SECRETARY OF LABOR, Complainant, v. ARMSTRONG STEEL ERECTORS, INC., Respondent.	OSHRC Docket No. 97-0250

DECISION

Before: WEISBERG, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

On October 8, 1996, a journeyman ironworker died after falling approximately 90 feet from the upper level of a steel truss-type bridge that his employer, Armstrong Steel Erectors, Inc., was constructing across the Kanawha River at Chelyan, West Virginia. Following an inspection by a compliance officer of the Occupational Safety and Health Administration ("OSHA"), Armstrong received a repeated citation and a serious citation alleging that it violated the Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-678, by failing to use adequate fall protection and by failing to designate a competent person to conduct project safety inspections. Commission Judge John H. Frye, III affirmed the two citation items. We affirm his decision.

I. Fall Protection

A. Facts

The cited standard, 29 C.F.R. § 1926.105(a),[1] requires fall protection if a workplace is "more than 25 feet above [the] ground or water surface." Armstrong attempted to meet this requirement by providing each of its ironworkers with a safety harness (*i.e.*, a safety belt) and one lanyard, and by instructing him or her to tie off "100 percent" of the time. Despite this instruction, the record shows that two lanyards were needed to tie-off "100 percent" of the time and that Armstrong's ironworkers did not always tie off even when they could.

There were not enough lifelines for the ironworkers to tie off 100 percent of the time as they were moving from place to place on the bridge. For example, some of the "chicken ladders" going between the bridge's lower and upper levels did not have lifelines. There also were no lifelines running the length of certain beams — the "lateral braces" and the "stringers." Although workers could tie off to these beams with a certain device that Armstrong provided, a "choker" (a steel-wire cable that looped around the beam), the judge found that the ironworkers "were unable to stay tied off 100 [percent] of the time with a choker while working [*i.e.*, walking] on the stringers because it was necessary to remove the choker from the stringer in order to pass the diaphragms [*i.e.*, short cross-braces] that connected the stringers to each other." The same was true on the lateral braces whenever the ironworkers needed to cross a "star point" *i.e.*, the place where four lateral braces came together like spokes at the axle of a wheel. An additional problem was that some ironworkers did not use chokers (and thus were not tied off) because the choker snagged and held them back.

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[1]29 C.F.R. § 1926.105(a) states: "Safety nets shall be provided when workplaces are more than 25 feet above ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical."

In addition to this absence of lifelines, there were deficiencies in the lifelines that Armstrong had installed. One deficiency was that some of the "stanchions" — posts — that Armstrong used to support its lifelines were not designed to allow an ironworker walking past to keep his or her lanyard tied onto the lifeline. There also were 3-foot gaps between the lifelines in a number of locations on the bridge. The ironworkers needed to untie and retie at these 3-foot gaps, just as they needed to do at the poorly designed stanchions. During this procedure, they were exposed to risks of falling. If Armstrong had supplied the ironworkers with two lanyards each, they could have remained tied off to one stretch of lifeline while tying onto the next stretch.

After the fatality, Armstrong gave all the ironworkers two lanyards. Armstrong also installed lifelines on the beams that lacked them (the stringers and lateral braces) and made sure there were lifelines on all chicken ladders. As a result, the ironworkers were able to stay tied off 100 percent of the time.

B. Discussion

In general, to establish a violation of a standard, the Secretary must establish its applicability, the employer's noncompliance with it, employee access to the noncomplying condition, and the employer's knowledge of the violation. *E.g., Rockwell Int'l Corp.,* 17 BNA OSHC 1801, 1806, 1995-97 CCH OSHD ¶ 31,150, p. 43,535 (No. 93-228, 1996). Armstrong agrees that § 1926.105(a) applies and essentially admits that its fall protection system was deficient in the manner alleged. It is also clear Armstrong knew of the deficiencies.[2]

To establish a violation of § 1926.105(a) for failing to require a listed fall protection device other than a safety net, the Secretary must also show that the device

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[2]The record establishes that Armstrong's supervisors knew ironworkers frequently failed to tie off. In fact, John Perrine told the OSHA compliance officer that 100 percent tie off was impossible to maintain with only one lanyard per employee and the deficient system of lifelines. Guy Hill, Armstrong's other foreman on the project, testified to the same thing.

was practical in the cited employer's circumstances. *Century Steel Erectors, Inc., v. Secretary,* 888 F.2d 1399, 1402, 1405 (D.C. Cir. 1989).[3] Practicality is determined based on evidence showing where and how the specific fall protection device could have been used, and may be rebutted by evidence that it was impractical, in light of industry custom and practice. *Falcon Steel Co.,* 16 BNA OSHC 1179, 1189-90, 1993-95 CCH OSHD ¶ 30,059, pp. 41,338-39 (No. 89-2883, 1993).

Here, the Secretary has met her burden. Armstrong does not dispute that providing two lanyards per ironworker and installing a complete system of lifelines was practical; indeed, Armstrong accomplished these things after the fatality. *Cf. Andrew Catapano Enterp.,* 17 BNA OSHC 1776, 1785, 1995-97 CCH OSHD ¶ 31,180, p. 43,612 (No. 90-50, 1996) (employer's abatement efforts demonstrates technological feasibility). Nor does Armstrong argue that its industry viewed these measures as impractical. Indeed, the only evidence pertinent to industry practice in the record was the ironworkers' testimony that their union trained them to use two lanyards to ensure 100 percent protection.

In its defense, Armstrong contends that it complied with the cited regulation by providing adequate fall protection for a "substantial portion of the workday," and that a single lanyard system is permissible where employees can hold on to a lifeline while repositioning their lanyards. We do not agree. First, as the court in *American Bridge/Lashcon v. Secretary,* 70 F.3d 131, 134 (D.C. Cir. 1995), makes clear, the issue of whether employees were protected for a substantial portion of the workday is only relevant where the employees are temporarily unable to tie-off because of "unexpected or unusual circumstances" and the Secretary claims that the employer should have used alternative fall protection in addition to the safety belts. *See also Falcon,* 16 BNA OSHC at 1191-92, 1993-95 CCH OSHD at pp. 41,340-41. Those circumstances clearly were not

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[3]Commission precedent regarding the application of 29 C.F.R. § 1926.105(a) derives from that of the District of Columbia Circuit, to which any employer may appeal our decisions.

present here. Armstrong's post-fatality abatement establishes that safety belts were practical for 100 percent of the workday. *See also Interstate Erectors, Inc.*, 74 F.3d 223, 227 (10th Cir. 1996)(the "substantial portion of the workday" test "does not provide a shield to an employer who fails to use fall protection devices when such devices are, in fact, practical, even if employees are protected most of the day").

We also reject Armstrong's contention that a single-lanyard fall protection system is adequate where employees can hold onto a lifeline while repositioning their lanyards. As the Commission stated in *American Bridge/Lashcon*, 16 BNA OSHC 1867, 1868-69, 1993-95 CCH OSHD ¶ 30,484, pp. 42,105-06 (No. 91-633, 1994) (quoting *Brock v. L.R. Willson & Sons*, 773 F.2d 1377, 1384 (D.C. Cir. 1985)), *aff'd*, 70 F.3d 131 (D.C. Cir. 1995), § 1926.105(a) is not "satisfied simply by the use of one of the devices listed in that section without regard to whether such use provides adequate fall protection to the employees." In affirming the Commission decision, the D.C. Circuit noted that a cable provides no protection to "a worker who tripped or was hit by a falling object and was unable to grab the cable." 70 F.3d at 135. Therefore, a lifeline cannot be considered adequate fall protection if the employee is not tied off to it. Holding on is not adequate fall protection.

Armstrong's final defense is the affirmative defense of unpreventable employee misconduct. To establish this defense, an employer must prove: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *E.g., Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, 1995 CCH OSHD ¶ 30,910, p. 43,034 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997).

We find that Armstrong has failed to make out this defense. Armstrong argues that it effectively communicated and enforced its safety rule requiring its ironworkers to tie off 100 percent of the time, but the evidence shows that Armstrong did not instruct

employees to use the two lanyards they would need to comply with this rule. Nor did it distribute two lanyards to each employee.[4] The record also shows that Armstrong's supervisors knew the ironworkers could not tie off 100 percent of the time because they did not have two lanyards or enough lifelines. There is also evidence that Armstrong's supervisors themselves violated the rule requiring 100 per cent protection. Particularly significant in this regard is a photographic exhibit depicting a number of Armstrong employees, including a supervisor, at the top of the bridge, without fall protection. We therefore reject Armstrong's unpreventable employee misconduct defense and affirm the violation.

C. Repeated Classification

A violation is repeated under section 17(a) of the Act, 29 U.S.C. § 661(a), if, at the time it occurred, there was a final order for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary may establish a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Id.* This prima facie showing of substantial similarity may be rebutted by evidence of disparate conditions and hazards associated with these violations of the same standard. *Id.*

Judge Frye affirmed the Secretary's repeated classification here on the basis of a prior final order affirming a serious violation of § 1926.105(a) in late 1993 at a project in Ohio. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1023, 1993-95 CCH OSHD ¶

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[4]Armstrong's claim that the ironworkers should have taken a second lanyard from the on-site supply trailer does not eliminate the requirements to instruct and supply. "Responsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees." *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875, 1993-95 CCH OSHD ¶ 30,485, p. 42,110 (No. 91-1167, 1994). We therefore reject Armstrong's attempt to shift the responsibility for its own noncompliance onto its employees.

30,609 (No. 93-2691, 1994) (judge's decision), *aff'd per curiam without published opinion*, 72 F.3d 919 (D.C. Cir. 1996). In that case, Armstrong's employees were walking and working at heights above 25 feet without tied-off safety belts. Judge Frye found that the Ohio project involved hazards and conditions substantially similar to those involved here, on Armstrong's West Virginia project, because both projects involved Armstrong's failure to provide lifelines to which employees could tie off while moving around.

Armstrong's contentions that the violative conditions on the Ohio project were substantially different from those on the West Virginia project, and that the hazards at the two projects were "not the same" are unavailing. The violative condition on both projects consisted of missing lifelines — the Ohio project entirely lacked lifelines, while the West Virginia project lacked lifelines on some chicken ladders and some beams. In any event, the substantial similarity of a hazard turns on the nature of the hazard. *See Stone Container Corp.,* 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). Armstrong's characterization of the hazard on the Ohio project — "falling off while walking along a beam" — applies equally to the West Virginia project. Moreover, the fall hazards on both Armstrong projects exposed employees to the risk of falling more than 25 feet. We therefore find that the two violations were substantially similar, and we affirm the Secretary's classification of the violation here as repeated.

D. Penalty

The Secretary proposed and Judge Frye assessed a penalty of $30,000. The compliance officer testified that the gravity of the violation was high. He did not give Armstrong any credit for good faith, nor did he consider that Armstrong deserved a penalty reduction in view of its history of prior violations. However, he gave Armstrong credit as a small employer (50-75 employees).

Armstrong argues on review that it deserves credit for good faith here because, after the prior citation (relating to the Ohio project), it began installing lifelines for ironworkers to tie off to as they walked around on the beams. In general, prior efforts to

comply can be relevant to the penalty assessment for a repeated violation. *See Potlatch*, 7 BNA OSHC at 1064. However, here, Armstrong knowingly failed to provide sufficient lanyards and to install a complete system of lifelines needed for adequate fall protection. We therefore find that Armstrong did not demonstrate sufficient good faith to warrant a reduction in the penalty amount.

Armstrong also argues that the gravity of this fall protection violation was not high because ironworkers were exposed to falling for only brief, three-second intervals as they untied and retied their lanyards to lifelines. We disagree, however, because of the ladders and beams that lacked lifelines altogether. We therefore affirm the judge's assessment of $30,000.

II. Frequent and Regular Inspections by a Competent Person

A. Facts

The cited standard, 29 C.F.R. § 1926.20(b)(2),[5] requires "frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." Here, the record shows that until September 23, 1996,

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[5]29 C.F.R. § 1926.20(b) states the following:

> *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.
>
> (2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Section 1926.32(f) defines "competent person" as follows:

> *Competent person* means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

approximately two weeks before the fatality occurred, Armstrong's designated competent person for this project was Charles Blake, its project superintendent. He made daily project safety inspections. However, when he left to move to another project, Armstrong did not formally designate anyone to succeed him as the competent person for the project. Blake testified that prior to his departure he spoke with foreman John Perrine and asked him whether he felt "qualified to take the job over." Blake also testified that he believed Perrine "had a lot of experience," "knew the policies," and knew how to "work safely." There is no evidence, however, that Blake told Perrine that he was being designated as the project's competent person or that he should make daily project safety inspections.

The fact that Perrine was not formally designated as Armstrong's competent person is confirmed by Perrine's testimony and by his statements to the compliance officer during the inspection. Perrine told the compliance officer that he was *not* the designated competent person required to make the daily project safety inspections. He testified that he was "never really designated as the job safety person." He also testified that, after Blake left, no one was designated to be in charge of safety — "[n]ot designated as such as a safety person." In addition, Perrine testified that Blake did not instruct him to conduct formal, daily project safety inspections. According to Perrine, he only had "a general understanding of what [he] would have to do" as the person in charge of the project, *i.e.*, "mostly taking care of the time and the hours, overseeing safety meetings and keeping an eye on the general safety on the job."[6]

The record also indicates that Perrine did not assume all of Blake's duties after Blake's departure. In particular, the compliance officer testified that Perrine told him during the inspection that, after taking over from Blake, he was not actually conducting daily safety inspections. Of course, as raising gang foreman, Perrine had been inspecting

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[6]Perrine testified and also told the compliance officer during the inspection that he was only superficially familiar with Armstrong's written safety program and almost entirely unfamiliar with the graduated-response steps and details of its disciplinary program.

his gang's work all along, which he continued after Blake's departure. Perrine testified, however, that he usually stayed on the barge deck or on the ground; he did not generally go up on the bridge truss.[7]

The general contractor, C.J. Mahan Construction Company, had its own designated competent person, Gary Phillips, its project superintendent. He made daily site inspections and observed that Armstrong was relying on lifelines and safety belts with lanyards. He further testified, "I would look for tie offs." However, he also testified that he "couldn't see" Armstrong's ironworkers "all the time" and "could not always see what [foreman Perrine's raising gang] was doing" because their work progressed much faster than that of foreman Hill's bolt-up crew. The compliance officer testified, "[f]rom what I understand[,] [Phillips] did not physically go up on the bridge."

B. Discussion

Armstrong contends that both its employee Perrine, and Phillips, the general contractor's project superintendent, performed the duties of a competent person. We disagree. Although Perrine may have had some of the attributes of a competent person as defined by section 1926.32(f), the judge found, and the record shows, that Perrine was

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[7]On review, Armstrong claims that its other foreman, "Guy Hill[,] specifically stated he would 'check the worksite every day.'" This is a misquote, however. Hill's testimony was as follows:

> Q. Did you ever have any or do any inspections of your work your site?
> A. I have checked[,] yes.
> Q. When did you check it?
> A. The biggest part of the time every day. I walked by to see if something is wrong.

As Judge Frye found, this testimony does not establish that Hill inspected the whole truss worksite as if he were a designated competent person. As foreman of the bolt-up crew, he needed to inspect the fall protection equipment that his crew relied on, including the lifelines and stanchions, and when he continued making these inspections after Blake left the project, he was only carrying out his regular duties as a foreman.

not actually designated as Armstrong's competent person and did not make the frequent and regular safety inspections of the entire worksite that Blake had made and that the regulation requires.

Armstrong argues that it may, alternatively, rely on Phillips. The standard states, however, that employers must designate a competent person who has the ability to identify "existing and predictable hazards" and "the authorization to take prompt corrective measures to eliminate them." Such competent persons must make "frequent and regular" inspections. The record here simply does not support a finding that Phillips had either the ability or the authority to address the hazards Armstrong's ironworkers were exposed to, or for that matter, that Armstrong had ascertained whether Phillips was a competent person[8] or that he was making frequent and regular inspections of job sites.

Nor does the record show that Armstrong had "designated" Phillips to be its competent person. The contract between Mahan and Armstrong states that Armstrong is responsible for complying with federal safety requirements and shall have a "competent representative at the Project at all times it has employees present . . . ." In apparent compliance with this contract, Armstrong designated Blake to be its competent person, who carried out his responsibilities by making daily safety inspections until he moved to a different project. The record, therefore, establishes that Armstrong had its own competent person and did not rely on Mahan. Moreover, nothing in the record indicates that Blake asked Phillips to assume his inspection duties when he left or that Phillips assumed them.

The need for each employer to designate a competent person is underscored by the facts of this case. Before he left the worksite, Blake made overtures to Perrine about assuming certain safety responsibilities on the site, but Perrine did not consider that he

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[8]The record contains no evidence that Phillips was familiar with Armstrong's safety program, that he knew what to look for, or even knew how adequate fall protection could be achieved.

had been designated a competent person, nor did he carry out regular and frequent inspections after Blake left. Similarly, neither Mahan nor Armstrong ever indicated to Phillips, Mahan's designated competent person, that he was to assume Blake's responsibilities and, apparently, he did not do so. Clearly this falls short of the requirements of the standard and, accordingly, we affirm the judge's decision.

C. Classification and Penalty

Judge Frye upheld the Secretary's serious classification for this violation and assessed the proposed penalty of $3,000. Armstrong does not take issue with this classification and penalty. Therefore, we affirm the judge's assessment.

Order

We affirm the judge's decision finding that Armstrong violated section 1926.105(a) and we assess a penalty of $30,000. We affirm the judge's decision finding that Armstrong violated section 1926.20(b)(2) and we assess a penalty of $3,000.

\s\
Stuart E. Weisberg
Chairman

\s\
Thomasina V. Rogers
Commissioner

Date: February 12, 1999

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v. Docket Nr. 97-0250

ARMSTRONG STEEL ERECTORS, INC.,
Armstrong

Appearances

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Before JOHN H FRYE, III, Judge

DECISION AND ORDER

I. Findings of Fact

Background

Armstrong Steel Erectors, Inc. ("Armstrong") is a corporation engaged in steel erection and bridge construction. (Answer, ¶ 2; Tr. 475.) At all relevant times, Armstrong was the steel erection subcontractor for the construction of a truss type bridge that spanned the Kanawha River in Chelyan, West Virginia. (Answer, ¶ 2; Tr. 16, 380-81; GX 3, pp. 1-3.) Following the

accidental death of an Armstrong employee on October 8, the Secretary inspected this construction site from October 9 to November 14, 1996. As a result of this inspection, OSHA issued two Citations and a Notification of Penalty to Armstrong on January 13, 1997. (Complaint, Ex. A; Answer, ¶ 7.) At the time of inspection, Armstrong had between fifty and seventy-five employees.[1] (Tr. 213.) It utilized tools, equipment, materials, goods and supplies which originated in whole or in part from locations outside the State of West Virginia. (Answer, ¶ 5.)

The Work performed by Armstrong

Armstrong was charged with constructing the truss portion of the bridge. This consisted of an upper level and a lower level. The lower level, often referred to as the "bridge deck," consisted of certain beams, known as "stringers," designed to support the road deck (Tr. 514; GX 2, p.2) Walkways known as catwalks ran lengthwise along the bridge. (Tr. 26, 145; GX 2, p. 2.)

The upper level of the truss was approximately forty feet above the lower level. (Tr. 145.) The upper level consisted of box beams running lengthwise along the outside, known as chords. (Tr. 17; GX 2, pp. 1, 3.) The top chords were approximately three feet wide. (Tr. 143.) Box beams, approximately fourteen inches wide, ran diagonally on the top level, connecting the top chords. (Tr. 17-18, 143; GX 2, p. 1, 3.)

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[1] Armstrong's employees at the worksite were mostly ironworkers hired out of a union hall, primarily Charleston Local 301. (Tr. 15-16, 63, 84-85, 132-33, 161-62, 285, 492.)

These were called top lateral braces. (Tr. 17.) Wind braces connected the top chords on the top level at each end of the truss portion of the bridge. (Tr. 137; GX 2, pp. 1, 5.)

Diagonal box beams connected the top chords to the bottom chords. (Tr. 19; GX 2, pp. 1, 2, 5.) On some of these diagonals, ladders known as chicken ladders had been installed that enabled employees to move from one level to the other. (Tr. 19; GX 2, p. 5.)

In constructing the truss span at the work site, Armstrong's employees regularly worked at heights well in excess of twenty-five feet above the ground or river below. (Tr. 68, 86, 112, 145, 238.)

Armstrong's Fall Protection Equipment and Practices at the Site

Armstrong had in place at the work site a fall protection system consisting of static lines supported and guided by stanchions that were installed on certain structural members of the bridge, retractable lines installed on certain chicken ladders, and 3/8" chokers, or wire cables with loops in both ends.[2] (Tr. 25, 28-29, 43, 226, 274.) There were no safety nets in use at the work site. (Tr. 23, 90, 135, 164.) Armstrong gave employees a full body harness and one safety lanyard when they began work at the site. (Tr. 22-23, 134, 163, 535.) The lanyards were six feet in length. (Tr. 80.)

[2] The choker was to be wrapped around a structural member and the employee's lanyard hooked to it. The choker then followed the employee as he moved along the structural member.

Armstrong's stated policy required employees to be tied off 100% of the time while working on the bridge. (Tr. 53, 65, 134, 152, 412, 446.) However, there were several locations on the bridge where employees were unable to stay tied off. These locations included the stringers[3] and the following places where employees were required to unhook their lanyards from one anchorage and reattach them to another: the static lines (Tr. 92-93, 139, 192, 194; GX 2, pp. 4, 6); between the catwalk and the bottom chord (Tr. 27-28); between the top chords and the wind braces (Tr. 139; GX 2, p. 5); and between the chicken ladders and the top chords (Tr. 140-41.) Mr. Perrine was aware that the ironworkers at the site could not maintain 100% fall protection using only one lanyard. (Tr. 201, 535.)

In addition, Mr. Perrine instructed Mr. Dunlap to coon[4] the stringers, approximately fifty feet in the air, without tying off, and Tara Savilla observed employees bolting up on the top laterals not using chokers prior to October 8, 1996. (Tr. 113.)

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[3] There were no static lines running lengthwise on the stringers. (Tr. 26, 138, 165.) Employees were unable to stay tied off 100% of the time with a choker while working on the stringers because it was necessary to remove the choker from the stringer in order to pass the diaphragms that connected the stringers to each other. (Tr. 29.) Tara Savilla observed workers walking on stringers not tied off at least once a day. The stringers were at a height of greater than twenty-five feet in the air. (Tr. 112-13.) Norman Duff also observed employees walking and working on the stringers, not tied off, on a regular basis. (Tr. 165.)

[4] "Cooning" apparently involves walking the bottom flange of an "I" beam while holding on to the top flange. (Tr. 68-69.)

Similarly, Mr. Duff often observed ironworkers walking and working on the top laterals without any fall protection. (Tr. 166-67.)

On September 10, 1996, the two spans of the bridge that were being built towards each other from either side of the river were connected. This is referred to as "topping out," and is an event of some importance. Foreman John Perrine and seven members of his raising gang had their photograph taken on the top chord of the bridge that day. No one, including Mr. Perrine, was tied off to the static line running directly in front of them.[5] Mr. Perrine was not wearing a safety harness or lanyard at the time. (Tr. 93-94, 107-08, 521; GX 11.) Other photographs introduced in evidence depict ironworkers on the bridge not using fall protection equipment. (GX 3, pp. 6, 7; GX 4; GX 6; Tr. 457-61.) On October 8, 1996, D.J. Lewis was killed when he fell from the top level of the bridge to the ground below. (Tr. 64.)

Enforcement of Fall Protection Rules

Armstrong's written safety and health program required that a verbal warning be given to an employee for his first violation of a safety rule, that a written warning be given for the second violation, that a suspension of one to five days be given for the third offense, and that an employee be terminated upon his fourth violation of a safety rule.

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[5] Mark Coots testified that one of the employees in the photograph, Tara Savilla, was tied off. Tr. 449. Tara Savilla testified that she was not tied off. Tr. 130. In light of the fact that six other employees and the foreman were not tied off, whether Ms. Savilla was tied off is not material.

Armstrong considered documenting disciplinary action to be critical. (Tr. 541-43; GX 13, sections 4.0 - 5.0.) However, at the Chelyan site, Armstrong gave only verbal reprimands for safety violations. No Armstrong employee was given a written warning, suspended, or terminated due to safety violations at the site. (Tr. 65-67, 505, 541-43.)

Armstrong's Prior History of OSHA Violations

On October 27, 1994, OSHA issued to Armstrong a Citation and Notification of Penalty alleging a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 654(a)(1) ("the Act"). This citation arose out of an inspection of Armstrong's Mayfield Heights, Ohio, work site. OSHA alleged that three Armstrong employees were exposed to a 21.5 foot fall. (GX 15.)

On April 24, 1995, the Secretary and Armstrong entered into a stipulation whereby Armstrong agreed to pay a $2,400.00 penalty for the violation and the Secretary agreed to amend the citation to delete the "serious" classification and refer to it as "non-classified." No modification was made to the factual allegations of the citation. The stipulation was approved by Administrative Law Judge Paul L. Brady on May 12, 1995, and became a final order of the Review Commission on June 17, 1995. (GX 16.)

On September 16, 1993, OSHA issued to Armstrong a Citation and Notification of Penalty alleging a violation of 29 C.F.R. § 1926.28(a), or in the alternative, 29 C.F.R. § 1926.105(a). This citation arose out of an inspection of Armstrong's Ridge Road, Ohio, work site. The violation was classified as serious and a $2,500.00 penalty was proposed.

(GX 17.) The case was assigned OSHRC Docket No. 93-2691 and was tried before Judge Barkley. Judge Barkley affirmed the Citation as a violation of 1926.105(a), and affirmed the serious classification and proposed penalty. He found, in part:

> OSHA Compliance Officers (CO) approaching Armstrong's worksite at the I-71 overpass observed and videotaped a number of Armstrong employees on the unguarded steel girders. . . . (T)he majority of the workers, although they had lanyards and harnesses, were not using them. Two of those workers . . . were welding rockers from the top of two bridge piers. A third unidentified worker laid cross bracing between two girders. A fourth walked unprotected on the girders above the pier where Dietz was working.
>
> . . .
>
> The evidence establishes that Armstrong employees were exposed to falls from heights over 25 feet while moving on the steel to access their work areas.

(GX 18, pp. 1-3.) Judge Barkley's decision was affirmed. *See Armstrong Steel Erectors, Inc. v. Secretary of Labor*, 17 OSHC 1521, 1996 U.S. App. LEXIS 3680 (D.C. Cir. Jan. 2, 1996).

The Present Citations

Serious Citation 1, Item 1a, alleges a violation of 29 C.F.R. § 1926.20(b)(2), and states:

> A person capable of identifying existing and predictable hazards in the surroundings or working conditions, such as but not limited to appropriate provisions to maintain 100% tie off for employees working on the bridge chords and stringers which ranged in height of 40 to 80 feet above ground level, and make frequent and regular inspections of the job site and materials, was not designated by the employer.

(Complaint, Ex. A, p. 4.)

Armstrong did not designate any one to be its competent person at the site after superintendent Charles Blake left the site on or about September 23, 1996. Although

John Perrine assumed additional duties after that date, he was not designated as the job safety person for Armstrong, he was not familiar with Armstrong's written safety program, and he did not conduct frequent and regular inspections of the job site. (Tr. 197, 534, 535-36, 539.) Armstrong's failure to designate a competent person to conduct frequent and regular inspections of the site exposed its employees to the possibility of serious injuries. (Tr. 211-12.)

Serious Citation 1, Item 1b, alleges a violation of 29 C.F.R. § 1926.21(b)(2), and states:

> Employees working at the Chelyan WV bridge construction site had not been trained regarding the company procedures to follow to maintain 100% fall protection, with the use of a full body harness while using only one lanyard to connect to a steel cable attached to stantions (sic) in areas where employees had to disconnect the "D" ring to pass over the stantion (sic) connection, while connecting and bolting up steel on the bridge chords and stringers, and the procedures and limitations to be taken while wearing a full body harness as fall protection.

Under the constraints posed by Armstrong's fall protection plan, it was not possible to be tied off 100% of the time with only one lanyard.[6] (Tr. 22-23, 134, 163, 535.)

OSHA grouped Citation 1, Items 1a and 1b because they involved similar hazards and similar factual situations and proposed a penalty of $3,000. (Complaint, Ex. A, p. 4; Tr. 211.) In proposing the $3,000.00 penalty, OSHA took into consideration the gravity of the alleged violation, Armstrong's size, good faith, and history of prior violations. (Tr. 212-14.)

Repeat Citation 2, Item 1, alleges a violation of 29 C.F.R. § 1926.105(a), and states:

> In areas where adequate safety lines were not provided to maintain the company 100% tie off, or the installation of such lines were impractical to maintain, safety nets were not provided where employees were performing various duties on the

[6] At trial, counsel for the Secretary elicited testimony from the Compliance Officer concerning statements made to him by Armstrong employees to the effect that these employees had not been trained. Counsel for Respondent objected to this testimony on the ground that the identities of these employees had not been disclosed in the discovery process and that, as a result, he was unable to meet this testimony. He further objected that the statements were hearsay and should be excluded. Counsel for the Secretary relied on the informer's privilege as grounds for the failure to disclose the identities, and on Rule 801(d)(2)(D), Federal Rules of Evidence, for the proposition that the compliance officer's testimony as to the substance of the statements was not hearsay. Counsel for Respondent urges that the informer's privilege must not be applied in such a way as to permit the Secretary to withhold statements until such time as those statements are introduced through the testimony of a third party, the compliance officer, because doing so deprives him of any opportunity to question the maker of the statement. See Respondent's brief, pp. 22-28; Secretary's brief, p. 34, fn 3. Because the Secretary has not relied on this testimony in her brief, it is not necessary to address Respondent's objection.

bridge structural steel at heights up to 80 feet from the ground level; as evident from an employee falling to his death from the top lateral bracing of the bridge. Armstrong's failure to provide adequate safety lines, safety nets, or other practical means of fall protection on the bridge exposed its employees to serious injuries. (Tr. 345-46.) OSHA proposed a penalty of $30,000.00 for Citation 2, Item 1 (Complaint, Ex. A, p. 5; Tr. 211), that was calculated by assessing a gravity based penalty of $5,000, multiplying this by ten based on the repeat classification, and then factoring in size, good faith, and history. (Tr. 242-43.)

II. Discussion

To establish a violation of a standard or regulation promulgated under the Act, the Secretary must show that "(1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) its employees were exposed or had access to the violative conditions; and (4) the employer had actual or constructive knowledge of the violation." *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1610 (No. 87-2007, 1992). See also *Trumid Construction Co., Inc.*, 14 BNA OSHC 1784, 1788 (No. 86-1139, 1990).

A. Citation 1a - Designation of a Competent Person

Sections 1926.20(b)(1) and (2) state:

(1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Armstrong's superintendent at the Chelyan Bridge site, Charles Blake, left the site on or about September 23, 1996. John Perrine, who had been Armstrong's raising gang foreman up to that time, became superintendent. There is no evidence that Armstrong designated Perrine or anyone else as its competent person for purposes of ' 1926.20(b). Nor is there any evidence that Armstrong caused frequent and regular inspections to be made of the worksite. Armstrong argues that the general contractor, C.J. Mahan Construction Co., had responsibility to conduct such inspections, citing numerous cases. This is correct. However, it does not relieve Armstrong of its responsibility under the Act to comply with ' 1926.20(b) by designating a competent person to conduct inspections on its behalf.[7]

Armstrong also asserts that this dispute centers solely on whether Mr. Perrine was competent. (Armstrong's brief, p. 15.) There is no substantial evidence on which to conclude that Mr. Perrine was not competent. However, that fact does not obviate this item. Competent or not, Mr. Perrine was not designated, nor was anyone else. Regular inspections were not conducted by Armstrong. The Secretary has established the violation

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[7] While Armstrong is correct that Guy Hill, one of the two foremen on the site, checked the work on his site on a regular basis (Tr. 422), there is no indication that he checked the entire site as opposed to his area of responsibility or that he had been designated as the competent person by Armstrong.

alleged. The Act defines a serious violation as one where "... there is a substantial probability that death or serious physical harm could result from a condition which exists ...." 29 U.S.C. § 666(k). "In determining the seriousness of a violation, the correct inquiry is not the likelihood of an accident, but whether, in the event of an accident, there is substantial probability that it would result in death or serious physical harm." *Vanco Construction, Inc.*, 11 BNA OSHC 1058, 1061 (No. 79-4945, 1982), aff'd, 723 F.2d 410 (5th Cir. 1984). In this case, the violations could have resulted in serious injury or death suffered in a fall from the bridge. One could argue that it contributed to the death of D.J. Lewis.

The proposed penalty takes into consideration the gravity and probability of injury, and Armstrong's size, prior OSHA violation history, and good faith. (Tr. 212-13.) It comports with section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

B. Citation 1b - Training
29 C.F.R. § 1926.21(b)(2) 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.

Citation 1, item 1b, alleged a failure to train employees in methods to tie off 100% of the time with only one lanyard. It specifically identified a failure to train on the procedures to follow when the static line to which a lanyard is attached is anchored to a stanchion so that the lanyard cannot pass that point without being unhooked from the static line on one side of the stanchion and reattached on the other. The uncontroverted evidence demonstrated that it is not possible to remain tied off in this situation while using only one lanyard.

Item 1b also alleged a failure to instruct in the proper procedures to follow while using a full body harness as fall protection. However, it did not elaborate on this alleged failure. Apparently this allegation has reference to the failure of Charles Blake to instruct employee Tara Savilla in the proper fit of a full body harness when she asked him whether she was wearing it properly. (Tr. 85.) However, Ms. Savilla was trained by John Perrine. (Tr. 120.) Thus there is no basis for this allegation.

The Secretary's argument also is based on evidence that falls outside the scope of the allegations set forth in this item. The Secretary points out that Armstrong's foreman,

Mr. Hill, failed to train three employees in the use of the chokers placed on the laterals. One of these employees testified that

> The choker kept catching like underneath the lateral brace and stuff and they would hang up. It was more of a nuisance than anything. (Tr. 31.)

Subsequently, the same employee testified that he regarded the choker as constituting more a hazard than a help to him. (Tr. 52.) Nonetheless, his foreman told him to use the choker. Another employee seems to have been unaware that the chokers had been placed on the laterals (Tr. 140, 142, 158-59), but his demeanor left room to doubt the accuracy of his memory if in fact he understood the questions. In addition to lying outside the scope of the allegations, this evidence is not strong.

To the extent that this item charges Armstrong with a failure to train its employees in a safety procedure that they could not implement with the equipment issued to them, it must be vacated. If that procedure was required, the Secretary must cite Armstrong for failing to provide the equipment necessary to implement it. In this respect, the allegations of this item are covered by Citation 2, item 1. To the extent that this item charges Armstrong with a failure to instruct employees in the use of a full body harness, it was not borne out by the evidence. The evidence that Armstrong failed to train employees in the use of the choker cables placed on the laterals is both outside the scope of the allegations set forth in the item and weak. Accordingly, this item is vacated.

C. Citation 2, item 1 - Fall Protection.

Section 1926.105(a) provides:

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

Section 1926.105(a) applies to steel erection activities in structures such as the Chelyan Bridge site. Section 1926.500(a)(2)(iii), part of Subpart M's fall protection standards, clarifies that "(r)equirements relating to fall protection for employees performing steel erection work are provided in § 1926.105 and in subpart R of this part." The fall protection provisions under Subpart R, "Steel Erection," found in § 1926.750(b), apply only to skeleton steel construction in tiered buildings. Accordingly, the fall hazards to which ironworkers at the Chelyan Bridge site were exposed are governed by section 1926.105(a). See *e.g. Armstrong Steel Erectors, Inc. v. Reich*, *supra*, (applying 1926.105(a) to bridge construction); *National Engineering and Contracting Co.*, 16 BNA OSHC 1929 (Nos. 92-550 and 92-1551, ALJ, 1994), rev. denied, 56 F.3d 1531 (D.C. Cir.), cert. denied, 116 S. Ct. 378 (1995). Section 1926.105(a) requires that all employees exposed to a fall hazard of over twenty-five feet be protected from such falls by nets or other practical means. Both the Review Commission and the federal courts have upheld the principle that the standard requires no less than 100% fall protection for all employees working at heights above twenty-five feet, where practical. In *Interstate Erectors, Inc. v. O.S.H.R.C.*, 74 F.3d 223, 228 (10th Cir. 1996), the court stated:

> OSHA interprets § 1926.105(a) to require the use of appropriate safety devices 100 percent of the time that such use is practical. OSHA therefore maintains that an employer violates § 1926.105(a) by failing to use appropriate safety devices at any time it is practical to do so. The ALJ determined that the Secretary's interpretation of the standard is the only reasonable interpretation. We will not disturb the ALJ's findings in this matter. We therefore . . . hold that failure to provide approved fall protection devices during all times in which the described danger of height is involved constitutes a violation of § 1926.105(a), unless the defenses of "impossibility" or "greater hazard" are established.

The findings of fact make clear that Armstrong failed to maintain continuous fall protection on the bridge. It was impossible to do so with the single lanyard that employees were issued prior to D.J. Lewis' fall.[8] The photograph of the topping out ceremony, depicting seven employees of the raising gang and their foreman standing atop the bridge next to a static line without tying off, establishes beyond doubt that continuous fall protection, even when possible, was not rigidly enforced.[9]

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[8] Armstrong acknowledges this fact:

> The compliance officer's first and primary objection was that the company employees could not maintain one hundred percent tie-off because they would have to clip and unclip to certain areas on the stanchions while they were walking. As shown by the physical evidence demonstrated at the hearing, the stanchion was designed in such a way that the cable itself could come off of the hook so that the employee could continue walking. There were certain areas, assuredly, where the line had to be physically tied so that the tension could be maintained (Johnson Tr. 269; Savilla Tr. 92; Perrine Tr. 515). There were also some limited areas toward the end of the bridge where the stanchions were not complete.

Armstrong's brief, p.31.

[9] Mr. Coots testified that he tied off Tara Savilla because the latter was nervous, while Ms. Savilla testified that she was not tied off. Mr. Coots version is perhaps more damning in that it shows that the men standing on the chord, including the foreman, regarded fall protection in that situation as something to be used only if one were nervous.

Armstrong relies on *American Bridge/Lashcon v. Reich*, 70 F.3d 131, 134 (D.C. Cir. 1995) for the proposition that it is not necessary to tie off for a short time during unusual circumstances. However, *American Bridge* does not support Armstrong's case. *American Bridge* recognized the exception stated in *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 675 (D.C. Cir. 1982) to the effect that, where the employer required workers to be tied off during the substantial portion of the workday, the failure to require tying off would not be considered a violation of ' 105(a) during unusual circumstances when high winds made it difficult to do so. *American Bridge* limited this exception by holding it inapplicable to discrete and predictable tasks, such as walking across a beam, even though employees were tied off while performing their primary function, erecting steel. *American Bridge* thus draws a distinction between unusual circumstances, such as those caused by the windstorm in *Willson*, and predictable circumstances. *See also Armstrong Steel Erectors v. Secretary, supra,* where the same argument that Armstrong makes here was rejected.

There is no showing that any of the circumstances in which Armstrong's employees were not tied off were unusual or unpredictable. On the contrary, all these circumstances - moving about on the steel and posing for a picture atop the bridge during the topping out ceremony - were not only predictable, but in the case of moving about on the steel, essential to accomplishment of the work.[10] Armstrong's defense is rejected.[11]

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[10] In reaching this conclusion, I do not address Armstrong's position that at the time he fell, D.J. Lewis had moved to a position that he was not instructed to occupy and where he did not need to be. Whatever the

Armstrong also points out in its defense that:

> In *Capital Electric Linebuilders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 130-131 (10th Cir. 1982), the court ruled that if an employer had work rules that were effectively communicated and enforced, it would be unreasonable to the require a supervisor to always watch the experienced, knowledgeable employees to make sure they always took the appropriate safety precautions. Here, it was established this work was communicated to employees.

See Armstrong's brief, p.34-35. Here, it is clear that, while the work rule may have been effectively communicated, it was not enforced. This defense is unavailing.

D. Classification and Penalty

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979.) The Secretary makes a rebuttable prima facie showing of a repeat violation where the prior and present violations are for failure to comply with the same standard. *Id*.

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merits of that position may be, it is clear that there were many other instances in which employees were not tied off, the most glaring being the topping out ceremony.

[11] Armstrong also asserts that it is settled that

> "An employer is not liable for failing to foresee every incident before it occurs and to take extraordinary precautions to prevent it." Any such violations are due to isolated employee conduct. Shell Construction Co., Inc., 4 BNA OSHC 1824, 1826, (Rev. Comm'n 1976).

See Armstrong's brief, p34. However, no extraordinary measures or unforeseeable circumstances were involved here.

Prior to the occurrence of the present 1926.105(a) violation, Armstrong had been cited for a violation of the same standard at its Ridge Road, Ohio, work site. The Secretary thus has established a prima facie case of a repeat violation.

Armstrong argues:

> As to Ridge Road, the employer has demonstrated complete dissimilarity. The concern of Judge Barkley in the second case at Ridge Road dealt with the fact the employer could have, but failed, to install cantilever lines. See, Opinion at 3-4; C Ex. 18). At the time of that particular OSHA citation, employees were only tied-off at their workstations and they were walking from place to place without the cables.

Armstrong's brief, p.36. However, Judge Barkley found that two of Armstrong's employees were not tied off at their work station. He refused to consider Armstrong's defense of employee misconduct to this violation because he also found Armstrong's failure to provide a means of fall protection while employees moved about on the steel to be a violation of ' 1926.105(a). So, while Armstrong may have had a defense to the citation insofar as employee misconduct may have been the cause of the failure to tie off at work stations, Armstrong was unequivocally found to be in violation of the same standard at Ridge road for the same reason: failure to provide a means to tie off while moving about on the steel. While Armstrong may not have implemented its system of static lines for this purpose at the time of the Ridge Road inspection, nonetheless the violations are, at

a minimum, substantially similar.[12] This violation is properly classified as repeat. Armstrong has not contested the amount of the proposed penalty. I have reviewed the Compliance Officer's computation and find that it is reasonable. A penalty of $30,000 is affirmed.

III. Conclusions of Law

Armstrong is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).

Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Serious Citation 1, Item 1a and 1b

Armstrong violated 29 C.F.R. § 1926.20(b)(2) by failing to designate a competent person after superintendent Charles Blake left the site on or about September 23, 1997. Armstrong did not violated 29 C.F.R. § 1926.21(b)(2).

The section 1926.20(b)(2) violation was properly characterized as serious. The proposed penalty of $3,000 conforms with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

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[12] This conclusion makes it unnecessary to consider the parties' arguments concerning whether a violation of ' 5(a)(1) of the Act for failure to provide fall protection from heights that are less than twenty-five feet is substantially similar to the present violation.

Repeat Citation 2, Item 1

Armstrong violated 29 C.F.R. § 1926.105(a) by failing to provide safety nets or other practical means of fall protection, including sufficient static lines and two lanyards per employee, in areas on the bridge over twenty-five feet in the air where employees were required to work.

The violation of section 1926.105(a) was properly characterized as repeat. The proposed penalty of $30,000.00 for Citation 2, Item 1 conforms with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

III. ORDER

Citation 1a is affirmed as a serious violation of the Act. Citation 2 is affirmed as a serious repeated violation of the Act. Total civil penalties of $33,000 are assessed.

JOHN H FRYE, III
Judge, OSHRC

Dated:
Washington, D.C.