Secretary of Labor,
Complainant,
v.
Reflections Tower Service, Inc.,
Respondent.

OSHRC Docket No. **00-1201**

Appearances:

Janice Thompson, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Keith L. Pryatel, Esquire
Kastner, Westman & Wilkins, LLC
Akron, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Reflections Tower Services, Inc. (Reflections), is engaged in the business of constructing and dismantling telecommunications towers. In 1999 through 2000, it was constructing a new 800-foot broadcast tower and dismantling a 745-foot communication tower for a television station in Parma, Ohio. In response to a complaint that an employee was injured, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Thomas Henry inspected the Reflections worksite on May 11 and 12, 2000. As a result of the inspection, on May 31, 2000, Reflections was issued a serious and an "other" than serious citation. Reflections timely contested the citations.

Citation No. 1, item 1, alleges a serious violation of § 5(a)(1) [29 U. S. C. § 654(a)(1)], the general duty clause of the Occupational Safety and Health Act (Act), for exposing employees to the hazards of being caught in moving equipment, striking the tower, and falling while ascending and descending the tower on the hoist line. Citation No. 1, item 2, alleges a serious violation of 29 C.F.R. § 1926.100(a) for failing to protect employees with protective helmets. Citation No. 1, item 3a, alleges a serious violation of 29 C. F. R. § 1926.1053(b)(4) for failing to use a stepladder for the purpose for which it was designed. Citation No. 1, item 3b, alleges a serious violation of 29 C.F.R. § 1926.1053(b)(7) for failing to secure or provide slip-resistant feet to a ladder used on a slippery surface.

Citation No. 2, item 1, alleges an "other" than serious violation of 29 C. F. R. § 1926.152(a)(1) for failing to use an approved container for storing and handling flammable and combustible liquids. Citation No. 2, item 2, alleges an "other" than serious violation of 29 C. F. R. § 1926.550(g)(4)(ii)(B) for failing to have an interior grab rail in a personnel basket. Citation No. 2, item 3, alleges an "other" than serious violation of 29 C. F. R. § 1926.550(g)(4)(ii)(I) for failing to have the load capacity of a personnel basket posted on the basket.

Before the hearing, on August 18, 2000, the Secretary moved to amend the citation by adding additional abatement methods for the alleged § 5(a)(1) violation. This motion was granted on October 10, 2000.

The case was originally designated for E-Z trial procedures under 29 C. F. R. §2200.200, *et seq.*; however, E-Z procedures were discontinued. The hearing was held in Cleveland, Ohio, on December 5, 2000. Reflections admits jurisdiction and coverage (Answer). Both parties filed posthearing briefs. After the hearing, the Secretary withdrew items 2 and 3 of Citation No. 2 and Exhibit C-26 (Secretary's letter dated February 16, 2001).

For the reasons that follow, Citation No. 1, items 1 and 3b, are vacated. Citation No. 1, items 2 and 3a, are affirmed. Citation No. 2, item 1, is affirmed. Total penalties of $1,100 are assessed.

Motion to Amend

At the beginning of the hearing, the Secretary moved to amend the complaint under Rule 15 of the Federal Rules of Civil Procedure by amending Citation No. 1, item 1, to allege a violation of 29 C. F. R. § 1926.1053(a), in the alternative, to the § 5(a)(1) violation. Section 1926.1053(a) refers to safety standards for ladders. There are 27 subsections of § 1926.1053(a). When asked at the hearing which particular subsection the Secretary was relying on, the Secretary responded that she was relying on all of them. Reflections objected to the motion on the basis that it would be prejudiced because this was the first time it was aware of the motion, and it would not have an opportunity to prepare a defense to this new standard.

In order to determine whether a party has suffered prejudice by an amendment, "it is proper to look at whether the party had a fair opportunity to defend and whether it

could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.,* 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992). In this case, Reflections would be prejudiced because its defense is based on alleged violations of the general duty clause, not a specific standard. The requirements of the general duty clause and the new standard are not identical. The § 5(a)(1) violations involve hazards relating to riding the hoist line. Section 1926.1053(a), the ladder standard with 27 subsections, alleges new factual circumstances. Additionally, the Secretary did not identify which of the 27 subsections of § 1926.1053(a) was violated. *See McWilliams Forge Co.,* 11 BNA OSHC 2128, 2129-2130 (No. 80-5868, 1984) (amendment denied where parties did not consent to try unpleaded allegation and issues relevant to unpleaded allegation were not tried); and *RGM Construction Co.,* 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995) (amendment of citation allowed where requirements of amended standard and original standard were identical, and issues raised by the amended citation were knowingly tried at hearing).

Because the amendment would prejudice Reflections by interjecting new issues and different facts, the Secretary's motion to amend was denied at the hearing.

Background

Reflections is engaged in the construction and dismantling of communication towers, primarily broadcast towers (Tr. 197). Its main office is in Youngsville, North Carolina. Julius Morris, owner and president of Reflections, founded it in 1988. Morris, who has worked in the tower industry since 1971, has worked on the erection of over 100 towers and on the dismantling of about 24 (Tr. 198).

A television station in Parma, Ohio, hired Kline Towers to design and build a new 800-foot broadcast tower and dismantle an old broadcast tower. The old tower that was to be dismantled was built in 1954 and was 745 feet tall plus the height of the antenna. Kline specializes in the design, fabrication, and installation of tall broadcast towers (Tr. 292). Raymond White is the vice-president and general manager of Kline. Kline subcontracted the erection and dismantling to Reflections. In order to build the tower, Reflections purchased a new hoist, load line, rigging equipment, shackles, blocks and chokers (Tr. 202).

At the second preconstruction conference held by White (of Kline) and Morris (of

Reflections), the Cleveland OSHA office Assistant Area Director Thomas Pontuti and CO Dan Pubal were in attendance. According to Morris, Pontuti told him that "we're going to be watching you all pretty close" and that OSHA would like to use the site as a training base for their office (Tr. 200). At that time, Pontuti gave Morris a copy of OSHA CPL 2-1.29 on communication tower construction (Tr. 281).

The new tower was built first in order to allow the television station to continue broadcasting. While the new tower was under construction, Pontuti and Pubal inspected the site and cited Reflections for not using 100 percent tie off to protect employees from falling. The citation was settled informally. At that time OSHA recommended that Reflections join the National Association of Tower Erectors (NATE), which they did (Tr. 201). That was the first citation that Reflections had ever received from OSHA.

The new tower was constructed and completed around December 1, 1999. Due to weather conditions, Reflections did not begin dismantling the old tower until April 15 or 16, 2000 (Tr. 219). The process of dismantling involves the following steps: set up equipment, rig the tower, remove equipment on the tower (cellular antennas, microwave dishes and lines that feed the antennas), remove equipment inside the tower, jump the gin pole up inside the tower, take the antenna off the top of the tower and, finally, unstack the tower (Tr. 223-224). At the time of dismantling, Reflections had five employees, including Morris; foreman Randall Eades; hoist operator Charles Starkey; and laborers Andrew Jelito and Michael Cunningham.

Andrew Jelito was hired as a laborer on April 17, 2000; on that day he signed papers and reviewed work procedures and safety practices (Tr. 208). Jelito had never worked on a tower before (Tr. 16). On April 18, he began work. That same day Morris held a safety meeting with the employees (Exh. R-1; Tr. 210).

On April 25, 2000, Jelito and foreman Eades were descending from the tower on the hoist line. Both employees were wearing harnesses with a lanyard attached to the shackles above the headache ball (Tr. 25, 89-90). The headache ball is 18 inches wide and weighs 1,600 pounds (Exhs. C-4, C-5; Tr. 247-248). The ball was partially between Jelito and Eades whose head was 6 inches above Jelito's (Tr. 40). They were over the blocks, which were 8 to 10 feet above the ground, and Jelito stated that he was turned with his back to the block (Tr. 42, 98). Jelito was going to grab the hood on his coat, and

the block was right there (Tr. 42, 77). He then tapped off at about the point where the load line goes into the block with his gloved hand (Tr. 78). The glove got caught and was pulled into the block, and two of his fingers were immediately amputated (Tr. 42).

After the injury occurred, Morris shut down the job and asked the employees to write down what they had witnessed (Exh. R-15, Tr. 245). This was Reflections' first work-related injury (Tr. 199).

DISCUSSION

Alleged Violation of § 5(a)(1)

The citation alleges that employees were exposed to the hazards of being caught in moving equipment, striking the tower, and falling while ascending and descending the tower on the hoist line. Section 5(a)(1) provides:

(a) Each employer –

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

In proving this alleged violation, the Secretary is relying on OSHA Instruction CPL 2-1.29 (hereinafter CPL), "Subject: Interim Inspection Procedures During Communication Tower Construction Activities," effective date of January 15, 1999 (Exh. C-11).

The Secretary's reliance on this CPL is misplaced because it does not apply to dismantling of towers and states "dismantling will be addressed in a future directive" (Exh. C-11 at p. 1). CO Henry admits that at the time of the inspection, he thought the CPL applied to the dismantling at the site (Tr. 142).

Reflections contends that there is no personal or industry recognition of these alleged hazards; that it works in accordance with industry practice; and that the abatement measures recommended by the Secretary are not feasible.

Elements of Alleged Violations of § 5(a)(1) of the Act

The Secretary has the burden of proving a § 5(a)(1) violation. In order to establish a violation of the general duty clause, the Secretary must show that "(1) a workplace

condition or activity presented a hazard, (2) the employer or industry recognized it, (3) it was likely to cause serious physical harm, and (4) a feasible and useful means of abatement existed by which to materially reduce or eliminate it." *Kokosing Construction Co., Inc.,* 17 BNA OSHC 1869, 1872 (No. 92-2596, 1996). The general duty clause was enacted to cover serious hazards where no specific standard applies. In this case § 5(a)(1) is not preempted by any other standard.

The occurrence of an injury by itself is not sufficient evidence to prove a violation of § 5(a)(1). *See Titanium Metals Corp. of America v. Usery,* 579 F. 2d 536, 542 (9th Cir. 1987), and *Marshall v. L. E. Myers Co.,* 589 F. 2d 270, 272 (7th Cir. 1978). The Act "was never designed, nor could it have been, to eliminate all occupational accidents." *Titanium* at 543.

Under § 5(a)(1), a "hazard is deemed 'recognized' when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry." *Pepperidge Farm, Inc.,* 17 BNA OSHC 1993, 2003 (No. 89- 0265, 1997). The Secretary "must show that knowledgeable persons familiar with the industry would regard additional measures as necessary and appropriate in the particular circumstances existing at the employer's worksite." *Inland Steel Co.,* 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986).

As to feasibility under § 5(a)(1), the "Secretary has the burden of coming forward with evidence on the feasibility issue." *Whirlpool Corp. v. OSHRC,* 645 F. 2d 1096, 1098 (D. C. Cir. 1981), *cert. denied,* 457 U. S. 1132 (1982). The Secretary "must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enterprises, Inc.,* 19 BNA OSHC 1161, 1190 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000). The Secretary must also show that her proposed abatement measures are economically feasible. *Waldon Healthcare Center,* 16 BNA OSHC 1052, 1063 (Nos. 89-2804 & 89-3097, 1993).

Alleged Hazard of Being Caught in Moving Equipment
While Riding the Hoist Line

Citation No. 1, item 1, alleges that employees were exposed to the hazard of being caught in moving equipment, specifically, the block, while riding the hoist line. Although the two sides of the block are covered by plates, the running load line is not guarded (Exhs. R-8, R-9). Employee Jelito had two fingers amputated when his hand got caught in the block while he was riding the hoist line.

Existence of a Hazard

There is evidence that touching the running line of the block is hazardous. White, Reflections' expert[1], stated that it would be a potential hazard to touch a running line because the line could pull your hand into the block (Tr. 311).

Recognized Hazard

Actual Knowledge: The Secretary did not present evidence that the employer had actual knowledge of this hazard. Morris stated the blocking Reflections utilizes is the only type of blocking he has ever seen on any tower site in his 29 years in the tower industry (Tr. 204). Morris further stated that he had not warned his employees about the blocking because it has never been a hazard in all his years in the industry (Tr. 226).

Industry Knowledge: The Secretary contends that because White, an industry expert, admits that it could be a hazard to touch the running line of the block, there is industry recognition of the hazard of being caught in the moving line of the block while riding the hoist line.

Reflections argues that there is no industry recognition of the alleged hazard. White testified that he has never seen blocking other than the kind used by Reflections on this jobsite and has seen employees lowered from the towers using this same type of blocking (Tr. 297-299). He has never seen a barrier guard on blocking (Tr. 298). Pontuti, the Secretary's expert who has been involved in more than 40 inspections of construction towers

[1] Based on White's qualifications (registered professional engineer involved in writing standards on design of broadcast towers for the Telecommunications Industry Association, made presentation on design and construction of tall towers to OSHA task force developing CPL 2-1.29) and experience (involvement in over 100 tower projects with Kline and visited about 100 tower construction sites and 10 dismantling sites), White was accepted as an industry expert at the hearing. In addition, White was found to be a credible witness, and the Secretary's objection of bias was overruled.

(but no dismantling of towers), has never seen any other type of guarded blocking (Tr. 343, 363). In addition, White stated that Kline used the same blocking on a Texas site that was visited by the OSHA task force that was developing the tower construction CPL (Tr. 296). Although the CPL recommends guarding other moving equipment, it does not address guarding the blocks (Exh. C-11 at A-7). CO Henry is aware that the CPL does not mention guarding of the blocking (Tr. 180). Reflections further claims that the industry did not recognize any type of guarded blocking because the new blocking equipment it purchased for this job did not have any guarding.

While the additional guarding suggested by the Secretary is not used in the tower industry, this does not preclude industry recognition of this hazard. Industry recognition of a hazard exists if it is common knowledge of safety experts who are familiar with the industry. *See Inland Steel* at 1971-73. Given White's testimony, touching the running load line of the block could pull the hand into the block and is clearly a recognized hazard.

The Secretary established that this alleged hazard of being caught in moving equipment is recognized by the communication tower industry.

Feasibility of Abatement

The Secretary recommends the following methods of abatement: (1) guard the ingoing nip points on lifting blocks, (2) place lifting blocks lower to the ground, (3) use tag lines to guide and prevent employees from getting caught in the lifting block, and (4) provide each employee on the tower with a radio for communication with the hoist operator.

(1) Guarding: CO Henry stated that a barrier guard, such as a piece of metal or plywood, in front of the blocks would prevent employees who are coming down on the hoist line from touching the blocks (Tr. 98). Neither Henry nor White has ever seen a barrier guard on blocking (Tr. 155, 298).

The Secretary must demonstrate that this measure is capable of being put into effect. *See Beverly* at 1190-91. The Secretary failed to do this.

(2) Place the blocks lower to the ground: Reflections contends that the blocks on this site could not have been placed lower to the ground because the old tower that was being dismantled did not have base-mounted anchor eyelets in its foundation. An anchor had to be installed which resulted in off-the-ground lift blocking (Exhs. R-5, R-6; Tr. 222-223, 229). Morris stated that the fair lead block at the ground had to be positioned so that cable

coming off the hoist to the block would spool up properly (Tr. 228-229). This block could not be repositioned because the load line running through it needed to run directly up the center of the top-mounted gin pole so it would not bind, cut, or saw any of the pole members (Tr. 205, 228-229).

The Secretary failed to show that this measure would be feasible on this jobsite.

(3) Tag Lines: CO Henry stated that employees could have a dangling tag line about 20 to 30 feet long to pull employees away from the block (Tr. 101). Reflections contends that on this site, a tag line was not feasible. Morris said they could not use tag lines for two reasons. First, Jelito would not be able to reach his work at the tower face if he were tagged out because it would put him 10 to 15 feet away from the face of the tower (Tr. 234, 140). Second, the guy wires anchoring the new tower would get tangled with a tag line (Exh. R-16; Tr. 234-239, 263, 275-276). Because of the proximity of the two towers and the television station building, guy wires and other wires were on all faces for the total height of the old tower (Tr. 236-237). Jelito stated "you had to watch the old guy wires on the tower you're coming down" (Tr. 82).

White stated he has never seen a dangling tag line (Tr. 303, 305). The Secretary, in her CPL relating to tower construction, permits riding the load line without a tag line if the employer shows "specific circumstances" which "precludes its use" (Exh. C-11, p. A-2). CO Henry admitted that it would be acceptable to ride a hoist line without a tag line if the hoist line were going slowly, and employees were kicking off the tower (Tr. 155-156).

The Secretary did not produce sufficient evidence that the use of a dangling tag line would be feasible on this jobsite.

(4) Radio: Radios are used when the hoist operator does not have direct eye contact with the employees on the tower or line. The Secretary did not prove that giving every employee a radio is a feasible method of abatement. Morris stated that everybody having a radio and talking to the hoist operator is confusing for the operator, so he tries to give radios only to key people to cut down the confusion (Tr. 221). Foreman Eades, who was riding the hoist line with Jelito, had a radio. Nonetheless, a radio would not have prevented the injury to Jelito since his left hand was caught instantly and he would not have been able to contact the hoist operator before the accident occurred (Tr. 78-79, 163).

While the Secretary established that the hazard of being caught in moving equipment

was recognized by the industry, she did not present sufficient evidence to prove that there was a feasible method of abatement. Accordingly, the Secretary did not establish all the elements of this alleged § 5(a)(1) violation.

Alleged Hazard of Striking the Tower
While Riding the Hoist Line

Citation No. 1, item 1, alleges that employees were exposed to the hazard of striking the tower while riding the hoist line.

Existence of a Hazard

The Secretary claims that an employee could be blown into the tower and hurt when hitting the tower. Reflections argues it was not windy on the day of the accident. Although Jelito said the wind blew Eades and him out about 30 to 40 feet from the tower at the top (Tr. 41), CO Henry stated that Jelito told him it was not windy on the day of the accident but was windy on another day; and Jelito did not tell him that he was blown into the block (Tr. 41, 179). Morris stated there was no high wind that day, only a light breeze of approximately four to five miles per hour (Tr. 207). Due to the inconsistency of Jelito's statement to Henry and his testimony, I find his testimony not credible on this point.

White stated that it could be a hazard if an employee actually hit the tower while riding on the line (Tr. 312). If he hit the tower with enough force for whatever reason, wind blowing or otherwise, it would be a hazard.

Recognized Hazard

Actual Knowledge: The Secretary did not demonstrate that the employer had actual knowledge of this hazard. No one on this jobsite ever struck the tower. If there were high winds, employees were not allowed on the tower. Employees Jelito and Cunningham stated that if you did come close to the tower while riding on the line, you used your feet to kick off the tower (Tr. 41, 321).

Industry Knowledge: The Secretary failed to show that the tower industry recognized the hazard of striking the tower while riding the line. No evidence was introduced as to the knowledge and practice of other tower companies. The safety measures used to avoid striking the tower are to descend slowly and to kick off the tower when you are close to it. The Secretary's own expert, Pontuti, said that you would not strike the tower if you were descending slowly and kicking off the tower (Tr. 346). On the day of the accident, Jelito was

traveling at 45 feet per minute which is well below the CPL acceptable rate of 100 feet per minute (Exh. C-11, p. A-5; R-7). While the CPL does not apply to dismantling, the Secretary cannot require abatement measures that are at variance with the CPL without explanation when employees are descending at a reduced speed. The Secretary failed to show what additional measures would be necessary and appropriate to avoid hitting the tower.

Feasibility of Abatement

The Secretary recommends the following methods of abatement: (1) do not allow employees to ride the line when dismantling towers; (2) if safe riding-the-line procedures, as set forth in CPL 2.1.29, are followed in dismantling towers, ensure employees attach to the hook under the ball and do not ride the top of the ball; (3) if safe riding-the-line procedures, as set forth in CPL 2-1.29, are not followed in dismantling towers, utilize ladder safety climbing devices and establish climbing procedures; (4) if safe-riding-the line procedures, as set forth in CPL 1-1.29, are followed in dismantling towers, use tag lines to guide and prevent employees from striking the tower; and (5) provide each employee on the tower with a radio for communication with the hoist operator.

(1) Do Not Ride Line and (3) Use Ladders: Using ladders to climb a 700 to 800-foot tower is impractical. Continual climbing of tall towers is physically demanding and can lead to stress and illness and may contribute to other safety problems (Exh. C-11 at p. 1). The Secretary failed to show that this method of abatement would be feasible.

(2) Do Not Ride on Top of Ball: This is addressed in the next section on the alleged hazard of falling.

(4) Tag Lines: For the same reasons noted in the previous section on the alleged hazard of being caught in moving equipment, the Secretary did not prove that a tag line was feasible on this jobsite.

(5) Radio: The Secretary did not show that having a radio to communicate with the hoist operator would prevent hitting the tower.

The Secretary failed to show that the hazard of striking the tower while riding the slowly moving hoist line was a recognized hazard and that there was a feasible method of abatement. Consequently, the Secretary did not establish all the elements of this alleged § 5(a)(1) violation.

Alleged Hazard of Falling While Ascending and Descending the Tower

Citation No. 1, item 1, alleges that employees were exposed to the hazard of falling while ascending and descending the tower while riding on top of the ball.

Existence of a Hazard

The Secretary alleges that standing on top of the ball, as Morris did, is a fall hazard. CO Henry said that an employee on top of the ball could fall off (Tr. 102). Certainly, if an employee did not have any fall protection, it would be a hazard to fall off the ball while on the line. In this case, employees practiced 100 percent tie-off while riding the line (Tr. 52, 220, 331)

Recognized Hazard

Actual Knowledge: Reflections contends that there is no hazard of falling while riding on top of the ball because of the use of personal fall protection. Morris has been riding the ball for thirty years without slipping or falling off (Tr. 247). Morris rides the ball by positioning his lanyard four to six times around the load line so there is no slack. He also uses 100 percent tie-off (Tr. 249). Even if he fell, he would only fall a few inches because there is no slack in his lanyard (Tr. 249). Cunningham confirmed that if Morris fell, it would be less than 1 foot (Tr. 332).

Additionally, Reflections maintains that riding on top of the ball provides the rider with more control. Morris stands with his feet on either side of the center plate of the ball, and this way he has both hands free to guide and control the ball (Tr. 250-251). White said it was safer to ride the top of the ball if maneuvering around the antenna or jettisoned objects; if you are under the ball, you are dangling free and twisting uncontrollably (Tr. 307-308).

The Secretary did not provide evidence that the employer had actual knowledge of this alleged hazard when utilizing personal fall protection.

Industry Knowledge: The Secretary failed to present any evidence that the alleged hazard is recognized by the tower industry. The Secretary's expert Pontuti admitted that the CPL does not address riding on top of the ball (Tr. 359).

Feasibility of Abatement

The Secretary recommends the following abatement methods: (1) do not allow

employees to ride the line when dismantling towers; (2) if safe riding-the-line procedures, as set forth in CPL 2-1.29, are not followed in dismantling towers, ensure employees attach to the hook under the ball and do not ride the top of the ball; and (3) if safe riding-the-line procedures, as set forth in CPL 2-1.29, are not followed in dismantling towers, utilize ladder safety climbing devices and establish climbing procedures.

(1) Do Not Ride Line and (3) Use Ladders: As noted in the previous section on the alleged hazard of striking the tower, the Secretary failed to prove the feasibility of this method of abatement. (2) Ride Under Ball: The Secretary has failed to provide any evidence that riding below the ball is a safer method than riding above the ball.

The Secretary did not present sufficient evidence to establish the fall hazard was a recognized hazard and that there was a feasible method of abatement. Thus, the Secretary did not establish all the elements of the alleged § 5(a)(1) violation.

In conclusion, the Secretary failed to carry her burden of proving all elements of a § 5(a)(1) violation for the alleged hazards of being caught in moving equipment, striking the tower, and falling while ascending and descending the tower on the hoist line. Therefore, the alleged violation of § 5(a)(1) is vacated.

VIOLATION OF STANDARDS

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

Alleged Violation of 29 C.F.R. § 1926.100(a)

Citation No. 1, item 2, alleges that an employee working with an overhead crane was not wearing a hard hat and was exposed to head injuries from the crane hook, tools and equipment from employees working overhead. Section 1926.100(a) provides:

> (a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

CO Henry saw foreman Eades working without his hard hat (Tr. 121).

Reflections contends that it was permissible for Eades not to wear his hard hat because there was nothing directly over his head, as seen in the photograph of Eades (Exh. C-12) taken by CO Henry, so he was not at risk of falling objects. Reflections further claims the affirmative defense of unpreventable employee misconduct by Eades.

CO Henry saw Eades without a hard hat working on tower sections on the ground. Not only was he near a crane truck with a boom that assisted in dismantling the sections, but there was also another employee who was working periodically up on the tower just to the right of Eades (Tr. 120-121). The fact that there was nothing directly over Eades' head, as seen in the photograph (Exh. C-12), does not permit Eades to work without his hard hat. Furthermore, this was not an isolated instance. Morris was aware that Eades often worked without his hard hat. The possibility of falling or flying objects on a tower construction/dismantling site is great, and Eades should have been wearing his hard hat. Thus, Reflections violated the hard hat standard.

Employee Misconduct Defense

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).

The record indicates that Reflections had a hard hat requirement and that this rule was reiterated to the employees at the weekly safety meetings. Morris was aware that foreman Eades was always taking off his hard hat and admitted that "I was on him constantly about it" (Tr. 253).

The fourth requirement that the employer must show to prove its affirmative defense is that it effectively enforced the rules when violations were discovered. "Evidence of verbal

reprimands alone suggests an ineffective disciplinary system." *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997). In this case employees were not adequately disciplined for not wearing their hard hats. Morris was always "telling" the employees to wear their hard hats (Tr. 58, 331). A verbal warning obviously was not enough to make employees take the hard hat rule seriously. Reflections lacked a formal discipline program consisting of increasingly harsher discipline measures such as verbal warnings, written warnings, work suspension, and termination. Furthermore, the employee who did not always wear his hard hat was the foreman. "(A) supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Ceco Corp.,* 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995).

The employee misconduct defense fails because Reflections did not establish that it adequately enforced its hard hat safety rule. Therefore, the violation of 29 C. F. R. § 1926.100(a) is affirmed.

Alleged Violation of 29 C.F.R. § 1926.1053(b)(4)

Citation No. 1, item 3a, alleges a 10-foot self-supporting ladder (stepladder) was used as a non-self-supporting ladder on a slippery surface. Section 1926.1053(b)(4) provides: "Ladders shall be used only for the purpose for which they were designed." CO Henry observed foreman Eades descending a folded stepladder that was leaning against a section of the tower (Exhs. C-12, C-13, C-14; Tr. 127).

While it was not determined whether the ladder was on a slippery surface, the standard requires that a ladder be used *only* for the purpose for which it was designed. A stepladder that is used folded as a non-self-supporting ladder is a hazard because it can slide out from under the employee on the ladder. The fall can result in serious injury such as fractures, contusions, abrasions, and lacerations.

Thus, the violation of 29 C. F. R. § 1926.1053(b)(4) is affirmed.

Alleged Violation of 29 C.F.R. § 1926.1053(b)(7)

Citation No. 1, item 3b, alleges a 10-foot stepladder, used as a non-self-supporting ladder, was not secured and was used on a slippery surface. Section 1926.1053(b)(7) provides:

Ladders shall not be used on slippery surfaces unless secured or provided

> with slip-resistant feet to prevent accidental displacement. Slip resistant feet shall not be used as a substitute for care in placing, lashing, or holding a ladder that is used upon slippery surfaces including but not limited to, flat metal or concrete surfaces that are constructed so they cannot be prevented from becoming slippery.

CO Henry observed foreman Eades descending a folded stepladder that was leaning against a section of the tower, and the ladder was not secured at the top (Exh.C-14, Tr. 126-127).

There is no evidence in the record as to the surface that the ladder was on. Furthermore, CO Henry admitted that he did not know what kind of feet the ladder had (Tr. 173).

The Secretary has failed to prove the alleged violation. Consequently, the alleged violation of 29 C. F. R. § 1926.1053(b)(7) is vacated.

Alleged Violation of 29 C.F.R. § 1926.152(a)(1)

Citation No. 2, item 1, alleges that an unapproved container without a lid was used to store a flammable liquid. Section 1926.152(a)(1) provides in pertinent part:

> Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved safety cans or Department of Transportation approved containers shall be used for the handling and use of flammable liquids in quantities of 5 gallons or less . . . .

CO Henry observed three plastic containers in a truck bed (Exh. C-16). He was told by foreman Eades that they held flammable liquid (Tr. 128). The containers were power tools and next to a generator that was hooked up (Exh. C-16; Tr. 128).

Employee Cunningham stated that employees took the containers to get diesel fuel and gasoline and, as soon as they returned to the jobsite, emptied them into the generator or hydraulic hoist (Tr. 331-332). Reflections argues that since the containers were empty, there is no violation.

This argument fails because the standard requires approved containers for storage and handling. Reflections' employees were handling the containers. The standard requires that containers be listed or approved by a nationally recognized laboratory. Containers made of plastic create a fire and/or explosion hazard. In this case, using unapproved containers for flammable fuel exposes the employees to the hazard of vapors igniting by spark from the working generator or an electrical tool.

Accordingly, the violation of 29 C. F. R. § 1926.152(a)(1) is affirmed.

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).

Reflections is a very small company that employed five employees at the time of the inspection. Because of its 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). Only one or two employees were exposed at any time, and they were not continuously exposed to the hazards. Therefore, the gravity of the violations is moderate.

Reflections demonstrated good faith. It was cooperative throughout the inspection and abated all of the violations at the time of the inspection, so credit will be given for good faith.

In its thirteen years of existence, Reflections had never been cited for any OSHA violations until this job. Some credit is given for a good safety history.

Based on these factors, a total penalty of $1,100 is reasonable for Citation No. 1. This penalty is sufficient 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. Citation No. 1, item 1, alleging a serious violation of Section 5(a)(1) of the Act,

is vacated and no penalty is assessed.

2. Citation No. 1, item 2, alleging a serious violation of 29 C. F. R. § 1926.100(a), is affirmed and an $800 penalty is assessed.
3. Citation No. 1, item 3a, alleging a serious violation of 29 C. F. R. § 1926.1053(b)(4), is affirmed and a $300 penalty is assessed.
4. Citation No. 1, item 3b, alleging a serious violation of 29 C. F. R. § 1926.1053(b)(7), is vacated and a no penalty is assessed.
5. Citation No. 2, item 1, alleging an "other" than serious violation of 29 C. F. R. § 1926.152(a)(1), is affirmed; no penalty was proposed and none is assessed.
6. Citation No. 2, item 2, is withdrawn by the Secretary and, therefore, is vacated.
7. Citation No. 2, item 3, is withdrawn by the Secretary and, therefore, is vacated.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: May 21, 2001