Secretary of Labor,
Complainant,

v. OSHRC Docket No. 00-0833
EZ

Nu-Waay Enterprises, Inc.,
Respondent.

APPEARANCES

Carla J. Gunnin, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Mr. Jerome M. Simpson, President
Nu-Waay Enterprises, Inc.
Tuskegee, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Nu-Waay Enterprises, Inc. (Nu-Waay), is a small contractor engaged in residential and commercial construction. On November 8, 1999, a Nu-Waay employee fell almost 24 feet from an elevated walkway while attempting to remove formwork at a national park in Louisville, Mississippi. As a result of an investigation by the Occupational Safety and Health Administration (OSHA), Nu-Waay received a serious citation on February 17, 2000. Nu-Waay timely contested the citation.

The case was designated for E-Z trial procedures under 29 C.F.R. § 2200.200, *et seq*. A hearing was held October 26, 2000, in Montgomery, Alabama. The parties stipulated jurisdiction and coverage. Also, Nu-Waay stipulates that at the time of OSHA's inspection, it had 8 to 9 employees (Pre-Hearing Conference Order; Tr. 7-8). Nu-Waay is represented *pro se* by its president and owner Jerome M. Simpson.

Prior to the hearing, the Secretary withdrew by notice dated October 17, 2000, item 3, alleging violation of 29 C.F.R. § 1926.451(b)(1); item 4, alleging violation of 29 C.F.R. § 1926.451(f)(3); item 5, alleging violation of 29 C.F.R. § 1926.451(g)(1)(vii); item 6, alleging

violation of 29 C.F.R. § 1926.452(c)(2); item 7, alleging violation of 29 C.F.R. § 1926.452(c)(3); and item 8, alleging violation of 29 C.F.R. § 1926.454(b).

The citation items remaining in dispute are item 1, alleging violation of 29 C.F.R. § 1926.20(b)(1) for failing to have safety programs; item 2, alleging violation of 29 C.F.R. § 1926.50(c) for failing to have employees with a valid certificate in first-aid training; and item 9, alleging violation of 29 C.F.R. § 1926.501(b)(1) for failing to use fall protection during removal of formwork from an elevated walkway. Items 1 and 2 propose a penalty of $1,050 each and item 9 proposes a penalty of $1,500.

Nu-Waay denies that it violated the standards and asserts an unpreventable employee misconduct defense to the lack of fall protection.

For the following reasons, the three violations are affirmed and a total penalty of $1,700 is assessed.

Background

Nu-Waay is a small construction company employing less than 10 employees, located in Tuskegee, Alabama. It began operation in 1984. Nu-Waay is engaged in a variety of residential and commercial construction projects involving concrete and roofing. Many of the projects are for the government (Tr. 125-126, 160). Prior to this inspection, Nu-Waay had never been inspected by OSHA (Tr. 52-53).

On July 19, 1999, Nu-Waay contracted with U. S. Fish and Wildlife to construct an elevated walkway and observation platform in the Noxubee National Wildlife Refuge in Louisville, Mississippi. Nu-Waay began work on the project on or about August 10, 1999. The project was to be completed by November 16, 1999 (Tr. 95, 126-127). The project involved removing an existing structure and replacing it with a 193 feet long, 7 - 8 feet wide, elevated walkway that ended at a covered observation platform (31 feet by 25 feet). The platform was approximately 24 feet above ground level (Tr. 30, 37, 97-98). To construct the elevated walkway, Nu-Waay had to construct concrete pilings with concrete end caps. The walkway was made of prefabricated concrete slabs (Exh. C-1, frames 1631, 1647-1649; Tr. 96-97).

On November 8, 1999, the elevated walkway and observation platform were essentially completed (Tr. 95). Around 7:00 a. m., Nu-Waay's job superintendent Sylvester Shepherd, carpenter leadman Anthony "Rick" Norris, and laborer Desmond Robertson started removing the

formwork around the platform (Tr. 101-102, 156-157). The formwork consisted of plywood deck supported by I-beams bolted to the concrete pilings. Formwork had been used to pour the monolithic beam that goes across the concrete pilings (Tr. 39-40).

First, the employees removed the temporary guardrails on the outer edges of the formwork deck (Tr. 32). Access holes about 12 inches square had been cut in the wood deck so that nuts on long bolts holding the I-beam could be removed. After the nuts were removed, Norris and Robinson would go down to the ground. A truck crane with a choker sling would winch the I-beam off the threaded bolts that went through the concrete pilings. Shepherd was operating the truck crane. Most of the formwork had come down as planned (Tr. 40-44, 46).

However, when one I-beam did not come loose, even with the choker sling pulling on it, Norris climbed back up to the observation platform. He climbed over the permanent guardrails onto the wood deck. Using a sledgehammer, Norris hit the stuck bolt. When the bolt loosened, the I-beam broke loose and one end fell to the ground, thus raising the other end along with the formwork and catapulting Norris into the air (Tr. 44-46). He fell approximately 24 feet and broke his back (Tr. 48-49). The accident occurred at 9:00 a. m (Tr. 108). U. S. Fish and Wildlife stopped all work on the project after the accident (Tr. 30-31).

On November 18, 1999, U. S. Fish and Wildlife referred the accident for inspection to the Jackson, Mississippi, OSHA area office. On November 30, 1999, OSHA Compliance Officer (CO) William Chandler conducted an investigation of the accident (Tr. 28-29). He held an opening conference by telephone with president Simpson and then viewed the site. The next day, CO Chandler interviewed Norris at the hospital. He also interviewed Simpson, Robertson and Shepherd. On December 2, CO Chandler returned to the accident site. Based on his investigation, the serious citation was issued on February 17, 2000.

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a standard.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive

knowledge of the violation (*i.e.,* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that the construction standards at 29 C.F.R., Part 1926, apply to Nu-Waay work at the national park. Nu-Waay's job involved constructing an elevated walkway and observation platform.

Also, Nu-Waay's knowledge of the conditions on site is imputed to Nu-Waay by its job superintendent Shepherd. Shepherd was operating the crane at the time of the accident and was in charge of the project's day-to-day activities. Shepherd supervised the work of Norris and Robinson (Tr. 46, 102, 157). When a supervisory employee has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

ALLEGED VIOLATIONS

Item 1 – Alleged Violation of § 1926.20(b)(1)

The citation alleges that Nu-Waay did not have safety and health programs to provide information and training to employees performing various construction activities, including requirements for fall protection. Section 1926.20(b)(1) provides:

> (b) *Accident prevention responsibilities*.
> It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

In determining the scope of an employer's duty under a broadly worded standard such as § 1926.20(b)(1), "an employer may reasonably be expected to conform its safety program to any known duties and that a safety program must include those measures for detecting and correcting hazards that a reasonably prudent employer similarly situated would adopt." *Northwood Stone & Asphalt, Inc.,* 16 BNA OSHC 2097, 2099 (No. 91-3409, 1994), *aff'd.* 82 F.3d 418 (6th Cir. 1996). An employer must include in its programs and must train its employees to recognize the hazards associated with their work and the ways to avoid those hazards of which a reasonably prudent employer would have been aware. *Pressure Concrete Construction Co.,* 15 BNA OSHC 2011, 2015 (No. 90-2668, 1992).

Nu-Waay concedes that it did not have any written safety programs for the Noxubee project (Tr. 131, 133). Norris told CO Chandler that he was not aware of any safety programs for fall

protection and first aid (Tr. 50). Nu-Waay did offer a safety program, dated May 10, 1999, developed for a roofing project it performed in Biloxi, Mississippi (Exh. R-2). That program, however, fails to constitute a safety program because it does not identify the circumstances when fall protection was required and what fall protection systems to utilize. Also, it refers to safety belts that are no longer accepted as fall protection.

A violation of § 1926.20(b)(1) is affirmed as serious. Without a fall protection program, employees were subject to serious injury, such as the injury sustained by Norris, or death.

Item 2 – Alleged Violation of § 1926.50(c)

The citation alleges that Nu-Waay had no employee trained to render first aid at the Noxubee work site. Section 1926.50(c) provides:

> In the absence of an infirmary, clinic, hospital, or physician that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U. S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

Nu-Waay admitted that none of its employees held a valid certificate in first-aid training (Tr. 127-128). President Simpson testified that he has received some first-aid training during his military experience; however, he was not on site at the time of Norris's accident.

It is undisputed that an infirmary, clinic, hospital or physician was not in reasonable proximity. The nearest hospital in Starkville, Mississippi, is 17 miles from the worksite (Tr. 47). The Noxubee National Wildlife Refuge is in a remote area and only has a gravel road going to the elevated walkway and observation platform. A minimum of 10 minutes response time for medical treatment is not prompt medical attention. *Love Box Co.*, 4 BNA OSHC 1138, 1142 (No. 6286, 1976).

Although Nu-Waay employees may have assisted Norris by making him comfortable, the record indicates that Norris received first aid from Larry Williams, an employee with the U. S. Fish and Wildlife (Tr. 48, 144). Nu-Waay did not have any arrangement or agreement with U. S. Fish and Wildlife to provide first aid to its employees (Tr. 117).

A violation of § 1926.50(c) is affirmed as serious. Without first-aid training as evidenced by a valid certificate, employees were exposed to serious injury.

Item 9 – Alleged Violation of § 1926.501(b)(1)

The citation alleges that employees removing framework for monolithic support beams, while outside the permanent observation deck guardrails, were not protected by a fall protection system. Section 1926.501(b)(1) provides:

> Each employee on a walkway/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

There is no dispute that on the day of the accident, the temporary guardrail installed on the formwork (plywood deck) was removed. In order to remove the nuts from bolts securing the formwork, the employees had to be on the wood deck and reach into the access holes that were 31 inches from the edge of the deck. Two employees, Norris and Robertson, were removing the nuts. Neither employee was wearing any type of personal fall arrest system, nor was there a safety net system (Tr. 43-44).

A violation of § 1926.501(b)(1), is established and properly classified as serious. Without fall protection systems, employees were exposed to serious injury or death. In this case, Norris fell 24 feet and broke his back, requiring extensive hospitalization.

Employee Misconduct Defense

Nu-Waay claims the accident was the result of unpreventable employee misconduct.[1] In order to establish the affirmative defense of employee misconduct, an employer must show:

> (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated the rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). Mr. Simpson was advised as to the criteria for proving the employee misconduct defense prior to hearing (Pre-Hearing Conference Order).

Nu-Waay failed to show a safety rule addressing fall protection. Although Simpson conducted a few safety meetings onsite, there is no showing that any of the meetings discussed fall

[1] Nu-Waay alleges in a post-hearing letter that on Friday before the accident occurred, Norris had finished his work at the job site and was supposed to leave the job site. Thus, Norris was not authorized to be on site on the day of the accident. There is nothing in the record to support this allegation.

protection requirements (Tr. 105-106). Further, there is no showing that Nu-Waay took steps to discover violations or enforce any fall protection rules. Unpreventable employee misconduct is not shown where the employer "failed to implement a safety program that emphasized the importance and priority of safety." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991), *review denied*, 978 F.2d 744 (D. C. Cir. 1992).

Nu-Waay's employee misconduct defense is rejected.

PENALTY ASSESSMENT

Section 17 (j) of the Occupational Safety and Health Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Nu-Waay is a very small company that employed 8 to 9 employees at the time of the inspection. There were 5 employees working on the Noxubee project. Based on the small size, a reduction in the proposed penalties is appropriate.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Here, only two employees were exposed during the removal of the formwork. The extent of the time of exposure was short. A temporary guardrail had been in place on the temporary wood deck until it was time for the deck to be dismantled. There is no evidence that the employees were not adequately protected by fall protection except for two hours on the morning of November 8, 1999. Prior to the day of the accident, there were temporary guardrails. Nu-Waay had harnesses, ropes, cables and other safety equipment at the project (Tr. 129, 143-144). A reduction in the proposed penalties is appropriate.

Nu-Waay exhibited good faith. It was cooperative throughout the inspection. Simpson's testimony demonstrated his concern for the safety of his employees. Weight is given to the fact that the accident occurred during Simpson's absence. Simpson testified that he had spent 70% of his

time at the site (Tr. 127). Although not an excuse, Nu-Waay did not show familiarity with OSHA rules, even though it had worked with Federal agencies. U. S. Fish and Wildlife had site supervisors on the worksite every day to ensure that the project proceeded in accordance with the contract (Tr. 116-117). Its contract with Nu-Waay required safety programs and compliance with OSHA standards (Tr. 51-52). However, Fish and Wildlife did not review Nu-Waay's program to assure compliance (Tr. 118, 121). Based on the employer's good faith, a reduction in the proposed penalties is appropriate.

Nu-Waay has no prior history of OSHA violations. This was Nu-Waay's first OSHA inspection (Tr. 52-53). The employer is entitled to a reduction in the proposed penalties for a good history.

Based on these factors, a penalty of $500 each is reasonable for items 1 and 2. A penalty of $700 is reasonable for item 9. These penalties are appropriate to encourage prospective compliance with the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the preceding decision, it is ORDERED that:

1. Item 1, alleging violation of § 1926.20(b)(1), is affirmed as serious and a penalty of $500 is assessed.
2. Item 2, alleging violation of § 1926.50(c), is affirmed as serious and a penalty of $500 is assessed.
3. Item 3, alleging violation of § 1926.451(b)(1), is withdrawn by the Secretary.
4. Item 4, alleging violation of § 1926.451(f)(3), is withdrawn by the Secretary.
5. Item 5, alleging violation of § 1926.451(g)(1)(vii), is withdrawn by the Secretary.

6. Item 6, alleging violation of § 1926.452(c)(2), is withdrawn by the Secretary.

7. Item 7, alleging violation of § 1926.452(c)(3), is withdrawn by the Secretary.

8. Item 8, alleging violation of § 1926.454(b), is withdrawn by the Secretary.

9. Item 9, alleging violation of § 1926.501(b)(1), is affirmed as serious and a penalty of $700 is assessed.

/s/
KEN S. WELSCH
Judge

Date: December 4, 2000