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SECRETARY OF LABOR, Complainant, v. EL PASO CRANE AND RIGGING COMPANY, INC., Respondent.	OSHRC Docket No. 90-1106

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor, conducted the inspection in this case after an employee of El Paso Crane and Rigging Company, Inc. ("the company") fell 27 feet onto a concrete floor in a building under construction in El Paso, Texas. The employee, Rogelio Orozco, had been walking upon a steel beam at roof level in order to reach a kink in a strip of lightweight steel banding that was being installed as support for insulation. The insulation and the roof deck had not yet been installed where Orozco was working because they had to be placed on top of the banding. Orozco had no safety net under him, and he was not using any other form of fall protection.

I. Background

OSHA issued a citation alleging in item 2, that the company had failed to provide a safety net.[1] In item 1, the citation alleged that the company had failed to instruct each employee on how to recognize and avoid possible exposure to fall hazards such as the one that gave rise to the fatality in this case.[2] OSHA proposed a $640 penalty for each violation in this citation, which was classified as serious. OSHA also issued a second citation, classified as other-than-serious, alleging that the company failed to sign its annual summary of occupational injuries and illnesses and thereby failed to certify that the summary was correct and complete.[3]

Administrative Law Judge Stanley M. Schwartz conducted a hearing at which the Secretary of Labor ("the Secretary") presented three witnesses: (1) the company's vice president, Phillip Cordova; (2) the inspecting compliance officer, Benita K. Horton; and (3) a company employee who had worked as a laborer at the construction site, Perfecto Dominguez. In its defense, the company recalled Cordova, who had more than 20 years

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[1]The standard at issue is 29 C.F.R. § 1926.750(b)(1)(ii), which states:

> On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

[2]The standard at issue is 29 C.F.R. § 1926.21(b)(2), which states:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

[3]The standard at issue is 29 C.F.R. § 1904.5(c), which states:

> Each employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses, at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

experience in construction with the company. The company also presented as an expert witness David Marquez, an "architect/engineer" having a master's degree in structural stability and 38 years experience in construction, including the construction of buildings of the kind ("tilt-wall construction") where the fatality occurred. Judge Schwartz, as stated in his decision, found "no reason not to credit" the testimony of Cordova and Marquez because their "demeanor . . . as they testified" was "at all times sincere and believable." Relying heavily upon both witnesses' testimony to the effect that safety nets were infeasible, and Cordova's testimony outlining the methods of operation and the physical obstructions that can occasionally prohibit use of the other forms of fall protection at issue during the hearing, *i.e.*, scaffolds and safety belts, the judge vacated the serious citation. He also vacated item 1 on the basis of the testimony of Cordova and that of Dominguez regarding the safety training that had been given to the company's employees. The other-than-serious item, which was only minimally addressed at the hearing because the underlying facts were undisputed, Judge Schwartz reclassified to de minimis. He determined that the failure to sign the annual summary of occupational injuries and illnesses had "such a negligible relationship to employee safety and health that a penalty assessment or abatement order would be inappropriate."

The Secretary filed a petition for discretionary review. We will separately address each alleged violation.

II. Analysis

A. Fall Protection (Item 2)

1. The Issue on Review

The cited standard requires safety nets if the building under construction is "not adaptable to temporary floors" and "scaffolds are not used," *see supra* note 1. To establish the existence of conditions violative of this standard, the Secretary must establish that the employer was not using safety nets even though temporary floors could not be installed and scaffolds were not being used. *See Donovan v. Daniel Marr & Son*, 763 F.2d 477, 483 (1st Cir. 1985); *L.R. Wilson & Sons v. Donovan*, 685 F.2d 664, 672 (D.C. Cir. 1982) ("by the

express terms of the standard, safety nets are required only if temporary flooring cannot be used *and* scaffolds are not in use"); *National Indus. Constructors, Inc.*, 10 BNA OSHC 1081, 1086, 1981 CCH OSHD ¶ 25,743, p. 32,127 (No. 76-4507, 1981) (noncompliance established by evidence that neither temporary floors, scaffolds, nor safety nets were used); *Daniel Constr. Co.*, 9 BNA OSHC 1854, 1860, 1981 CCH OSHD ¶ 25,385, p. 31,627 (No. 12525, 1981) (noncompliance established by failure to use protective measures mentioned in standard), *aff'd*, 705 F.2d 382 (10th Cir. 1983). There is no dispute in this case that the Secretary did establish the existence of conditions violative of the cited standard. There is also no dispute that the Secretary established the other elements of a violation. *See, e.g.*, *Kulka Constr. Mgt. Corp.*, 15 BNA OSHC 1870, 1873, 1992 CCH OSHD ¶ 29,829, p. 40,687 (No. 88-1167, 1992) (Secretary must prove applicability of cited standard, existence of conditions violative of standard, employee exposure thereto, and employer knowledge thereof); *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (same), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

We turn, therefore, to the question of whether the company established any affirmative defense. As Judge Schwartz held, the company may affirmatively defend by establishing that compliance with the cited standard, section 1926.750(b)(1)(ii), was infeasible in that safety nets, as well as any other available form of fall protection such as scaffolds, were infeasible. *Williams Enterp.*, 6 BNA OSHC 1986, 1989, 1978 CCH OSHD ¶ 23,064, p. 27,877 (No. 76-1801, 1978) (impossibility defense under same steel erection standard); *see State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160, 1161, 1993 CCH OSHD ¶ 30,042, pp. 41,226-27 (No. 90-1620, 1993) (citation to 29 C.F.R. § 1926.105(a); infeasibility defense addressed, including unavailability of alternative measures); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28, 1991 CCH OSHD ¶ 29,442, pp. 39,682-85 (No. 88-821, 1991) (where there is no alternative protection in use, affirmative defense of infeasibility includes proof of infeasibility of alternative measures).[4] It is not enough, however, for the

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[4]The hearing in the case took place prior to the issuance of *Seibel*, a potentially crucial decision, inasmuch as it returned the burden of proof on alternative measures to the employer, where it had not rested since 1986. *See Seibel*, 15 BNA OSHC at 1227-28, 1991 CCH OSHD at pp. 39,683-85 (history of alternative measures (continued...)

company to show that compliance can be infeasible in some situations or operations unless the company further shows that the particular fact situation to which the citation refers was one of those infeasible situations. As our case precedents hold, employers must comply to the extent feasible on a situation-by-situation basis, even if considerable evidence can be mustered to establish that the industry cannot achieve full compliance in all operations. *See Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1203, 1993 CCH OSHD ¶ 30,052, p. 41,302 (No. 90-2304, 1993) *appeal filed*, No. 93-4913 (5th Cir. June 14, 1993); *Walker Towing Corp.*, 14 BNA OSHC 2072, 2075, 1991 CCH OSHD ¶ 29,239, p. 39,159 (No. 87-1359, 1991); *Bratton Furniture Mfg. Co.*, 11 BNA OSHC 1433, 1434, 1983-84 CCH OSHD ¶ 26,538, p. 33,858 (No. 81-799-S, 1983).

Here, the company presented extensive evidence of the infeasibility of the one form of fall protection that the cited standard by its literal terms requires, *i.e.*, safety nets. The Secretary argued for their feasibility, primarily through the testimony of the compliance officer, but Judge Schwartz found that the compliance officer "was unfamiliar with the construction method used at the site" and "was unable to explain how a net could have been installed," because she had "not determined if the structure could have supported a net." On review the Secretary apparently concedes that the company has established its affirmative defense with respect to safety nets, for he does not take exception to Judge Schwartz's reliance on the testimony of Cordova and Marquez that safety nets were infeasible in tilt-wall construction, and the Secretary does not argue that there is any satisfactory evidence of the feasibility of a safety net for Orozco. Accordingly, there remains for consideration

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[4](...continued)
aspect of infeasibility); *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1956-59, 1986-87 CCH OSHD ¶ 27,650, pp. 36,024-27 (No. 79-2553, 1986) (placing burden of proof for alternative measures upon Secretary), *rev'd and remanded*, 843 F.2d 1135 (8th Cir. 1988), *on remand*, 13 BNA OSHC 2147, 2150 & 2151, 1987-90 CCH OSHD ¶ 28,495, pp. 37,764 & 37,766 (No. 79-2553, 1989) (leaving burden of proof upon Secretary despite adverse court opinion). That is, Judge Schwartz would have been obliged to put the burden upon the Secretary except that *Seibel* intervened. *See Id.* (implying that Commission judges must leave burden on Secretary until change in Commission precedent). Nevertheless, on review the company does not claim prejudice from Judge Schwartz's decision to apply the new precedent, and our review of the record including the hearing transcript discloses that the parties tried and argued the case as if the burden of proof might ultimately fall upon the employer. We therefore direct our attention to the merits of the company's defense. *Compare Seibel*, 15 BNA OSHC at 1228, 1991 CCH OSHD at p. 39,685 (same approach).

only whether other feasible forms of fall protection were not suitable in these circumstances. The two devices on which the parties presented evidence are tied-off safety belts and portable scaffolds ("scissor lifts").

2. Scissor Lifts

The total area of the roof was 250 x 500 feet, and the roofing materials were being installed in 250 x 50-foot sections. One section took one day, for a total of ten days to complete the roof. The first step in each section consisted of laying out strips of the lightweight banding, which came in 250-foot rolls. Each section required twenty-five rolls of the banding, which were unrolled across the roof's 250-foot dimension, at a rate of five rolls at a time, with the strips lying 2 feet apart. The insulation came in 50-foot rolls which, as the next step in each section, were unrolled perpendicularly to the banding strips. The last step consisted of covering the insulation with metal decking, thereby forming a deck from which to work on another 250 x 50-foot section.

An employee would begin the next section by unrolling strips of the banding -- five at a time -- onto the existing metal decking. Nonetheless, he would have to go out onto the perimeter of the building to attach the five strips at 2-foot intervals and he would have to go out onto the opposite perimeter to pull the strips taut and into position, 2-foot intervals across the open roof beams. Also, Cordova agreed, it was not possible to follow this procedure for the whole 50 feet that had to be covered with banding before the 50-foot pieces of insulation could be put down; at some point, employees had to walk upon the open roof beams for the whole 250 feet. Furthermore, if any strip of banding was"kinked", an employee had to go back to it somehow and unkink it, either by walking across the roof beams or by going down to the floor to get a scissors lift to reach the kink from below.

It is undisputed that the company had more than one scissor lift at the worksite; they were used for tightening bolts in the structural steel, as well as for tasks associated with installing the roof. For example, an employee on a scissor lift was needed to tape together the pieces of vinyl-backed insulation as they were stretched out upon the banding. The following two extracts from the transcript of the hearing are the closest Cordova came to testifying that, to reach and unkink the particular kink in the banding that existed on the day

of his fall, Orozco could not have used a scissor lift. The first extract is from Cordova's testimony upon direct examination by the Secretary's attorney:

> Q. Okay. There were no scaffolds?
>
> A. There were motorized scaffolds that they could use underneath where they were working . . . . They were not using them at the time, for one reason or another.
>
> It could be that [it was] because there was a second floor underneath, because there were pipe braces off of tilt walls that I talked about earlier -- because of electrical stuff up off of the floor that there was no place to put this -- or plumbing, or other reasons. Sometimes they couldn't get a scaffold to these areas.

As Cordova had already testified, however, he had not been present at the worksite when Orozco chose to walk upon the beams rather than use a scissor lift. Therefore, immediately after the above-quoted testimony, the attorneys for both parties made clear that Cordova was not describing what exactly, if anything, had prevented Orozco from using a scissor lift. Instead, Cordova was listing things that might prevent and, at the worksite, had already sometimes prevented use of scissor lifts. "I believe," said the Secretary's attorney, "he testified that he knows the process and [that] he was there [at the worksite] weekly and he saw what they were doing."

The same lack of first-hand knowledge undercuts Cordova's testimony upon recall as a witness for the company, from which comes our second extract:

> A. As far as I know, there were people working under there. Perfecto Dominguez, he was on the scissor lift driving back and forth, taping the vinyl-backed insulation to hold it together.
>
> When they tensioned the thing and it pulled apart, his job was to be up under there taping the insulation. . . . So we were having to get motorized scaffolding equipment in there to do this.
>
> Q. Okay. These other people come in, and they are installing maybe the sprinklers or maybe taping. This is already after the decking is already down, isn't it?

[Discussion omitted as to whether Cordova might be permitted to explain his answer, which was a simple "No."]

A. Well, I have got [the company's photograph] Number 12? Okay.

This sprinkler is [depicted in Exh. R-12] . . . . [A]t this time, the sprinkers were in before the roof deck was on.

On [this job], some of the electrical conduit was in prior to the roof going on. This was an ongoing operation that we were having to work harmoniously together with other subtrades. And, like I say, we needed our motorized scaffolds to get us back and forth to tighten bolts, to do welding, to weld the bridging in [as part of the roof structure], [and to] place material up there to get material to the jobsite.

Q. Right.

A. We need to have the thing open so we can run these motorized scaffolds in there and allow other subtrades to get in there and work. So--

Q. But you are telling me that while you are laying down this banding, there are also people working exactly right underneath there on the sprinklers while you are also running a scaffold underneath them -- that that could be a potential scenario. Is that what you are telling me?

A. Well, if we are running the scaffold, then they can't be occupying the same floor space. They can run a scaffold and we can run a scaffold side by side. The only time we stop people from working people underneath us is when we have the loads in the air where they are attached by a crane and they are not set down on the structure.

And at this point of construction -- and when this accident took place, we were not using a crane on this job to hold any loads up.

. . . .

So at that time . . . [w]e [were] just dragging [banding] over their heads. So other trades were in there working at the same time.

A photograph in evidence shows the place upon the floor where Orozco fell; that particular location was established. The location of the kink toward which he had been proceeding was not established, however, and it therefore seems that no one identified it during any of the post-accident investigations, including the company's. Cordova never

testified explicitly that his post-accident investigation had revealed anything definite that precluded Orozco from taking a scissor lift to the kink -- no actual physical obstruction nor any operation actually being performed by another subcontractor. Cordova repeatedly testified that numerous other subcontractors were on the worksite, but he never testified that he or anyone else knew of any operation in the area through which Orozco would have had to travel. This is critical because, as Cordova specified, the company and other subcontractors can each "run a scaffold side by side." Cordova also specified that, usually, if the various work tasks could be coordinated, employees of the other employers on the construction site "would be working at different times that we were not directly over their head."

> We have meetings with them and say, Okay; today we are going to be right here, so you guys have got to be over there. . . .
>
> [T]hat is the process that [we use] -- we have to work hand in hand and allow them access to get to this workplace. If we don't allow them access to get to this workplace, then they are unable to do their work.

Cordova said,"We try not to work directly overhead."

3. Summary of the Arguments of the Parties on Scissor Lifts

The company "does not dispute that in some circumstances scissor lifts could be used to untangle kinks in the banding," and the company does not claim to have established "the particular constraint which led Rogelio Orozco, the deceased employee, to choose to walk to the kink rather than use a scissor lift on the occasion of his fatal fall." The company argues, however, that Cordova was "well aware of what those constraints were on this project." Therefore, "[t]he Administrative Law Judge's conclusion that one or more of the constraints described by Mr. Cordova must have prevented use of the scissor lift for unkinking on the occasion in question is a reasonable inference under the record." In essence, the company asks us to infer that, if Orozo could have managed to use it, he would have chosen to use an available scissor lift.

The Secretary argues that Cordova "could only speculate" as to why Orozco did not use a scissor lift, and that the company failed therefore to establish the infeasibility of that form of fall protection. The Secretary further argues that Cordova's testimony proves that

arrangements could have been made with the other subcontractors to allow for the company to have an employee on a scissor lift unkinking the banding.

4. Analysis of the Feasibility of Scissors Lifts in the Instant Circumstances

Judge Schwartz did not draw an inference that there must have been an obstruction precluding Orozco from using a scissor lift. He only reasoned as follows:

> [E]mployees in motion could not have tied off [any safety belts to a safety line]. Cordova's testimony indicates that part of the banding and insulating process required employees to walk out on the steel, and that obstructions and other operations kept them from using the lifts to untangle banding. His testimony also indicates that the obstructions and operations which prevented the use of nets and temporary floors also prevented the use of catch platforms and scaffolds. It is found, therefore, that there were no feasible alternative safety measures that could have been used.

This passage makes no explicit mention of Orozco's circumstances; neither is there an implicit inference that they were adverse to the use of a scissor lift, for the passage only refers to the construction process in general. Moreover, the judge found that Cordova was not on the construction site when the accident occurred and that Cordova only testified that certain construction operations *could* have kept employees from using lifts to untangle banding. Judge Schwartz's citations to the hearing transcript reveal that he relied on the two extracts which we have already quoted. In short, there is no indication that the judge was drawing the inference that the company asserts in its review brief, *i.e.*, that other construction work "must have prevented use of the scissor lift for unkinking on the occasion in question." Nor do we find any basis in the record for drawing the inference that other construction work prevented Orozco from using the scissors lift.

This leaves us, then, with a record bare of evidence as to the circumstances that confronted Orozco as he contemplated how to reach the kink. Without evidence of this type, we must find that the company has failed to show why it was infeasible for Orozco to use a scissor lift, and we hold that the company has not established its infeasibility defense.

5. Classification and Penalty

The Secretary proposes a penalty of $640 for a serious violation of the standard. Considering the criteria set forth in section 17(j) of the Act, 29 U.S.C. 666(j), and particularly the company's evidenced concern for employee safety, noted by the Judge Schwartz in his decision, we assess a penalty of $640.

B. Training (Item 1)

1. The Issue on Review

The parties have focused on the first part of the cited standard, 29 C.F.R. § 1926.21(b)(2), *see supra* note 2, which requires each employer to "instruct each employee in the recognition and avoidance of unsafe conditions." This command is so general and potentially subjective that the Commission and courts have seen fit to read into it a reasonableness standard. That is, to establish noncompliance, the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *E.g., R & R Builders, Inc.*, 15 BNA OSHC 1383, 1390, 1991 CCH OSHD ¶ 29,531, pp. 39,862-63 (No. 88-282, 1991) (citing unpublished Sixth Circuit opinions); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2008-09, 1991 CCH OSHD ¶ 29,223, p. 39,130 (No. 85-369, 1991); *see also National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1054 (8th Cir. 1978). The Secretary must also establish the usual elements of a violation. *See Kulka*, 15 BNA OSHC at 1873, 1992 CCH OSHD at p. 40,687 (applicability of cited standard, noncompliance, employee exposure, and employer knowledge); *Astra*, 9 BNA OSHC at 2129, 1981 CCH OSHD at pp. 31,899-900 (same).

2. Scissor Lifts

Horton testified that she "verified, through employee interviews, that [the employees] had not been told specifically to tie off, in the various operations that they were using, that there were no work platforms utilized in the -- rolling the insulation out or applying the decking or stretching the steel banding across." Later in her testimony, Horton agreed that safety belts probably could not be used for the random task of unkinking the banding, but

she believed that the company "could have been more specific with their instructions as to when [the employees] were to use their safety belts and to tie off, and when they were to use the scissor lift . . . ." Horton's concern was this: "[The employees] indicated to me that they had been told to work safely. They did not indicate specifics as to when they were to use their safety belts and lanyards and other fall protection." Horton determined from her interviews that employees had been only told to use safety belts as needed.

Cordova testified as follows about the company's instructions for unkinking the banding upon the open roof beams:

> A. [The process] would be to walk out there and take the kink out.
>
> Q. Okay. So an employee would have to walk onto the steel or off of the metal deck to unkink it?
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> A. On -- whatever they felt was the safest method, if they thought it was crawling along the steel or walking on top of it. They would have to go out there to take the kink out of it, yes.
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> Q. Is that something that you would leave to the employee's discretion?
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> A. That is left to employee discretion.
>
> Q. Okay. Is there any--
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> A. They are provided a safety platform that they can use to do this.

Cordova summarized as follows: "They were instructed to use their safety platforms, but it was their discretion, whether it was easy for them to reach out there and take a kink out or to go down and get on a platform. That was up to them: whatever would be safer for them."

Dominguez began his testimony as a witness for the Secretary by affirming that he had not received any training for walking out on the open beams. As his testimony developed, however, it became apparent that he had received some training prior to the accident. According to both Dominguez and Cordova, there had been weekly safety meetings. Cordova testified that attendance was mandatory with pay. Dominguez testified that the meetings were taught in English and Spanish; also, any videos shown at the meetings

were in both languages. A meeting that Orozco and Dominguez had both attended, according to the signed record of attendance that predates the inspection, covered the necessity for clean shoes when walking upon structural steel and for a safety belt when working in a stationary position. All employees had been issued safety belts and had been instructed in their use; Orozco and Dominguez both had safety belts, and Dominguez testified that he knew to use his safety belt for stationary work, including work from a ladder or scissor lift. All employees had also been issued copies of the OSHA standards. To further augment this formal training, employees were encouraged to ask questions, particularly when they were given a copy of the week's safety lesson as a paycheck insert. Cordova had an "open door policy" toward complaints. Also according to Cordova, new employees customarily received substantial on-the-job training under the supervision of experienced employees, and the employees assigned to install banding had been made aware of the hazards involved.

3. *The Arguments of the Parties*

The thrust of the Secretary's argument is against the company's instruction on unkinking the banding. In the Secretary's view, a company cannot instruct employees to choose "whatever would be safer for them" if their only choice is to use fall protection or subject themselves to a fall hazard. The Secretary warns that what the company has been doing, in effect, is granting itself a variance each time an employee decides that walking upon open beams is safer than using "scaffolds," one of the alternative measures listed in the cited standard.[5] Or, to put it another way, the company has been following its own, less stringent rule instead of the applicable standard.[6] The Secretary also faults the company's

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[5]Any employer who believes that compliance will create a greater hazard than already exists must obtain a permanent variance from the Secretary before deviating from an applicable standard. *See, e.g., RSR Corp. v. Donovan*, 747 F.2d 294, 303 (5th Cir. 1984) (citing cases).

[6]Employers must model their rules on the applicable requirements. *See, e.g., R & R Builders*, 15 BNA OSHC at 1390, 1991 CCH OSHD at p. 39,863; *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382, 1991 CCH OSHD ¶ 29,524, pp. 39,849-50 (No. 88-2642, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-351, 1991); *Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1056, 1991 CCH OSHD ¶ 29,344, p. 39,453 (No. 86-1087, 1991).

rule for providing no guidelines by which an employee might reasonably determine whether it was "safer," as Cordova put it, "to reach out there and take a kink out."[7]

The company's retort is essentially that the Secretary is so quick to criticize employee discretion that he cannot perceive that the company's safety program as a whole gives employees reasonable guidance for exercising the discretion.[8] The company emphasizes first of all that the employees must have discretion because they cannot always use scissor lifts to unkink the banding. Thus, the employees were given the OSHA standards and "were specifically instructed to check their shoes before walking on structural members, to tie off when working at a stationary location, and to utilize other safety equipment." "The record in this case clearly demonstrates that Respondent's employees received specific training regarding the specific hazard involved in this case, a fall from a steel structure."

4. Analysis

All evidence indicates that the company sufficiently conveyed to its employees that walking upon open beams is unsafe because it presents a fall hazard; how to avoid "falling to your death" was the theme of the safety meeting on structural steel and, indeed, the hazard is obvious. There is no question that Dominguez was aware of the hazard and we have no evidence that any employee failed to understand that the hazard existed whenever any banding had to be unkinked. Even Cordova's instruction to do "whatever would be safer" implies that unkinking the banding would put the employee in an unsafe position.

Also, we conclude that the Secretary failed to prove that the company's instructions for avoiding the hazard were significantly less than a reasonably prudent employer would have given in the same circumstances. The Commission has said many times that we look

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[7]In general, employers must make their rules specific enough to advise employees of the hazards associated with their work and the ways to avoid them. *See, e.g., National Indus. Constructors*, 583 F.2d at 1056; *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2017-18, 1992 CCH OSHD ¶ 29,902, p. 40,812 (No. 90-2668, 1992); *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1619-20, 1992 CCH OSHD ¶ 29,681, p. 40,243 (No. 89-2019, 1992); *Daniel Int'l Corp.*, 9 BNA OSHC 2027, 2031, 1981 CCH OSHD ¶ 25,813, p. 32,265 (No. 76-181, 1981).

[8]The employer's safety program as a whole is relevant to determining whether there was compliance with the cited standard. *See Marshall v. M.W. Watson, Inc.*, 652 F.2d 977, 979-80 (10th Cir. 1981); *also infra* notes 11 & 12 (cases indicating that safety program as whole gives context in which to evaluate substance of employer's instruction and training).

at the substance of an employer's safety program, not merely its form.[9] The same applies to an employer's safety instructions; their sufficiency must be judged in the context of the safety program's substance.[10] An employer's instructions are not necessarily deficient just because they allow the employees discretion as to how to proceed, particularly where the working circumstances are such that no one form of protection is capable of being used every time.[11] In the case now before us, the feasible means of fall protection for unkinking the banding was being selected on a situation-by-situation basis. According to Cordova's uncontradicted and unrefuted testimony, there were often columns, braces, plumbing, second-level floors, or other physical obstructions in the way of a scissor lift, and the company was not always able to make arrangements with other subcontractors to have the whole 250-foot by 50-foot area free of other employees doing construction work. In these circumstances, a company that tells its employees what fall protective equipment is available

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[9]*See, e.g., Dover Elevator Co.*, 16 BNA OSHC 1281, 1287, 1993 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) ("In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects"); *O'Horo*, 14 BNA OSHC at 2008, 1991 CCH OSHD at p. 39,130 (finding necessity for actual enforcement of safety rules rather than merely "a paper program"); *Texland Drilling Corp.*, 9 BNA OSHC 1023, 1026, 1980 CCH OSHD ¶ 24,954, p. 30,788 (No. 76-5307, 1980) ("The Secretary's arguments overemphasize the formal aspects of Texland Drilling's safety program and fail to give proper significance to its substance").

[10]*Cf. Ford Dev. Corp.*, 15 BNA OSHC 2003, 2009-10, 1992 CCH OSHD ¶ 29,900, pp. 40,801-02 (No. 90-1505, 1992) (citing cases generally indicating that employers must teach applicable safety requirements in necessary detail by some means, including formal instruction and on-the-job training), *petition for review filed*, No. 93-3090 (6th Cir. Jan. 29, 1993); *Concrete Constr.*, 15 BNA OSHC at 1620, 1992 CCH OSHD at p. 40,243 ("section 1926.21(b)(2) does not limit the employer in the method by which it may impart the necessary training" but somehow substance must be imparted); *Archer-Western Contrac., Inc.*, 15 BNA OSHC 1013, 1020, 1991 CCH OSHD ¶ 29,317, p. 39,381 (No. 87-1067, 1991) (training evidently adequate in that employees properly performed crane rigging and signaling after some instruction in safety meetings), *aff'd*, 978 F.2d 744 (D.C.Cir. 1991) (table); *O'Horo*, 14 BNA OSHC at 2010, 1991 CCH OSHD at pp. 39,130-31 (substance of requirements on trench sloping and shoring not taught in sufficient detail by on-the-job training and general instructions, and formal instruction not provided); *Dravo Engrs. and Constructors*, 11 BNA OSHC 2010, 2011-12, 1984-85 CCH OSHD ¶ 26,930, p. 34,507 (No. 81-748, 1984) (warning to "watch counterweight" is sufficient in light of tool box meetings on hazard of swinging counterweight).

[11]*Compare Consolidated Freightways*, 15 BNA OSHC at 1321, 1991 CCH OSHD at p. 39,810 (discretion held inappropriate if employees "have not been trained in the criteria to be considered and the guidelines to be followed" for use of protective equipment while cleaning up various chemical spills), *with Dravo*, 11 BNA OSHC at 2012, 1984-85 CCH OSHD at p. 34,507-08 (employer's instruction not to go on trestle without legitimate work-related purpose upheld as adequate).

and describes its use, or the circumstances in which it must be used, may quite conceivably be doing all that anyone could reasonably do.

We find no problem with the company's instructions about using safety belts. Insofar as this record shows, employees were told to tie off when stationary; Dominguez knew that this was the rule. Moreover, although Horton believed that safety belts could be used while employees were in straight-line motion to lay the strips of banding, she agreed that tied-off safety belts probably could not be used to go out to a kink. Thus, although Horton wanted the company to be "more specific with their instructions as to when [the employees] were to use their safety belts and to tie off," she did not identify any deficiency in the company's instructions on safety belts and there is no evidence as to how these instructions could have been more specific.

We also find no problem with the company's instruction regarding scissor lifts. "[The employees] were instructed," according to Cordova's plain testimony, "to use their safety platforms, but it was their discretion, whether it was easy for them to *reach out* there and take a kink out or to go down and get on a platform"and " how they chose to proceed was up to them: whatever would be safer for them." (Emphasis added.) Taking into account the workplace circumstances, it is hard to see what more a reasonable employer should have said than this, which tells employees to use scissor lifts unless the kink can be reached safely. The record shows without contradiction that the employees knew to work from any existing decking as much as possible while installing the banding, and the employees knew to use safety belts for stationary work. Nevertheless, not only were there sometimes obstructions to a scissor lift, but some of the work involved in installing the banding could not be accomplished in any other way than by walking upon the open beams; even Horton acknowledged this fact. Thus, Horton's belief that the company "could have been more specific with their instructions as to when [the employees] . . . were to use the scissor lift" was never supported by any reliable facts or information, such as industry custom and practice or the recommendations of safety professionals familiar with the industry. Because the Secretary's evidence is conclusory, we find that the Secretary failed to establish noncompliance with the cited standard.

We also find no basis for the Secretary's theory that the company has been, in essence, granting itself variances by allowing its employees to choose to walk on the beams. An employer cannot reasonably ask his employees to do more than is feasible in the circumstances, and how better to impress upon employees the importance of safety than to tell them to do whatever is safer? To penalize this employer for this instruction when he has clearly identified the hazards to the employees and pointed out the ways they can be avoided would not only be so clearly unreasonable, but would also be discouraging and counterproductive to the cause of employee safety and health. The issue as to this particular citation item, item 1 of the serious citation, is whether the employer's program of safety instruction provided adequate guidance to the employees, not whether the accident could have been averted if Orozco had made a better choice in accordance with the instructions. We essentially dealt with that issue in rejecting the infeasibility defense to serious citation item 2. Accordingly, we affirm the judge's decision to vacate item 1 of the serious citation.

C. Annual Summary (Other-than-serious Citation)

1. The Issue on Review

The cited regulation requires, in pertinent part, that "each employer . . . shall certify that the annual summary of occupational injuries and illnesses is true and complete. . . . by affixing the signature of the employer, or the officer or employee of the employer who supervises the preparation of the log and summary of occupational injuries and illnesses . . . ." *See supra* note 3 (quotation of full text). It is undisputed that the company's annual summary was unsigned and that this noncompliance constituted a violation. The one issue is whether the violation was only *de minimis*, as Judge Schwartz found, rather than other-than-serious as the Secretary alleged.

The Commission and its judges have authority to reclassify a violation as *de minimis*. *Secretary v. OSHRC (Erie Coke Corp.)*, ___ F.2d ___ (3d Cir. 1993) *petition for reh'g filed*, No. 92-3297 (3d Cir. Aug. 13, 1993); *see also Phoenix Roofing, Inc. v. Secretary*, 874 F.2d 1027, 1032 (5th Cir. 1989); *Donovan v. Daniel Constr. Co.*, 692 F.2d 818, 821 (1st Cir. 1982). "A *de minimis* violation is one in which there is technical noncompliance with a standard but

the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement order." *Keco Indus., Inc.*, 11 BNA OSHC 1832, 1834, 1983-84 CCH OSHD ¶ 26,810, p. 34,297 (No. 81-1976, 1984); *see also Anoplate Corp.*, 12 BNA OSHC 1678, 1688, 1986-87 CCH OSHD ¶ 27,519, p. 35,686 (No. 80-4109, 1986) (same explanation of law). Technical noncompliance with OSHA's recordkeeping regulations can in some circumstances have a negligible relationship to employee safety and health. *See Anoplate*, 12 BNA OSHC at 1687-88, 1986-87 CCH OSHD at pp. 35,685-86 (failure to record employees' job title and regular department, but small workforce and sufficient information about type of eye injury to indicate location where injury occurred); *B.C. Crocker Cedar Prod.*, 4 BNA OSHC 1775, 1776, 1975, 1976, 1976-77 CCH OSHD ¶ 21,179, p. 25,471 (No. 4387, 1976) (failure to use OSHA Form No. 100, but employer had recorded sole recordable accident on form furnished by Idaho State Industrial Commission). Not all instances of noncompliance with OSHA's recordkeeping regulations can be classified as *de minimis*, however. *See General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2072 & n.20, 1991 CCH OSHD ¶ 29,240, pp. 39,169-70 (No. 84-816, 1991) (denial of employee access to medical and exposure records, inasmuch as use of such records in worker's compensation proceedings promotes occupational safety and health); *General Motors Corp. Inland Div.*, 8 BNA OSHC 2036, 2040-41, 1980 CCH OSHD ¶ 24,743, p. 30,470 (No. 76-5033, 1980) (failure to record on OSHA Form No. 100 three instances of respiratory illness, inasmuch as such records "play a crucial role in providing the information necessary to make workplaces safer and healthier"). We must now decide whether a company's failure to sign its annual summary of occupational injuries and illnesses must be classified as *de minimis* rather than other-than-serious, taking into account that, by the terms of the cited regulation, an official signature is required to certify that the annual summary is "true and complete," *see supra* note 3.

2. Facts

Upon cross-examination by the company's attorney, Horton testified that, to the best of her recollection from her inspection, all requisite information pertaining to the company's

annual totals of occupational injuries and illnesses had been entered correctly on the annual summary, and that the only information missing was the requisite official signature, which would verify that a company official had examined the annual summary for correctness. [12] But neither Cordova nor any other company official gave any testimony to the effect that he had examined the annual summary for correctness and then had simply failed to sign it.

3. The Parties' Arguments

On the following basis, the Secretary distinguishes this case from those in which we found *de minimis* violations of recordkeeping requirements, *i.e.*, *Anoplate* and *Crocker*:

> The instant case does not involve a question of whether requisite information was recorded properly in every detail or if it was assembled in the appropriate format. What this citation is about is the regulatory requirement that an employer officially stand behind the accuracy of the information provided.

The Secretary views the requirement for an official signature as a mechanism to ensure accuracy:

> Inaccurate or incomplete information would obviously subvert the purposes of the reporting requirements. To help insure the accuracy of these records, the Secretary included a certification requirement, which compels a particular individual to take responsibility for the truth and completeness of the annual summary. This serves both as a means to enhance the likelihood of compliance as well as an enforcement tool in the breach. An individual who falsely certifies the accuracy of the summary is subject to criminal prosecution for a false reporting under 29 U.S.C. § 666(g) and 18 U.S.C. § 1000. The certification in such an action would obviously be a crucial part of the government's case. By finding the lack of a certification to be *de minimis*, the judge effectively writes this enforcement mechanism out of the standard. Accordingly, it was error to hold this violation to be *de minimis*.

Quoting the Secretary's brief against him, the company argues that the cited violation is *de minimis* because it "does not involve a question of whether requisite information was

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[12] 29 C.F.R. § 1904.5(a) prescribes that an annual summary shall include the following information: "a copy of the year's totals from the form OSHA No. 200 and . . . [c]alendar year covered, company [n]ame[,] establishment name, establishment address, certification signature, title, and date."

recorded properly in every detail or if it was assembled in the appropriate format." The company presents the following analysis:

> Despite extensive rhetoric regarding the importance of reporting requirements and the dangers of inaccurate or incomplete information, the Secretary does not allege that either occurred in this instance. Respondent properly recorded the required information in the required format. The sole violation alleged was the absence of a signature. . . .
>
> . . . .
>
> Respondent submits that the *B.C. Crocker* case is directly analogous to the situation in the instant proceeding. Obviously, the state form had not been certified under the penalties of 29 U.S.C. Section 666(g) or 18 U.S.C. Section 1001. Nevertheless, the Commission apparently recognized that the compilation and recording of the information was the element which would promote safety of employees, not the fact that it was prepared in accordance with federal perjury laws.

In the company's view, then, there is "no evidence which demonstrates any relationship between employee safety and the requirement of a signature."

4. Analysis

As the court discussed in *Phoenix Roofing*, 874 F.2d at 1032-34, any finding that a violation is *de minimis* means that the instance of noncompliance had little or no impact on safety and health in view of the particular factual circumstances at the employer's workplace; it does not mean that the cited OSHA standard has little impact and will not be enforced, regardless of any employer's circumstances. Thus, when we find a *de minimis* violation, we are not questioning the wisdom of any cited standard, nor are we rendering any standard unenforceable; we are merely finding that a particular employer's deviation was trifling in that it never really compromised any protection meant for employees under the terms of the standard. In other words, we are finding that, despite the employer's literal deviation from the standard's terms, its purpose was achieved.

The Secretary argues that the purpose of the standard cited here is to assure that the employer has examined the annual summary for accuracy. This process of examination, the Secretary reasons, provides a direct and tangible relationship to employee safety and health. In the record before us, there is a lack of evidence concerning whether this examination occurred, regardless of the presence of a signature. Accordingly, we must find the judge's decision that this citation item should be classified as *de minimis* is not supported by the evidence. We affirm this item as other-than-serious.

III. Order

Item 2 of the serious citation is affirmed and a penalty of $640 is assessed. Item 1 of the serious citation is vacated. The other-than-serious citation is affirmed.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: SEPTEMBER 30, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON D.C. 20006-1246

FAX:
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Secretary of Labor,
Complainant,

v.

El Paso Crane & Rigging Company, Inc.,
Respondent.

Docket No. 90-1106

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 23, 1991. The decision of the Judge will become a final order of the Commission on October 23, 1991 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 October 15, 1991** 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
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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 23, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-1106

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. EL PASO CRANE AND RIGGING COMPANY, INC., Respondent.	:	OSHRC DOCKET NO. 90-1106

APPEARANCES: Terry K. Goltz, Esquire
Dallas, Texas
For the Complainant.

Charles C. High, Jr., Esquire
El Paso, Texas
For the Respondent.

DECISION AND ORDER

SCHWARTZ, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("the Act").

An inspection was conducted of a construction worksite in El Paso, Texas, where Respondent was erecting a building, after a tragic accident. The accident occurred on October 31, 1989, when one of Respondent's employees fell from a steel beam and sustained fatal injuries. As a result of the inspection, two citations were issued. Citation number 1 alleges a serious violation of 29 C.F.R. § 1926.21(b)(2). It also alleges a serious violation of 29 C.F.R.

§ 1926.750(b)(1)(ii), or, in the alternative, § 1926.105(a).[1] Citation number 2 alleges an "other" violation of 29 C.F.R. § 1904.5(c). Respondent timely contested the citations, and a hearing was held on February 27, 1991. Respondent filed a post-trial brief. The citation items are discussed below.

29 C.F.R. §§ 1926.750(b)(1)(ii) and 1926.105(a)[2]

The basic facts of this case are undisputed. Respondent was one of a number of subcontractors at the site. The project was a 500 by 750-foot commercial tilt-wall building divided into three 250 by 500-foot sections with vinyl-backed insulation between the roof and the structural steel. Respondent's job was to erect the walls and structural steel, and to install the insulation and metal roof decking. (Tr. 10-13; 155-58; 173-74; 182-83; 194).

In tilt-wall construction, a crane lifts and positions concrete wall panels which are held in place by steel braces set inside the building. The braces support the panels and remain in place until all of the decking is installed and secured; they are adjustable so the panels can be aligned as construction progresses. Cranes operating inside the building set steel columns in place, as well as the girders and joists that ultimately support the roof. The joists are bolted to the columns and bridging is installed and welded, after which banding, insulating and roof decking can begin.

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[1]The 1926.105(a) citation was vacated on the record, based on its preemption by 1926.750(b)(1)(ii). (Tr. 151-52). My reasoning in this regard is set out below.

[2]Although these standards were cited as item 2 of citation number 1, they are addressed first for purposes of expediency.

(Tr. 10-23; 160-75; 186-87; 232; C-1-7; R-1-12)[3].

The banding used at the site was half-inch lightweight metal strips on spools. It was laid across the joists two feet apart by employees who held onto the ends of a rack with five spools, each containing 250 feet of banding, which reeled off as they walked from one side to the other of the building section. If any kinks occurred employees untangled them, after which they fastened the banding to each end of the section. They then rolled insulation, which was in five by 50-foot rolls, across the banding; the banding provided support for the insulation. Once an area of 50 by 250 feet was covered, 30-foot sheets of roof decking were placed over the banding and insulation. Employees walked out on 36-inch platforms, decking already in place or the structural steel itself to install banding and insulation. They could also use motorized scaffolds called scissor lifts to untangle banding. (Tr. 13-19; 25-32; 181-85; 188; 221-27; C-3-7).

At the time of the accident, the building was about 50% completed. Rogelio Orozco and three or four other employees were installing banding and insulation in the building's center section. The employees were working up on the steel, which was about 27 feet high. Orozco fell to the concrete floor below as he was attempting to untangle some of the banding. (Tr. 12-13; 21; 25; 41-42; 96; 129-31; 183-84; 194; 236-37).

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[3]C-1-7 were taken during the inspection and depict the section of the building in which the accident occurred. R-1-12 are photos of a different site showing the same type of construction. (Tr. 14; 43; 66-67; 157-59; 163-64; 167-68; 176-77).

Benita Horton is a compliance officer ("CO") with the Occupational Safety and Health Administration ("OSHA"). She inspected the site from November 3-9, 1989. She testified that Respondent was cited because employees had been working up on the steel without nets or other fall protection. She talked to Phillip Cordova, who told her temporary floors and nets could not be used. Horton concluded that portable nets could have been used after researching the matter and consulting with regional personnel. She could not explain how they could have been installed, and did not determine if a net could have been attached to the structure. She had seen nets used in steel erection, but was not familiar with industry custom in regard to using nets for banding. (Tr. 37-40; 49-51; 59-67; 70-81; 101-07; 115; 124-25).

Horton believed other measures could have been used. She said the scissor lifts could have been used to untangle the banding, and that the safety line in C-7 would have protected employees rolling out insulation. She noted the line would not have worked for untangling banding, or if employees had to work more than six feet from it. She also noted employees in motion could not have tied off. She saw employees installing insulation, but did not see them laying banding. Frank Cordova, the company president, demonstrated how banding could be laid from the decking, but she did not know if all of it could be installed that way. (Tr. 51-53; 79-80; 85; 88-103; 114-15; 120-23).

Horton observed that 1926.750(b)(1)(ii) is a specific standard which applies to steel erection, while 1926.105(a) is a general

standard. She said a specific standard usually takes precedence over a general one, and that 1926.105(a) was cited in the alternative based on OSHA Instruction STD 3-3.1. (Tr. 68-70; 74-75; 80-83; 116-18; C-15).

Phillip Cordova has been Respondent's vice president from its inception in 1974. He testified that while he was not there when the accident occurred, he had visited the project weekly since it started and was familiar with the construction process used. He said temporary floors and nets could not have been used at the site due to obstructions such as braces, columns, second-level floors and other operations, which he explained. Employees would have been driving lifts around to weld and bolt structural members, to get materials up to the steel and to tape insulation as it was being installed. Concrete workers would have been pouring cement, and sprinkler system, electrical and plumbing workers would have been using lifts to do their work. Cordova said these operations were required to take place during banding and insulating, and indicated they could have kept employees from using lifts to untangle banding. He also indicated that while employees could install some of the banding from platforms and decking, they had to lay a portion of it by walking on the steel. (Tr. 7-10; 21-23; 32-33; 36-37; 153-57; 173-79; 186-92; 198; 224; 228-32; 237; R-12).

Cordova further testified that due to the process his company was required to use at the site and the OSHA requirement that nets extend six feet beyond the work area, a portable net of 62 by 250 feet would have been needed. He noted that even if the process had

been altered to install one sheet of decking at a time, a net of 52 by 62 feet would have been required; 50 feet of banding had to be laid before one roll of insulation could be rolled across it, and 40 feet of insulation had to be laid before one 30-foot sheet of decking could be installed. Cordova had checked with net manufacturers and learned that the largest portable net available was about six by 20 feet. (Tr. 185-91; 220-28).

Cordova stated that even if there had been a net large enough, using it would have collapsed the structure. He noted that the building was very unstable during construction and was not designed to support nets of that size. Although the bridging was welded, the joists were only bolted to the columns to allow for alignment. If nets were tied to structural members, the building would collapse. If they were tied to the walls, the braces and wall panels would collapse. Cordova was familiar with industry custom regarding this kind of construction, and had never known of nets being used. (Tr. 185-97; 226-28).

Cordova said the safety line in C-7 was devised to show Horton the difficulties of using such a line. The line was over 100 feet long and slack, and both men were tied off to it with a six-foot lanyard. Cordova noted that if one man fell he would pull the other off with him, and that carrying equipment out on the steel to install the line was dangerous. He also noted the line limited the range of motion and ability to work. He pointed out that employees were instructed to tie off when performing stationary duties on the steel, such as welding, but that employees in motion could not tie

off. (Tr. 23-25; 30-31; 34-35; 214-19).

David Marquez is an architectural and engineering consultant with 38 years of experience. He has a B.S. in civil engineering, and an M.S. in structural stability. He testified he designed the first tilt-wall building in El Paso. He was familiar with the design of the subject building, and had reviewed the plans for it. His opinion was that it would not be able to support the weight of a 50 by 50-foot net prior to the roof's completion, and that stringing such a net from the columns or joists would cause the structure to collapse. He said the building was not designed to hold a net of that size, which would add an additional 30,000 pounds of stress to the structure, and that there were too many obstructions for a net to be used. (Tr. 244-60).

Marquez further testified he had never seen safety nets used during the construction of a building like the one at the site, and that he had not found a net measuring 50 by 50 feet. He noted he had been a quality controller at an air force base two years before in regard to a similar building; he and the Corps of Engineers had concluded safety nets were not possible for that building. He pointed out that such a building would have to be designed to hold a net, and that a contractor like Respondent could not change the design. (Tr. 250; 254-60).

As noted above, the 1926.105(a) citation was vacated on the record due to its preemption by 1926.750(b)(1)(ii). The Secretary correctly cited 1926.105(a) in the alternative, as the Commission has recommended for cases in which it is unclear which standard

applies. See, e.g., Paschen Contractors, Inc., 14 BNA OSHC 1754, 1757, 1990 CCH OSHD ¶ 29,066 (No. 84-1285, 1990). However, the Commission's recent decision in Bratton Corp., 14 BNA OSHC 1893, 1990 CCH OSHD ¶ 29,152 (No. 83-132, 1990), compels the preemption of 1926.105(a) in this case.

In Bratton, the issue was whether 1926.750(b)(2)(i), a specific steel erection standard, preempted 1926.28(a), a general standard. The Commission said the determinative factor was the type of fall hazard addressed by 1926.750(b)(2)(i), and noted that several circuit courts had held that the standard addressed only interior falls. Since the cited hazard in Bratton was in regard to exterior falls, the Commission concluded that 1926.750(b)(2)(i) did not preempt 1926.28(a). Id. at 1895-96. The Commission noted it was expressing no view on whether 1926.28(a) would apply when steel erection exposed employees to interior falls. Id. at 1895 n.5. However, it is evident that had the Commission reached the issue, it would have concluded the general standard does not apply in steel erection cases involving the hazard of interior falls.

The record demonstrates that the hazard in this case was in regard to interior falls. Based on the foregoing, the 1926.105(a) citation is preempted by 1926.750(b)(1)(ii) and is accordingly vacated. The remaining issue to be determined is whether there was a violation of 1926.750(b)(1)(ii), which provides as follows:

> On buildings or structures not adaptable to temporary floors, and where scaffolds are not used, safety nets shall be installed and maintained whenever the potential fall distance exceeds two stories or 25 feet. The nets shall be hung with sufficient clearance to prevent contacts with the surface of structures below.

The applicability of the standard is clear, since the record shows that the potential fall distance was over 25 feet. There were no scaffolds used at the site other than the scissor lifts, and the Secretary, in alleging the violation, obviously determined the building was not adaptable to temporary floors. The standard therefore required the use of safety nets, and since it is undisputed that nets were not used, the Secretary has established a prima facie violation. Regardless, it is concluded Respondent was not in violation of the standard, for the following reasons.

Respondent asserts the affirmative defense of impossibility in regard to the use of nets. The Commission redefined this defense in the late 1980's to require an employer to show that compliance was infeasible under the circumstances. Dun-Par Engineered Form Co., 12 BNA OSHC 1949, 1956-59, 1986 CCH OSHD ¶ 27,650 (No. 79-2553, 1986); Cleveland Elec. Illuminating Co., 13 BNA OSHC 2209, 2213, 1989 CCH OSHD ¶ 28,494 (No. 84-593, 1989). Once an employer demonstrated infeasibility, then the Secretary had the burden of showing the feasibility of alternative measures. Dun-Par, supra.

The Commission has reexamined this defense once again in its recent decision in Seibel Modern Mfg. & Welding Corp., OSHRC Docket No. 88-821, (August 9, 1991). In Seibel, the Commission noted that employers may not rely on industry custom and practice alone to avoid the abatement method specified by the standard, but must rather show the method was unreasonable and unusable under the circumstances. It also overruled Dun-Par, supra, in regard to the burden of proof as to alternative measures. Employers must now

show not only that the abatement method prescribed by the standard was infeasible, but also that an alternative protective measure was used or there was no feasible alternative measure.

Respondent has clearly met its burden in regard to the use of nets in this case. Although the CO believed nets could have been used, it is apparent from her testimony that she was unfamiliar with the construction method used at the site. Moreover, she was unable to explain how a net could have been installed, and had not determined if the structure could have supported a net. The testimony of Cordova and Marquez, on the other hand, was that nets could not have been used because of obstructions and other work taking place inside the building and, even more importantly, because using nets would have caused the structure to collapse. I observed the demeanor of Cordova and Marquez as they testified. They were at all times sincere and believable, and there is no reason to not credit their testimony. Accordingly, it is found as fact that safety nets could not have been used at the site.

Respondent has also met its burden in regard to alternative measures. While the CO's opinion was that the safety line would have provided some protection, she herself acknowledged it would not have worked for untangling banding and that employees in motion could not have tied off. Cordova's testimony indicates that part of the banding and insulating process required employees to walk out on the steel, and that obstructions and other operations kept them from using the lifts to untangle banding. His testimony also indicates that the obstructions and operations which prevented the

use of nets and temporary floors also prevented the use of catch platforms and scaffolds. It is found, therefore, that there were no feasible alternative safety measures that could have been used.

The undersigned is well aware of the tragic consequences of the use of the insulation method at the site, and the hazards of the process are apparent. However, my conclusion that Respondent was not in violation of the standard is based on the language of the standard itself and the unique facts of this particular case. The employer's good faith and obvious concern for employee safety have also been noted.[4] This citation item is vacated.

29 C.F.R. § 1926.21(b)(2)

Benita Horton testified she determined employees had not been instructed about the hazards of working on the steel based on her observation of the site and employee interviews.[5] She understood some instructions were given but believed they were inadequate and should have been more specific regarding how to work safely and when to use safety belts and scissor lifts. She did not recall seeing any safety rules, but there was an indication employees were told to use safety belts as needed. (Tr. 48-49; 109-12).

Perfecto Dominguez has been employed with Respondent as a laborer for over two years. He testified he had worked on the steel at other sites, but that he had not done so at the subject

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[4]It is refreshing that Respondent has voluntarily stopped using the insulation method out of concern for employee safety. (Tr. 239-41).

[5]Horton testified Phillip Cordova assisted her by translating during interviews with Spanish-speaking employees. (Tr. 63).

site until after the accident.[6] He first said he did not recall attending safety meetings before the accident, but then indicated he had. He also said he did not recall any training about working on the steel, but then indicated that before the accident he had been given a safety belt and lanyard and instructed when to use them. He noted he had used the belt when installing decking and using the scissor lift. (Tr. 129-43).

Dominguez further testified that his signature appeared on a document dated September 4, 1989, which was about safety. He noted employees signed papers when they attended safety meetings and that they received safety sheets along with their weekly paychecks. He said the safety meetings were in both Spanish and English, and that employees were given videos about safety which were also in Spanish and English. (Tr. 135-45; R-15).

Phillip Cordova testified that his responsibilities include implementing the company safety program. He said there are periodic mandatory general assembly safety meetings, as well as weekly safety meetings when paychecks are handed out. He noted the weekly meetings had taken place since the company's inception; at the time of the accident they were held by his safety helper, Jim McMinn, and a payroll clerk fluent in Spanish and English to ensure employees understood the meeting. Employees signed attendance sheets which set out the information covered, and were given copies

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[6]The testimony of Dominguez was translated during the hearing by a court-certified interpreter of Spanish. (Tr. 125-29).

of the sheets with their checks. Cordova identified R-15 as copies of the weekly meeting sheets. (Tr. 198-201).

Cordova further testified that the March 13, 1989 meeting addressed structural steel and that Rogelio Orozco had signed the attendance sheet. The sheet told employees to check their shoes before walking out on the steel, which meant to check for mud or debris and to ensure shoelaces were tied. It also told them to be alert and aware of the dangers and to use required equipment, such as safety belts. Cordova said employees were instructed to tie off when performing stationary work, but that they could not do so when mobile. He also said employees were told to use lifts to untangle banding, but that it was left to their discretion to decide whether it was safer to do this from a lift or from the steel. (Tr. 28-29; 201-03; 211-17; R-15).

Cordova identified R-16 as the list of equipment given to Rogelio Orozco on June 24, 1988. He noted the list was part of the safety program and that employees received instructions about the equipment when it was issued to them. He said employees also received R-17, a list of company guidelines, and an OSHA booklet in English which contained the construction standards. (Tr. 203-11).

Cordova stated that because of the dangerous nature of the work, all new employees go through an on-the-job training program. He noted that the program is not written but is very detailed, and that employees are trained until they are sufficiently aware of the hazards to be able to work on their own. He said the training is

usually given by his father, Frank Cordova, the company president, but that Orozco was trained by his own father, who had worked for the company since its inception. He also said that 14 of the 60 employees at the time of the accident were relatives of Orozco, and that all of them had been through the program. (Tr. 236-38).

The subject standard provides as follows:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The citation was issued because the CO believed Respondent should have given more specific instructions about how to work safely on the steel and when to use safety equipment. However, it is found that Respondent did, in fact, instruct employees as required and that it was not in violation of the standard.

The record shows that employees go through a detailed on-the-job training program, and that they do not work on their own until they are sufficiently aware of the hazards involved. They are given an OSHA construction standards booklet, and instructions when safety equipment is issued. They attend weekly safety meetings and are given safety videos, both of which are in Spanish and English. They are told to check their shoes before walking on the steel, to tie off when doing stationary work, and to be alert and aware when working on the steel. They are instructed to use lifts to untangle banding, but to use their discretion to decide if it is safer to do this work from a lift or the steel.

The 1926.750(b)(1)(ii) discussion, supra, established that employees were required to perform some of their duties on the steel without any fall protection. It also established that the lack of protection, while obviously hazardous, was unavoidable under the unique facts of this case. Upon consideration of the work performed and the instructions and training provided, it is found that Respondent gave employees all of the instructions that it could have under the circumstances. The fact that the decision of whether to use scissor lifts was left to employee discretion was reasonable in this case. The program, instructions and training adequately met the employer's responsibility under the above standard to instruct each employee in the recognition and avoidance of unsafe conditions that arose during the insulation operation. This citation item is accordingly vacated.

29 C.F.R. § 1904.5(c)

Benita Horton testified that although Respondent had the required injury and illness records, the 1986 annual summary was not signed to certify that it had been checked and was accurate. (Tr. 53-54; 112-13).

The subject standard provides, in pertinent part, as follows:

> Each employer ... shall certify that the annual summary of occupational injuries and illnesses is true and complete. The certification shall be accomplished by affixing the signature of the employer ... at the bottom of the last page of the log and summary or by appending a separate statement to the log and summary certifying that the summary is true and complete.

Respondent does not dispute the violation, but contends it should be classified as de minimis. Commission precedent is well settled that a violation should be characterized as de minimis where a technical noncompliance with a standard bears such a negligible relationship to employee safety or health that a penalty assessment or abatement order would be inappropriate. See, e.g., Keco Indus., Inc., 11 BNA OSHC 1832, 1834, 1984 CCH OSHD ¶ 26,810 (No. 81-1976, 1984). Moreover, the Commission has held mere technical noncompliance with a recordkeeping requirement to be de minimis. Anoplate Corp., 12 BNA OSHC 1678, 1687-88, 1986 CCH OSHD ¶ 27,519 (No. 80-4109, 1986); B.C. Crocker Cedar Prod., 4 BNA OSHC 1775, 1776, 1976 CCH OSHD ¶ 21,179 (No. 4387, 1976). In this case, Respondent's only recordkeeping deficiency was its failure to certify the 1986 summary. It is concluded that such failure is properly classified as a de minimis violation.

Conclusions of Law

1. Respondent, El Paso Crane and Rigging Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of § 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On October 31, 1989, Respondent was not in violation of 29 C.F.R. §§ 1926.21(b)(2), 1926.750(b)(1)(ii), and 1926.105(a).

3. On October 31, 1989, Respondent was in de minimis violation of 29 C.F.R. § 1904.5(c).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 and 2 of serious citation number 1 are VACATED.

2. Item 1 of "other" citation number 2 is AFFIRMED as a de minimis violation, and no penalty is assessed.

Stanley M. Schwartz
Administrative Law Judge

DATE: SEP 10 1991