 1996 CCH OSHD ¶ 30,930 (No. 93-3274, 1995), and it "remand[ed] to the Commission with the direction that the Commission reinstate the November 25, 1994 order of the [Administrative Law Judge] affirming the citation and imposing a penalty of $4,000 as stipulated by the parties. Jt. App. 15." In accordance with the Third Circuit's decision and mandate, we reinstate the judge's decision finding a repeat violation of 29 C.F.R. § 1926.451(a)(4), as the citation alleged, and assessing a penalty of $4,000 therefor.

Stuart E. Weisberg
Chairman

Velma Montoya
Commissioner

Daniel Guttman
Commissioner

Dated: October 16, 1996

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SECRETARY OF LABOR
Complainant,
v.

D. M. SABIA & COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 93-3274

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 2, 1994. The decision of the Judge will become a final order of the Commission on January 4, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 22, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 2, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3274

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-3274
D. M. SABIA COMPANY,	:	
Respondent.	:	

Appearances:

Maureen A. Russo, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

James F. Sassaman, Dir. of Safety
General Building Contractors
Association
Philadelphia, Pennsylvania
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

The sole issue to be determined is whether the violation of 29 C.F.R. § 1926.451(d)(1) is a "repeat" violation under section 17(a) of the Act[1] as alleged.

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[1] Section 17(a) of the Act, 29 U.S.C. § 666(a) provides:
Any employer who willfully or repeatedly violates the requirements of Section 654 of this title, any standard, rule, or order promulgated pursuant to Section 655 of this title, or regulations

(continued...)

The violation alleged to be repeat is so because "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation" as required under the Commission decision in *Potlach Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979)("*Potlach*").

The stipulation between the parties establishes the factual predicate for the conclusion that the violation is repeated. There is agreement that Respondent had been cited for the "same or similar" violations of the same standard on three prior occasions and that each of the prior citations was a final order of the Commission (Stipulation, ¶ 4).

The legal conclusion is less obvious. The parties are fully aware that for many years the Commission's definition of "repeated" under *Potlach*, Supra., was not the same as that applied by the Third Circuit. Under their decision in *Bethlehem Steel Corp., v. OSHRC*, 540 F.2d 157 (3rd Cir. 1976) ("*Bethlehem*") the Third Circuit reached a different conclusion. It held that a violation could be classified as repeated only where there were at least two previous violations and the respondent "flaunted" the requirements of the Act.

It appears that the Commission has decided that it will no longer apply the *Bethlehem* test in the Third Circuit. In its decision in a case arising in the Third Circuit, *Jersey Steel Erectors*, 16 BNA OSHC 1162 (No.90-1307, 1993) ("*Jersey Steel*"), the Commission acknowledged the divergence. It nonetheless stated "[w]e continue to adhere to the *Potlach* test." *Jersey Steel*, supra, 16 BNA at 1167. By pointing out that the result would have been the same "even if we were to a apply the *Bethlehem* test," *Id.* (Emphasis added.), the Commission emphasized its determination to decline to apply *Bethlehem*, even in the Third Circuit case then before it. Thus, the test of "repeated" which must be applied here is that laid out in *Potlach*.[2] As an Administrative Law Judge with the Commission I am

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[1](...continued)

> prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

[2] Although the Third Circuit affirmed the Commission's decision in which it adhered to *Potlach* it is not, as the Secretary argues in his brief clear that the Third Circuit was (continued...)

constrained to follow its precedents. Under the *Potlach* test, the violation is repeated.[3]

Finally, Respondent's reliance on a provision of the Secretary's Field Operation Manual in asserting that prior violations must have occurred within a certain time in order to form the basis of a repeat violation is misplaced in that the manual is not binding on the Commission.

The violation of 29 C.F.R. § 1926.451(a)(4) is repeated. Accordingly, Citation 2, Item 1 is AFFIRMED.

The stipulation entered into between parties includes their agreement that:

> The proposed penalty of $4,000 gives due consideration to the serious nature of the violation, the repeated nature of the violation and is otherwise in accordance with the requirements of the Act.

(Stipulation, ¶ 6).

There is nothing in the record before this Administrative Law Judge which might indicate that a penalty of $4,000 is anything other than appropriate. Accordingly, a penalty of $4,000 is assessed for the repeat violation.

FINDINGS OF FACT

Findings of fact relevant and necessary for a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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[2](...continued)
abandoning *Bethlehem*. The decision of the Court is included in a listing of cases decided without opinion. Under Third Circuit rules opinions which have "precedential or institutional value" are to be reported, not merely issued as an unpublished disposition. See, Third Circuit Rules, App. 1, Internal Operating Procedures, Ch. 5, sec. 5.1, 28 U.S.C.A.

[3] It is noted that under the *Bethlehem* test, the alleged violation in this case could not be found to be repeated because the stipulation, which is the only factual record, is insufficient to support a finding that Respondent "flaunted" the requirements of the Act.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in repeated violation of the construction safety standard at 29 C.F.R. § 1926.451(d)(4) as alleged in Item 1 of Citation No. 2 issued to it on or about November 26, 1993.

ORDER

1. Citation 2, Item 1, issued to Respondent on or about November 26, 1993, is AFFIRMED.

2. A civil penalty of $4,000 is assessed.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: NOV 25 1994
Washington, D.C.

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SECRETARY OF LABOR, Complainant, v. D.M. SABIA CO., Respondent.	OSHRC Docket No. 93-3274

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA, Commissioner.

BY THE COMMISSION:

D.M. Sabia Co. (''Sabia''), a masonry contractor, stipulated that it violated 29 C.F.R. § 1926.451(a)(4), which requires guardrails and toe boards on open sides and ends of platforms more than 10 feet above the ground or floor. At issue is whether Administrative Law Judge Michael H. Schoenfeld erred in finding the violation repeated under section 17(a), 29 U.S.C. § 666(a),[1] of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (''the Act''). For the reasons stated below, we apply the law of the Third Circuit, reverse the judge's decision, and conclude that, based on the stipulated record in this case, the Secretary did not prove that the violation is repeated.

[1]Section 17(a) of the Act, *amended by* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990), provides:

> Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

I. *Third Circuit Law Applies*

Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the law of that circuit in deciding the case, even though it may clearly differ from the Commission's law. *See, e.g., Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794-95, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992).[2] Those circumstances are present in this case.[3] Under the law of the Third Circuit, a violation is repeated if (1) there are at least two previous violations of the standard or regulation; and (2) the cited employer "flaunted" the requirements of the Act. *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157, 160-62 (3d Cir. 1976). This differs from the Commission's repeated test, subsequently announced in *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979), that a violation is repeated if, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a substantially similar violation.[4] *See, e.g., R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070,

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[2]Contrary to the judge's conclusion, the Commission in *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168, 1993 CCH OSHD ¶ 30,041, p. 41,220 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994), did *not* state that it would no longer apply the Third Circuit test. Rather, the Commission there found that the violations were repeated under *either* the Commission's test *or* the Third Circuit's test. *Id.* The Commission followed the same approach in *R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1074, 1995 CCH OSHD ¶ 30,682, p. 42,579 (No. 91-1873, 1995) (consolidated); *see also Nooter Constr. Co.*, 16 BNA OSHC 1572, 1577 & n.8, 1994 CCH OSHD ¶ 30,345, p. 41,840 & n.8 (No. 91-237, 1994) (result is same under Commission's or Third Circuit's unpreventable employee misconduct analysis).

[3]The parties can appeal this case to the Third Circuit because the violation occurred in Pennsylvania and the employer's principal office is located there as well. See section 11(a) and (b) of the Act, 29 U.S.C. § 660(a) and (b). The cited employer may also appeal to the D.C. Circuit. Section 11(a) of the Act, 29 U.S.C. § 660(a).

[4]The other circuit courts that have discussed *Potlatch* in their decisions have expressed their general agreement with it. *See J.L. Foti Constr. Co. v. OSHRC*, 687 F.2d 853, 856-57 (6th Cir. 1982); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982); *Willamette Iron and Steel Co. v. Secretary of Labor*, 673 F.2d 1341 [10 BNA OSHC 1477] (9th Cir. 1982) (not published in official reporter); *Communications, Inc. v. Marshall*, 672 F.2d 893 [10 BNA OSHC 1273, 1274] (not published in official reporter) (D.C. Cir. 1981); *see also Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 837-38 (5th Cir. Unit A Mar. 1981) (Fifth

(continued...)

1074, 1995 CCH OSHD ¶ 30,682, p. 42,579 (No. 91-1873, 1995) (consolidated). The Third Circuit reaffirmed its repeated test in *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32 (3d Cir. 1980) (court changed "flaunted" to "flouted"). While noting the Commission's test in *Potlatch*, the court stated

> we remain bound by our decision in *Bethlehem Steel* unless that case is overturned by the Court [e]n banc, or until the Supreme Court chooses to resolve the conflicting interpretations of § 666(a) adopted by [other circuits].

636 F.2d at 33 n.1. Since neither of these events have taken place, we are constrained to apply the Third Circuit's test here to determine if the violation is repeated, although we respectfully disagree with that test.[5]

II. *Application of the Third Circuit's Test*

We conclude that the Secretary has failed to meet his burden of proof under the Third Circuit's test. While the stipulation by the parties quoted in note 5 establishes that Sabia violated

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[4](...continued)
Circuit noted its general agreement but held that the Secretary has the burden of proving the substantial similarity of conditions associated with the prior and present violations of the same standard). The Commission's test in *Potlatch* was derived to a large extent from *George Hyman Constr. Co. v. OSHRC*, 582 F.2d 834, 839 (4th Cir. 1978) and *Todd Shipyards Corp. v. Secretary of Labor*, 566 F.2d 1327, 1330-31 (9th Cir. 1977).

[5]Under the Commission's test, a prima facie case of substantial similarity is established by showing that the prior and present violations are for failure to comply with the same standard. *Potlatch*, 7 BNA OSHC at 1063, 1979 CCH OSHD at p. 28,171; *see, e.g., Edward Joy Co.*, 15 BNA OSHC 2091, 2092, 1991-93 CCH OSHD ¶ 29,938, p. 40,904 (No. 91-1710, 1993). The employer can then introduce evidence to rebut this showing. *Id.* The Secretary has made such a prima facie showing of substantial similarity here based on the following stipulation agreed to by the parties:

> Respondent has been cited for this same or similar violation of 29 C.F.R. § 1926.451(a)(4), on July 22, 1974; January 23, 1985; and May 16, 1991; and each citation went to a final order.

In light of Sabia's concession that it had previously been cited for violating the same standard and that the prior citations became final orders, and Sabia's failure to introduce any evidence to rebut the Secretary's showing of substantial similarity, we conclude, as the judge did, that the violation is repeated under the Commission's test.

the same standard more than twice before,[6] we find that, based on the stipulation by the parties, the Secretary has not shown that Sabia flouted the Act. According to the Third Circuit, among the factors to be considered in determining if an employer has flouted the requirements of the Act are:

> the number, proximity in time, nature and extent of violations, their factual and legal relatedness, the degree of care of the employer in his efforts to prevent violations of the type involved, and the nature of the duties, standards, or regulations violated.

Bethlehem Steel, 540 F.2d at 162. "The mere occurrence of a violation of a standard or regulation more than twice" does not constitute flouting. *Id.*

Sabia's four violations of the standard, which are spread out over a period of 19 years, have increased in proximity, but their number and proximity do not rise to the level of flouting when considered in light of other cases. In *R.G. Friday*, 17 BNA OSHC at 1073-74, 1995 CCH OSHD at p. 42,579, the Commission applied the Third Circuit test and found that the employer flouted the Act based mainly on the seven prior final orders it had received over the previous ten years for violating the same scaffolding standard, with increasing rather than diminishing frequency; the two most recent violations occurred fourteen days apart. *See also Jersey Steel Erectors*, 16 BNA OSHC at 1167-68, 1993 CCH OSHD at p. 41,220 (Commission found flouting where three prior final orders of the same standard occurred within the previous five years and two of the three final orders were themselves characterized as repeated). Here, the stipulations are silent as to whether the more recent of Sabia's prior violations were themselves repeated.

While section 1926.451(a)(4) is not a general standard, neither are its requirements so specific and narrow that they would, on their own, establish the sort of factual and legal

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[6]Relying on the part of the Secretary's Field Operations Manual included in the parties' stipulations, which provides that final orders more than three years old would not be considered as a basis for a repeated characterization, Sabia argues that the Secretary unfairly did not apply this policy to Sabia. (Only one out of the three orders against Sabia relied upon here became final within three years of the violation.) However, as Sabia acknowledges, the Manual does not have the force or effect of law, and for that reason we dismiss this argument, as the judge did. *See, e.g., Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1323 n.10, 1991-93 CCH OSHD ¶ 29,500, 39,812 n.10 (No. 86-351, 1991).

relatedness that would support a finding that the employer flouted the Act. Nor does the stipulated record indicate whether the violations are factually related. We only know that they involved the same standard and occurred within the Third Circuit. In contrast, in *Jersey Steel*, 16 BNA OSHC at 1167, 1993 CCH OSHD at p. 41,220, the Commission noted that the three prior final orders involved "strikingly similar" head protection violations.

We also do not have information regarding the employer's degree of care. In *R.G. Friday*, there was evidence that the safety program was not initiated until after many of the prior violations became final orders. 17 BNA OSHC at 1074, 1995 CCH OSHD at p. 42,580. We cannot infer merely from Sabia's pattern of violations that the company does not place a very high priority on compliance; Sabia's violations were remote in time and relatively few.

We therefore find that the Secretary did not prove that Sabia flouted the Act's requirements, and thus under the Third Circuit's test the Secretary has not shown that the violation is repeated.[7]

III. *Serious Characterization and Penalty*

We find that Sabia's violation of section 1926.451(a)(4) is serious. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious if there was a "substantial probability that death or serious physical harm could result." Here the parties stipulated that the violation "involved exposure to a 'serious' hazard." Under section 17(j) of the Act, 29 U.S.C. § 666(j), we determine an appropriate penalty by considering the size of the employer's business, the gravity of the violation, the good faith of the employer, and the employer's history of violations. Because there was no hearing in this case, there is little information in the record regarding these factors. The amended complaint (to which Sabia did not take exception) states that Sabia has 152 employees overall, including approximately 34 employees at the worksite in this case. The gravity of the violation is moderate to high because, as the parties stipulated, the violation "involved a fall potential between 16 and 20 feet" that could result in serious physical injury.

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[7]Chairman Weisberg notes that given the law in other circuits which have adopted the Commission's *Potlatch* test, it is incumbent on the Secretary to persuade the Third Circuit to overturn its decision in *Bethlehem Steel*, or to seek review by the Supreme Court to resolve the conflict and provide a uniform interpretation of the term "repeated."

As noted above, Sabia had a history of violations, for it had three prior violations of section 1926.451(a)(4), one each in 1974, 1985, and 1991. The record is silent as to Sabia's good will. Based on the above, we assess a penalty of $1,000 for Sabia's violation of section 1926.451(a)(4).

It is so ordered.

Stuart E. Weisberg
Chairman

Velma Montoya
Commissioner

Dated: October 30, 1995