UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-0028
CORNELL AND COMPANY, INC.	:	
Respondent.	:	

ORDER

Cornell and Company, Inc. (Cornell) has filed a notice of withdrawal of appeal in the above-captioned case. The Commission acknowledges receipt of Cornell's notice of withdrawal. There being no matters remaining before the Commission for adjudication, the administrative law judge's decision affirming serious citation 1, item 1, alleging a violation of 29 C.F.R. § 1926.105(a) and assessing a penalty of $640.00 is the final order of the Commission. The judge's decision is accorded the significance of an unreviewed judge's decision and has no precedential value. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated July 30, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on July 30, 1993.

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FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR Complainant, v. CORNELL AND COMPANY, INC., and its successors, Respondent.	OSHRC DOCKET NO. 91-0028

NOTICE OF WITHDRAWAL OF APPEAL

Respondent, Cornell and Company ("Cornell") herein withdraws its appeal and provides notice, in accordance with Commission Rule 93, 29 C.F.R. §2200.93, that it does not intend to file a brief before the Commission in this matter. Cornell asserts that it will not further challenge the Secretary of Labor's citation for a serious violation of 29 C.F.R. §1926.105(a) and proposed penalty of $640.00.

Respectfully submitted,

BARRY F. BEVACQUA, ESQUIRE
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BRIAN F. JACKSON, ESQUIRE
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Four Penn Center Plaza
Philadelphia, PA 19103-2599

Attorneys for Respondent,
Cornell and Company, Inc.

Dated: July 13, 1993

CERTIFICATE OF SERVICE

I, BRIAN F. JACKSON, hereby certify that on this 13th day of July, 1993, I caused to be served, via First Class Mail, a copy of Cornell and Company's Notice of Withdrawal of Appeal in the above-captioned matter on the following:

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BRIAN F. JACKSON

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SECRETARY OF LABOR
Complainant,
v.

CORNELL & COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 91-0028

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 April 30, 1992. The decision of the Judge will become a final order of the Commission on June 1, 1992 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 May 20, 1992 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 30, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0028

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard W. Gordon
Administrative Law Judge
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SECRETARY OF LABOR, Complainant v. CORNELL & COMPANY, INC. Respondent.	OSHRC Docket No. 91-0028

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

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

Before Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act") to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

On December 3, 1990, the Secretary issued a citation to Cornell & Company, Inc. ("Cornell") following an inspection of Cornell's worksite, the Mobil Oil Paulsboro Refinery

("Paulsboro Refinery") - Billingsport Road, Gibbstown, New Jersey, during the period of September 18, 1990 to October 11, 1990. The Secretary's complaint charged Cornell with a serious violation of 29 C.F.R. § 1926.105(a) for not protecting its employees from exterior fall hazards of up to 80 feet while performing structural steel work.

Serious citation 1, item 1, states:

> 29 C.F.R. § 1926.105: Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:
>
> (a) Paulsboro, NJ - Mobil Coker Area - Two employees who were working on the steel structure were not protected from falls. Life lines were not provided to attach safety belts to when walking beams. On or about 9/19/90.[1]

The cited standard in effect at the time of the alleged violation states:

> § 1926.105(a) Safety Nets.
> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

By filing a timely notice of contest, Cornell brought this proceeding before the Occupational Safety and Health Review Commission ("Commission"). A hearing was held in New York, New York, on August 15, 1991. The Secretary subsequently moved on August 28, 1991, to amend Paragraph V of the complaint to conform to the evidence presented at the hearing, alleging that Cornell's employees were exposed to both exterior and interior fall hazards as opposed to only exterior fall hazards. I now grant that unopposed motion. The parties have submitted their briefs and this matter is now ready for decision.

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[1] The Secretary was permitted at the hearing to amend the date of the alleged violative conduct to on or about September 19, 1990. (Tr. 125, 128)

BACKGROUND

As subcontractor for Nooter Construction Company ("Nooter"), Cornell's main operation at the Paulsboro Refinery, which is owned and operated by Mobil Oil ("Mobil"), was to separate and remove the drill tower from the coker unit, thereby exposing the tank so that boilermakers could later replace it. (Tr. 19, 62-63) Cornell's work on this project also included removing portions of the steel structure that might interfere with the removal of the tank, as well as replacing and repairing any damage to the structure. (Tr. 18) According to Charles Roberts, Cornell's Safety Director, this project was unique and, to his knowledge, had never been done before. (Tr. 119-120)

Beginning on September 18, 1990, Compliance Officer Louis Cugno conducted an OSHA inspection of the worksite at the Paulsboro Refinery as part of the National Emphasis Program in the Petrochemical Industry. (Tr. 17-19) On September 18th, Mr. Cugno held an opening conference in Nooter's offices which was attended by Mike Ferguson, a Foreman for Cornell who was working on the Paulsboro Refinery project. (Tr. 17, 81-82)

On September 19th, Mr. Cugno conducted a walk-around inspection of the worksite with Mr. Norton, a safety representative from Mobil. (Tr. 20) While viewing the structure from ground level, Mr. Cugno observed one worker walking from one beam to another on the outside perimeter of the structure for approximately one to two minutes. (Tr. 21-22; also see Exhibit C-1) Mr. Cugno noticed that the worker was not protected by either a safety net or a safety line. (Tr. 20-21)

Mr. Cugno then rode an elevator up to the work platform area of the structure where, according to Mr. Cugno, Mr. Ferguson identified the worker he had observed as Guy Feldman. (Tr. 21-22) At that point, Mr. Cugno examined the beams on which he had observed Mr. Feldman walking, taking note of the fact that there were no safety belts or lifelines in the area. (Tr. 28) Mr. Cugno then concluded that Mr. Feldman had been exposed to both an exterior and interior fall hazard of 80 to 90 feet. (Tr. 28-29)

During his testimony, Mr. Feldman confirmed that he had been walking along the beams without being "tied off" by a safety belt or line. (Tr. 69) According to Mr. Feldman, he had been in the process of moving a "snatch block", which is a round shiv that weighs approximately 5 to 10 pounds. (Tr. 73-75) This task, Mr. Feldman alleges, is part of the connecting process, during which, he argues, one needs total mobility and therefore, cannot be tied off by safety cables. (Tr. 61-62, 71)

Later, while on the work platform with Mr. Ferguson, Mr. Cugno observed a second worker walking along a beam above the platform for about 15 to 20 feet without the protection of a safety cable or lifeline. (Tr. 29-30; also see Exhibit C-2) Mr. Cugno testified that, again, Mr. Ferguson identified the worker for him as Steve O'Donnell. (Tr. 30) According to Mr. Cugno, Mr. O'Donnell was not engaged in any work at the time he was observed walking unprotected along the beam. (Tr. 30)

Mr. Cugno classified the alleged violation as serious, because of the grave nature of the injuries and hazards involved in a potential fall of at least 80 feet. (Tr. 33) In addition, Mr. Cugno believes that Cornell should have known of the alleged violation, first, because it was in plain view of the Foreman, and second, because Cornell was familiar with the

Mobil's Safety Policy, which states that persons working at heights greater than 10 feet cannot work without fall protection. (Tr. 33-34; also see Exhibits C-4 and C-5.) Indeed, Mr. Roberts, Cornell's Safety Director, admitted during his testimony that he was familiar with Mobil's Safety Rule 20, which requires the use of safety belts when working at heights of 6 feet or higher. (Tr. 116; also see C-4, p. 4 of attached Mobil Safety Policies and Procedures)

DISCUSSION

I. The Applicability of § 1926.105(a)

According to OSHA's regulation on the applicability of standards,

> "if a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process."

29 C.F.R. § 1910.5(c)(1) Because § 1926.105(a) is considered to be a general safety standard, it cannot be applied to Cornell's work activities at the Paulsboro Refinery if a more specific standard governs the operation.

The safety standards which specifically govern steel erection are contained in Subpart R of Part 1926. 29 C.F.R. §§ 1926.750 - .752. According to § 1926.750(b)(1)(ii), with regard to "skeleton steel construction in tiered buildings", safety nets must be installed where scaffolds are not being used and the potential fall hazard exceeds 25 feet. Whether Cornell's work activities at the Paulsboro Refinery are governed by this specific safety standard hinges upon whether Cornell's work activities fall within the definition of "skeleton steel construction in tiered buildings".

The Secretary argues that the definition of "tiered building", as set forth in *Daniel Constr. Co.*, 9 BNA OSHC 1854, 1981 CCH OSHD ¶ 25,385 (No. 12525, 1981) ("*Daniel*"),

does not include the type of work being done by Cornell at the Paulsboro Refinery. In *Daniel*, the Commission held that, for the purposes of § 1926.750,

> "The term 'tiered building' is not limited to multi-floored structures but includes any building or structure in which a skeleton steel framework is erected in vertically stacked steel columns."

Id. at 1858.

Cornell's work activities at the Paulsboro Refinery clearly did not involve the erection of a "skeleton steel framework...in vertically stacked steel columns." *Id.* This project, described by both Cornell's Safety Director and its Counsel as "unique", involved retrofitting the *already existing* steel structure of the coker unit by removing the drill tower and preparing the structure for subsequent replacement of the tank. (Tr. 10, 119-120, 18 & 62-63) While Cornell's work did include the removal of certain portions of the steel structure which might interfere with replacing the tank, the nature of this work did not entail the erection of vertically stacked steel columns. (Tr. 18) Therefore, because Cornell's work activities in no way involved the actual erection of a steel structure in the manner defined by the Commission in *Daniel*, the specific standards of Subpart R governing steel erection do not apply here.

Potential fall hazards, however, such as those alleged here, are not to be disregarded simply because a specific safety standard does not apply to the type of work involved. According to § 1910.5(c)(2),

> "any standard shall apply according to its terms to any employment and place of employment in any industry, *even though* particular standards are also prescribed for the industry, as in Subpart B or *Subpart R* of this part, to the extent that none of such particular standards applies."

(Emphasis added). In other words, a general safety standard is preempted by a specific safety standard only when that specific standard definitively applies to a given situation.

The Secretary points out that several Circuit Courts have addressed the issue of preemption as it relates to general and specific safety standards. For instance, the Third Circuit in *Adams Steel Erection*, 12 BNA OSHC 1393, 1397, 1984-1985 CCH OSHD ¶ 27,326 (No. 84-3586, 1985) ("*Adams*") concluded that there is no convincing evidence to support the assertion that "§ 1926.105(a)'s general requirement for fall protection is preempted by the steel erection standards [contained in Subpart R]."

In *Adams*, the court determined that § 1926.750(b)(1)(ii) applies only to *interior* fall hazards and not to *exterior* fall hazards, such as those at issue in Adams. The court then held, citing to § 1910.5(c)(2), that "general safety standards will supplement specific safety standards by filling those gaps necessarily remaining after the promulgation of specific standards." *Id.* Therefore, since specific safety standard § 1926.750(b)(1)(ii) was inapplicable, the *Adams* court reversed the Commission's decision to vacate a § 1926.105(a) violation on the grounds of preemption. Also see *Daniel Marr & Son Co.*, 12 BNA OSHC 1361, 1984-1985 CCH OSHD ¶ 27,313 (No. 84-1756, 1985) (First Circuit held that § 1926.750(b)(1)(ii) does not apply to the exterior falls alleged and therefore, § 1926.105(a) is not preempted by the specific standard); *L.R. Willson & Sons, Inc.*, 12 BNA OSHC 1499, 1984-1985 CCH OSHD ¶ 27,390 (No. 84-1471, 1985) (D.C. Circuit urged Commission to adopt the consensus opinion of three Courts of Appeal and the Secretary that § 1926.105(a) should apply to workers subjected to exterior fall hazards in the steel erection industry); and *Williams Enterprises of Georgia, Inc.*, 832 F.2d 567 (11th Cir. 1987) (Court held that Subpart

R should not be considered the exclusive set of safety standards for the steel erection industry).

The Commission finally addressed the issue of preemption as it relates to general and specific safety standards in *Bratton Corp.*, 14 BNA OSHC 1893, 1987-1990 CCH OSHD ¶ 29,152 (No. 83-132, 1990) ("*Bratton*"). Citing favorably to the various Circuit Court decisions which had consistently rejected the Commission precedent that work in the steel erection industry was exclusively governed by the specific safety standards contained in Subpart R, the Commission held that,

> "the steel erection standards in Subpart R do not preempt application of the general construction standards to steel erection work 'where general standards provide meaningful protection to employees beyond the protection afforded by the steel erection standards....'"

Id. at 1896 (quoting *Williams Enterprises, Inc.*, 11 BNA OSHC 1410, 1416, 1983-84 CCH OSHD ¶ 26,542 p. 33,877 (No. 79-843, 1983), *aff'd in pertinent part*, 744 F.2d 170 [11 OSHC 2241] (D.C. Cir. 1984).

Although the Commission's decision in *Bratton* dealt specifically with the application of general safety standard § 1926.28(a), the Commission's reasoning logically extends to *any* general safety standard that may apply to exterior fall hazards not specifically addressed by a specific safety standard. Therefore, because § 1926.750 and Subpart R, as a whole, does not apply to the exterior fall hazards alleged to be present at the Paulsboro Refinery, it was appropriate for the Secretary to apply general safety standard § 1926.105(a).

A final consideration regarding the applicability of § 1926.105(a) to the case at hand involves whether it can be construed to apply to the *interior* fall hazards alleged by the Secretary. As discussed above, the specific safety standards of Subpart R have been found

to apply only to *interior* fall hazards, leaving general safety standards, such as § 1926.105(a) and § 1926.28(a), to "fill the gap" by governing *exterior* fall hazards. Here, Subpart R does not apply to Cornell, because, as discussed above, its work activities at the Paulsboro Refinery did not involve the erection of a "tiered building" as defined by the Commission in *Daniels*. Since the specific standards of Subpart R are inapplicable, § 1926.105(a), as a general safety standard, operates to "fill the gap" and therefore, applies to the *exterior* fall hazards alleged here. Whether § 1926.105(a) should also apply to the alleged *interior* fall hazards remains at issue.

The Secretary, noting that no circuit court has directly ruled on this question, argues that the requirements of § 1926.105(a) should be extended to interior fall hazards, a position which the Secretary contends is consistent with the *Adams* court's ruling that general safety standards should fill any gaps left by the inapplicability of a specific safety standard. To rule otherwise, the Secretary continues, would be to deny protection to those workers in the steel erection industry who are exposed to interior fall hazards, but are unable to avail themselves of the protection the specific safety standards contained in Subpart R provide simply because the unique nature of their work removes them from its coverage.

In order to extend such protection to these workers, and in line with the gap-filling language in *Adams*, I adopt the Secretary's position on this issue and extend the application of § 1926.105(a) to include the interior, as well as exterior, fall hazards alleged here.

II. The Secretary's Burden of Proof

Where the Secretary alleges that an employer has failed to utilize any of the fall protection measures enumerated in § 1926.105(a), including safety nets, the Secretary must, in order to prove a violation, "establish a prima facie case...showing that the employees were exposed to a fall in excess of 25 feet and that none of the protective measures were used." *Century Steel Erectors, Inc.*, 14 BNA OSHC 1273, 1275, 1987-1990 CCH OSHD ¶ 28,682 (No. 88-1621, 1989). The Secretary's burden also includes proof that use of these fall protection measures is practical, as evidenced by industry custom and practice. *Id.* at 1278. Also see *Spancrete Northeast, Inc.*, 14 BNA OSHC 1585, 1987-1990 CCH OSHD ¶ 28,946 (No. 89-4111, 1990).

Mr. Cugno testified that he observed both Mr. Feldman and Mr. O'Donnell walking along the beams of the steel structure completely unprotected by safety cables or lifelines. (Tr. 21, 27-30) Indeed, Mr. Feldman admitted during his testimony that he was walking along the beams without being tied off. (Tr. 69) Mr. Cugno also testified that he observed no safety nets in use at the Paulsboro Refinery worksite. (Tr. 21) Since Cornell has offered no evidence to contradict Mr. Cugno's allegations, and, in fact, Mr. Feldman, readily admitted that he was not tied off while walking the beams, the Secretary has met its burden of proving that none of the fall protection measures listed in § 1926.105(a), including safety nets, were in use by Cornell at the worksite with regard to these two instances.

In addition, the two Cornell employees observed by Mr. Cugno were clearly exposed to potential falls in excess of the 25 feet required for a § 1926.105(a) violation. As one who has conducted approximately 275 inspections, 70% of which involved construction activities, Mr. Cugno stated that, in his opinion, the beam on which Mr. Feldman was walking was

more than 80-90 feet from ground level. (Tr. 21; Also see Exhibit C-1). In addition, Mr. Cugno testified that Mr. O'Donnell, as pictured in Exhibit C-2, was observed walking a beam above the work platform, which is described in the video taken by Mr. Cugno (Exhibit C-3) as being approximately 80 feet from the ground. (Tr. 39)

In its brief, Cornell contends that the second worker observed by Mr. Cugno could only have fallen about 15 feet to the work platform below, as described by Mr. Cugno in his testimony. (Tr. 27) The portion of Mr. Cugno's testimony to which Cornell cites, however, does *not* refer to Mr. O'Donnell, the second worker, but refers to Mr. Feldman, the first worker:

> "Q. Now, when you [Mr. Cugno] ascended the elevator up to the work area, can you describe what level you were at relative to the level that *Mr. Feldman* is identified on in this photo [Exhibit C-1]?
> A. (No response)
> Q. Were you above, below or at the same level?
> A. Below.
> Q. And, how far below?
> A. Approximately 15 feet."

(Tr. 27) (Emphasis added) In fact, Mr. Cugno's testimony that Mr. Feldman was walking beams that were 15 feet above the work platform, coupled with the video's (Exhibit C-3) description of the work platform as being 80 feet above ground level, translates into a potential 95 foot fall for Mr. Feldman from the beam to ground level.

Cornell also argues that it was not possible for the second worker, Mr. O'Donnell, to fall from the interior beam on which he was walking to ground level more than 80 feet below, because he would first have to fall the 15 feet to the work platform. As discussed above, Mr. Cugno never testified that Mr. O'Donnell was walking a beam that was 15 feet above the work platform; in fact, Mr. Cugno never indicates throughout his testimony exactly

how far above the work platform the beam on which Mr. O'Donnell was walking unprotected was.

Regardless of how far above the work platform the beam on which Mr. O'Donnell was observed walking unprotected was, it was still possible for him to have fallen the more than 80 feet to ground level. As shown in Exhibit C-2, the beam on which O'Donnell was walking, although an interior beam, was only one beam in from the outermost beam of the structure. In addition, the video (Exhibit C-3) taken by Mr. Cugno clearly indicates the large open area cut into the metal wall surrounding the work platform through which Mr. O'Donnell could have fallen the more than 80 feet to ground level.

Finally, Cornell's claim that the first worker, Mr. Feldman, was misidentified by Mr. Cugno as a Cornell employee and in fact, as Guy Feldman, is not persuasive. Again, Mr. Feldman himself admitted that he was walking along the beams in question without being tied off and, in fact, testified that after being called down from the beam to the work platform to speak with Mr. Cugno, he clearly identified himself to Mr. Cugno by name and as a Cornell employee. (Tr. 69) There is no question, then, that the first worker observed by Mr. Cugno was Guy Feldman, a Cornell employee.

The Secretary contends that industry custom supports its position that the use of fall protection measures, such as safety belts and safety lines, by Cornell at the worksite was indeed practical. In considering industry custom, the Secretary properly takes note of the "limited industry" in which Cornell's work at the Paulsboro Refinery took place. Cornell's own Safety Director, Mr. Roberts, who has over 20 years of experience in the steel erection industry, agreed that the work being done by Cornell at the worksite was a "rather unique

job", and he could not recall a similar job ever having been done before. (Tr. 95, 119-120) Even Cornell's own Counsel, in his opening statement, described this operation as "unique", noting that "a job like this had not been done previously in the middle Atlantic states." (Tr. 10)

In light of the unique nature of Cornell's work at the Paulsboro Refinery, it is difficult to identify with certainty what industry custom might be with regard to such work. The only evidence regarding industry custom that Cornell introduced came through Mr. Feldman's testimony regarding connecting work and the need for a connector to remain mobile when steel is brought in on cranes. (Tr. 61-62) Mr. Feldman, himself a connector, defined one as the member of a five man team that does the "initial erecting of any steel structure." (Tr. 61) The very nature of Cornell's project, however, did not include connection work as defined by Mr. Feldman. As discussed above, Cornell's work at the Paulsboro Refinery did not involve the erection of a steel structure, but involved the unique job of removing the drill tower from the coker unit. (Tr. 62-63) Also, Mr. Cugno testified that he concluded that no connection work was being done at the worksite, because he saw no crane activity or feeding of beams taking place. (Tr. 23, 31)

Later in his testimony, Mr. Feldman stated that moving a 5-10 pound snatch block, which he claims he was doing when he was observed walking the beams unprotected, is part of the connecting process. (Tr 70-71) While Mr. Feldman contends that mobility is also needed for this aspect of connecting, because the fairlead line has to be guided with one hand, while the snatch block is held with the other, he concedes that two workers could carry out this task and remain connected by safety lines, essentially admitting that with two

workers moving the snatch block, the need for mobility, as he described it, would be eliminated. (Tr. 75-76)

The Secretary argues that, in light of the unique nature of Cornell's work at the Paulsboro Refinery, the most reasonable way in which to determine industry custom is to examine the relevant safety policies in effect for the worksite, specifically Mobil's Safety Policies and Procedures. These Policies and Procedures were explicitly made a part of both the coker unit and the drill tower agreements between Nooter and Cornell. (See Exhibits C-4 and C-5, page 1 of each.) Rule 20 of Mobil's Safety Policies and Procedures states that,

> "Safety belts must be worn when working 6 feet or more above a solid surface if scaffolds with standard guardrails, midrails and toeboards are not provided."

(Exhibit C-4, page 4 of attached Mobil Safety Policies and Procedures) A more detailed Mobil Safety Policy dealing with scaffolds, ladders and safety belts further provides that,

> "Safety belts/harnesses must be worn when an employee is working more than ten (10) feet above grade if handrails are not provided."

(Exhibit C-4, next to last page) Neither Rule 20 nor the Mobil Policy on the use of safety belts make any exceptions for connection work or the moving of snatch blocks. In addition, having freely entered the agreements of which these Safety Policies and Procedures are a part, these are rules and policies of which Cornell was aware. Mr. Roberts, in fact, acknowledged in his testimony that he was aware of Rule 20's requirements. (Tr. 116)

Given the unique nature of the project at the Paulsboro Refinery, the parties to these agreements were certainly free to amend Mobil's Safety Policies and Procedures in order to provide for exceptions or even to replace them with other safety rules or policies which might have better served the special needs of the unique work involved. Neither Nooter

nor, in particular, Cornell, chose to do so, and therefore, Mobil's Safety Policies and Procedures appear to be the best indication of what is reasonable and customary practice of the industry engaging in this type of work.

In sum, then, the Secretary has met its burden of proving a violation of §1926.105(a) by Cornell at the Paulsboro Refinery.

III. Cornell's Infeasibility Defense

Cornell's amended answer basically alleges only infeasibility as an affirmative defense. As discussed above, the issue of practicality is actually part of the Secretary's burden in proving a violation under § 1926.105(a). Also, Cornell has introduced no evidence of impossibility and, in fact, Cornell's own employees, Mr. Feldman and Mr. Ferguson, both testified that safety cables and lifelines had been installed and were in use by Cornell employees in some areas of the worksite. (Tr. 79-80, 89) Since Cornell has not pled a greater hazard defense, any evidence introduced by Cornell on this issue is irrelevant and therefore, will not be considered. Finally, because Cornell did not introduce any evidence as to economic infeasibility, this issue will not be considered in evaluating Cornell's infeasibility defense.

In order to establish an infeasibility defense, Cornell must prove first, that compliance with § 1926.105(a) was infeasible, and second, that "an alternative protective measure was used *or* that there was no feasible alternative measure." *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1228 (overruling *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1986-1987 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), *rev'd in part*, 843 F.2d 1135 [13 OSHC 1652]

(8th Cir. 1988)). With regard to the first element, the Secretary concedes that the use of safety nets at the Paulsboro Refinery was infeasible because of the way in which the beams of the steel structure run in many different directions, as pictured in the videos (Exhibits C-3 and R-1) submitted by both Cornell and the Secretary.

The second element, though, requires Cornell to prove one of two things: either that alternative fall protection measures were used or that use of these measures was infeasible. It has already been conclusively shown that, with regard to the two instances observed by Mr. Cugno, neither worker was using fall protection as they walked the beam. Therefore, Cornell has not proven that these fall protection measures, as alternatives to the use of safety nets, were being used by these employees.

In order to successfully establish its defense of infeasibility, then, Cornell must show that the use of any alternative fall protection measures was infeasible. First of all, Cornell's own employees, Mr. Ferguson and Mr. Feldman, both testified that safety cables were installed around the outside perimeter of the structure and in the main access areas of the worksite, evidence of the fact that the installation and use of safety cables at the worksite *was* feasible, at least in those areas. (Tr. 79-80, 89) Second, although Mr. Cugno testified that no safety cables or lifelines were visible to him in the areas around the beams on which he observed Mr. Feldman and Mr. O'Donnell, Cornell did not offer any convincing evidence that it was infeasible to install cables or lines in these areas. (Tr. 28-29) Third, while Mr. Feldman claimed that he could not be tied off by a lifeline while moving the snatch block because he needed mobility, he also admitted that two workers could have easily done the job, creating a situation in which the use of safety cables and lines was feasible. (Tr. 76)

Finally, in his testimony, Mr. Cugno described numerous ways in which Cornell could have feasibly utilized safety cables and lifelines at the Paulsboro Refinery to eliminate the fall hazards he observed. For instance, according to Mr. Cugno, Cornell could have attached safety lines and rope grabs to the structure or used retractable life line devices and beam clamps. (Tr. 35-36) Mr. Cugno also stated that Cornell could have employed the "dog collar technique", where a worker loops the safety cable he has attached to a lifeline around the structure on which he is walking and walks with the line in front of him. (Tr. 37-38)

All of this evidence leads to the definitive conclusion that the use of these fall protection measures by Cornell at the Paulsboro Refinery, as alternatives to the use of safety nets, was, indeed, feasible. Cornell has not persuasively demonstrated that safety cables or lifelines could not have been installed around the areas in question and used by Cornell employees, such as Mr. Feldman and Mr. O'Donnell, in the same manner in which they were installed and used in other areas of the worksite. As a result, Cornell has not proven all of the elements needed to establish a defense of infeasibility.

CONCLUSION

In summary, the Secretary properly cited Cornell under § 1926.105(a) for exposing its workers to both exterior and interior fall hazards without the use of either safety nets or alternative fall protection measures. The Secretary has clearly met its burden of proving a violation of § 1926.105(a) and Cornell has failed to establish the defense of infeasibility. Accordingly, the citation is affirmed.

Under § 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I find that a penalty of $640.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested 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.

ORDER

1. Serious citation 1, item 1 alleging a violation of 29 C.F.R. § 1926.105(a) is AFFIRMED and a penalty of $640.00 is ASSESSED.

Richard W. Gordon
RICHARD W. GORDON
Judge, OSHRC

Dated: April 24, 1992
Boston, Massachusetts