United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. MCCONNELL SMITH GUAM, INC., and its successors, Respondent.	OSHRC DOCKET NO. 99-0466

APPEARANCES:

For the Complainant:
Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX

For the Respondent:
Dennis F. Olsen, Esq., Everett, Washington

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, McConnell-Smith Guam, Inc. (McConnell), at all times relevant to this action maintained a place of business at the "SU Building" at 626 Pale San Vitores Road, Guam, where it was engaged in the erection of precast concrete panels (Tr. 14, 95-96). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On January 25, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of McConnell's Guam worksite. As a result of that inspection, McConnell was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest McConnell brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 29, 1999, a hearing was held in Agana, Guam. At the hearing Complainant withdrew "serious" citation 1, item 2 (Tr. 5). The parties have submitted briefs addressing the matters remaining at issue. In its brief McConnell also includes a motion requesting an award of attorney fees

pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C.A. §504, and incorporated within the Commission Rules of Procedure at §2204 *et seq.*, based on the dismissal of item 2. McConnell further moves for reconsideration of this judge's February 2, 2000 Order denying McConnell's request that the Court provide it with a copy of the hearing transcript.

Motion for Attorney's Fees

Commission Rule 2204.105(a) provides that:

> To be eligible for an award of attorney or agent fees and other expenses under the EAJA. . . [t]he applicant must show that it satisfies the conditions of eligibility set out in this subpart and subpart B.

Subpart (b)(4) requires that any applicant which is a partnership, corporation, association, or public or private organization demonstrate that it has a net worth of not more than $7 million and employs not more than 500 employees. Section 2204.202 more specifically states that:

> Each applicant except a qualified tax-exempt organization or cooperative association shall provide with its application a detailed exhibit showing the net worth of the applicant. . .. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards of this part.. . .

McConnell's application for attorney's fees is deficient in that it does not include the net worth exhibit required under §§2204.105 and .202. The application is, therefore, REJECTED, with leave to refile upon a proper demonstration of eligibility.

Motion for Reconsideration

McConnell's motion for reconsideration adduces no facts or legal arguments not addressed in this judge's February 2, 2000 Order, and is, therefore, DENIED.

Alleged Violation of §1926.501(b)(1)

Serious citation 1, item 1 alleges:

CFR 1926.501(b)(1): Each employee on a walking/working surface with unprotected sides or edges which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems or fall arrest systems.

> a) On the 6th floor North side (2) employees were observed near an unprotected edge without fall protection in that the employees had on body harnesses but were not tied off, exposing employees to an approximate 62 foot fall hazard to ground level.

Facts

OSHA Compliance Officer (CO) Randall Gene White testified that he conducted the January 25, 1999 inspection of the SU Building (Tr. 10). White initially observed and videotaped the working

conditions at the SU Building from a vantage point approximately 60 yards away, and 30 feet below the area on the 6th floor of the building where McConnell was working (Tr. 10, 20-21, 69-70; Exh. C-1). White then approached the site and contacted representatives of the owner, the general contractor and the various sub-contractors (Tr. 11). White identified the McConnell representative and lead man, Marty Craig, as one of the employees he had observed and videotaped earlier (Tr. 11, 22, 101). At the time White videotaped him, Craig was at the very edge of the sixth floor of the SU Building speaking on a phone, or walkie-talkie (Tr. 14, 27, 73-75, 161; Exh. C-1). White testified that Craig did not appear to be tied off; White could not see any resistance on Craig's lanyard, and at one point White caught the end of the lanyard flipping back and forth on videotape (Tr. 23-24, 70-71, 75; Exh. C-1).

White further testified that, later in the afternoon, while conducting his walk-around, he observed another McConnell employee, Oswaldo Gonzales, working on the sixth floor without fall protection (Tr. 26-27, 79). White stated that Mr. Gonzales, a connector, was using a come-along, or winch within one foot of the edge (Tr. 26, 79). According to Douglas Casey, McConnell's contract manager in Guam, Gonzales was likely using the come-along to winch a concrete panel into place so that it could be welded off (Tr. 158-59, 141-45). When White approached Mr. Gonzales, Gonzales reached around and attached the lanyard he was wearing to a static line (Tr. 26).

White testified that guardrails had been installed on the sixth floor (Tr. 29). There was also an adequate fall arrest system in place, consisting of harnesses and lanyards which had been provided to employees and which could be attached to a static line running across the floor between the columns (Tr. 60-65). Both Craig and Gonzales were working outside the guardrails, however, and neither were clipped off to the static line (Tr. 29, 83).

Discussion

The cited standard provides:

> *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) 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.

In order to prove a violation of §1926.501(b)(1) the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1999 CCH OSHD ¶31,948 (No. 97-0152, 1999).

The evidence clearly establishes that McConnell employees Craig and Gonzales were working near the unprotected edge of the sixth floor of the SU Building; the cited standard is, thus, applicable. No safety net systems were in place, and both employees were working outside of the guardrail system. Craig and Gonzales were both wearing a harness and lanyard fall arrest system, but neither were clipped off. Both employees, therefore, violated the requirements of the standard. Both were within the zone of danger and so were exposed to the cited fall hazard. Marty Craig was supervising the work on the sixth floor. He should, therefore, have been aware that Gonzales, who was working in plain sight was not using fall protection. Because Marty Craig was McConnell's lead man, his knowledge of his own and Gonzales' violation of the fall protection standards is imputed to his employer. *See; Ormet Corp*., 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (No. 85-531, 1991). The Secretary has made out her *prima facie* case.

McConnell does not dispute the existence of the violative conditions described by CO White, and introduced evidence that both Marty Craig and Oswaldo Gonzales were disciplined as a result of the OSHA inspection (Tr. 101-102). McConnell maintains that the January 25, 1999 violations were isolated incidents of employee misconduct. Though McConnell did not plead the affirmative defense of "greater hazard," it is clear from its safety program that McConnell believed the use of personal fall protection posed a hazard to its employees in the performance of their work. The greater hazard defense, therefore, will also be addressed.

Employee Misconduct

In order to establish the affirmative defense of unpreventable employee misconduct, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

The work rule. McConnell maintains that it did have work rules designed to prevent the violation cited, and that those rules were communicated to employees. After closely examining McConnell's fall protection policy, however, this judge must conclude that McConnell's work rules, though adequately communicated to its employees, were not designed so as to prevent the cited violations. McConnell is, therefore, unable to meet the first prong of the employee misconduct defense.

Andrew Taylor, vice president of McConnell's Guam operations, testified that McConnell has a safety program that is part of its employment package and that is provided to every new employee. This program applies at all McConnell's work sites (Tr. 94, 104; Exh. R-1, R-3). McConnell's **HEALTH AND SAFETY MANUAL**, Section 8.4 **FALL PROTECTION** states:

> On a job site in Barrigada our company was reskinning a warehouse. One of the men was working on the roof and was not wearing the fall protection provided by the company. He accidentally stepped on some insulation, falling 20 feet into a pallet of boxes. Fortunately the boxes broke his fall, but the injuries were bad. Had the boxes not been there the incident could have been much worse. Fall protection is of **no** use unless you **wear it** and **use it properly.**

(Exh. R-1, p. 32). McConnell's **PERSONNEL POLICY STATEMENT**, Section 19 *HEALTH AND SAFETY* requires, *inter alia*, that ". . . all employees are required to use: . . . Personal Protective Equipment (PPE), at all appropriate times." (Exh. R-3, p. 10).

Douglas Casey testified that he is responsible for the company safety management (Tr. 121). Casey testified that he creates a specific hazard analysis, including a fall protection plan, for each McConnell job site, based on the job requirements and his inspection of the site (Tr. 122). The site plan for the SU Building was developed by Casey and the lead man, Marty Craig (Tr. 122; Exh. R-4). Both Taylor and Casey testified that employees are instructed weekly, during Monday safety meetings held by the lead man, to use the provided equipment as required by the site plan (Tr. 107-08, 124, 128). The site plan states, in relevant part:

> III. IMPLEMENTATION OF FALL PROTECTION PLAN
>
> * * *
>
> **Detailing**: Employees exposed to falls of six (6) ft, who are not actively engaged in leading edge work or connecting activity, such as welding, bolting, cutting, bracing, guying, patching, painting, or other operations, and who are working less than six (6) ft from an unprotected edge will be tied off at all times or guard-rails will be installed. Employees engaged in these activities but who are more than six (6) ft from an unprotected edge as defined by the control zone lines, do not require fall protection but a control zone must be erected to remind employees they are approaching an area where fall protection is required.
>
> IV. CONVENTIONAL FALL PROTECTION CONSIDERED FOR THE POINT OF ERECTION OR LEADING EDGE ERECTION OPERATIONS.
>
> A. Personal Fall Arrest Systems

> In this particular erection sequence and procedure, personal fall arrest systems requiring body belt/harness systems, lifelines and lanyards will not reduce possible hazards during their usage at the leading edge of precast/prestressed concrete construction.[1]
>
> * * *
>
> Leading edge erection and initial connections are conducted by employees who are specifically trained to do this type of work and are trained to recognize the fall hazards. The nature of such work normally exposes the employee to the fall hazard for a short period of time and installation of fall protection systems for a short duration is not feasible because it exposes the installers of the system to the same fall hazard, but for a longer period of time.[2]

(Exh. R-4, p. 6-7).

The site plan purports to require personal fall protection, but, as set forth therein, employees at the unguarded edge who are engaged in "leading edge work" or connecting activity, such as welding, bolting, cutting, bracing, guying, patching, painting, or other operations, are exempted by the Respondent from the tie off requirement contained in the fall protection plan. Only employees engaged in the undefined "detailing" are required to be tied off.

Douglas Casey testified that McConnell's job at the SU Building was to bring the concrete panels that form the skin of the building into position (Tr. 158). A crane was used to hoist the panels (Tr. 158). The connector's job was to guide the panel into place by means of a guide rope or wire attached to the panel, and to winch it into place with a come-along it so that it could be welded off (Tr. 158-59). As McConnell's work was described by Douglas Casey, it is unclear when, if ever, McConnell's employees would be required to tie off under the site plan. Whereas §1926.501(b) clearly requires the use of a personal fall arrest system whenever no other fall protection is in place, McConnell's work rules require the use of personal fall protection only in very limited circumstances.

In this case, Casey believed that Oswaldo Gonzales was winching in a concrete panel at the time of CO White's inspection (Tr. 141-42). According to both Casey and the site plan, Gonzales need not

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[1] McConnell failed to introduce any evidence in support of this contention, as noted in the discussion of McConnell's greater hazard defense below.

[2] To establish the affirmative defense of infeasibility, an employer must show that 1) the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994). McConnell introduced no evidence supporting its safety program's conclusion that it is infeasible for employees to tie off during leading edge or initial connection work. Moreover, McConnell does not maintain that it was infeasible for either of the cited employees to tie off. Lead man Craig was speaking on a walkie-talkie, and was not engaged in either leading edge, or connection work. Gonzales, who was ostensibly engaged in connection work, was in a position to clip his lanyard to a static line as soon as he saw the OSHA CO.

have been tied off during this activity (Tr. 142). It is clear, therefore, that McConnell did not have a work rule designed to prevent the violation involving Gonzales.

It is not clear whether Marty Craig's conduct, standing at the leading edge, talking on a walkie-talkie, fell under the nebulous category of "detailing," or under the "other operations" exemption contained in McConnell's fall protection plan. What is clear is that McConnell's fall protection requirements were so ambiguous as not to constitute a rule at all.

Adequate Communication. As noted above, both Taylor and Casey testified that employees are instructed weekly, during Monday safety meetings held by the lead man, to use the provided equipment as required by the site plan (Tr. 107-08, 124, 128). Taylor testified that fall protection was always a scheduled topic, and was, in fact, discussed repeatedly during the job at the SU Building (Tr. 109-11). Minutes of the weekly safety meetings reflect that fall protection and tying off was identified as a hazard topic at safety meetings held November 17 and 30, 1998 (Exh. R-5, R-7), December 7, 21 and 28, 1998 (Exh. R-8, R-10, R-11, R-12), and January 11, 20, and 25, 1999 (Exh. R-13, R-14, R-15).

Though McConnell submitted documentation adequately establishing that fall protection was discussed at weekly safety meetings, none of the witnesses had attended the safety meetings or knew exactly what information was disseminated (Tr. 136, 139). The record establishes that it was lead man Craig's responsibility to communicate the contents of the site plan, and to stress that fall protection be used in accordance with that plan (Tr. 107-08, 124, 128). As discussed above, the site plan did not require compliance with the cited OSHA standard, and was not designed to eliminate the violative conduct. Whether Craig adequately communicated the site plan, therefore, cannot excuse the violation.

Discipline. Finally, McConnell failed to introduce evidence that whatever fall protection plan it had was consistently enforced.

Douglas Casey testified that McConnell has a progressive disciplinary program, though it is not a written program (Tr. 166). Casey stated that in his three years with the company, he had verbally reprimanded employees many times for minor safety infractions, such as hard hat violations (Tr. 165-66). Casey testified that more serious violations result in a written warning (Tr. 166).

Casey testified that lead man Craig was fired towards the end of February as a result of the OSHA violation (Tr. 163, 169). Gonzales received a written reprimand (Tr. 164, 167; Exh. R-18). Casey did not believe that there were any other occasions on this job site where employees were disciplined (Tr. 164).

Andrew Taylor testified that there was one other instance where a McConnell employee was fired for his violation of safety rules (Tr. 170). According to Taylor, Britt Warn was terminated in 1997 for failing to enforce the company fall protection policy (Tr. 171).

Robert Delos Reyes, a representative of the SU Building's owner, testified at the hearing that Craig was McConnell's site supervisor in March, *after* he was allegedly let go by McConnell for safety violations (Tr. 174).

This judge finds that McConnell did not establish that it had a progressive disciplinary system. Rather, it appears that, in disciplining Craig and Gonzales, McConnell was reacting solely to the receipt of an OSHA citation. In Gonzales's case, McConnell was clearly not enforcing its own work rule, which, according to McConnell's own witness, was not violated by the cited conduct. In Craig's case, there is evidence that the alleged disciplinary action was never actually taken. McConnell failed to establish the affirmative defense of employee misconduct.

Greater Hazard

In order to establish the greater hazard affirmative defense, the employer must show that: 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See, Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

McConnell's site plan sets forth in detail McConnell's reasoning for *not* requiring employees engaged in "leading edge"or connecting activities to utilize the fall protection required by the cited standard*:*

> 1. It is necessary that the employee be able to move freely without encumbrance in order to guide the sections of precast concrete into their final position without having lifelines attached which will restrict the employee's ability to move about at the point of erection.
>
> 2. A typical procedure requires 2 or more workers to manoeuvre (sic) around each other as a concrete member is positioned to fit into a structure. If they are each attached to a lifeline, part of their attention must be diverted from their main task of positioning a member weighing several tons to the task of avoiding entanglements of their lifelines or avoiding tripping over lanyards, more fall potential would result than from not using device.
>
> For this specific erection sequence and procedure, retractable lifelines do not solve the problem of two workers becoming tangled. In fact, such a tangle could prevent the lifeline from retracting as the worker moved, thus potentially exposing the worker to a greater fall than 6 ft. Also, a worker crossing over the lifeline of another worker can create a hazard because the movement of one person can unbalance the other. In the event of a fall by one person there is a likelihood that the other person will be caused to fall as well.
>
> 3. Employees tied to a lifeline can be trapped and crushed by moving structural members if the employee becomes restrained by the lanyard or retractable lifeline and cannot get out of the path of the moving load.
>
> The sudden movement of a precast concrete member being raised by a crane can be caused by a number of factors. When this happens, a connector may immediately have to move a considerable distance to avoid injury. If a tied off body belt/harness is being used, the connector

> could be trapped. Therefore, there is a greater risk of injury if the connector is tied to the structure for this specific erection sequence and procedure.

(Exh. R-4, p. 7).

McConnell introduced no evidence to support the conclusion set forth in its site plan, *i.e*, that the tripping and/or crushing hazard posed by lifelines is greater than the fall hazard §1926.501(b)(1) is designed to address.

In any event, the Commission has held that where an employer believes that compliance with OSHA standards creates a greater hazard for its employees during regularly performed operations, the employer's failure to explain why it did not apply for a variance obviates the need to address the first two elements of the defense. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

McConnell's business almost exclusively involves the erection and connection of concrete members at heights. McConnell's work takes place at the unguarded edge of the working surfaces it is enclosing. Its employees are exposed to the fall hazards addressed in §1926.501(b)(1) on a daily basis. McConnell's site plan discusses the presumed hazards posed by compliance with .501(b)(1) and rejects the protections required by that standard.

Where, as here, an employer believes that compliance with an OSHA standard creates a greater hazard for its employees, its recourse is to apply to OSHA for a variance from the operation of that standard. McConnell introduced no evidence indicating that it had ever applied for such a variance, or setting forth any reasons for its failure to do so.

McConnell has failed to establish the affirmative greater hazard defense. Because McConnell has not rebutted the Secretary's *prima facie* case, the violation will be affirmed.

Penalty

A penalty of $3,000.00 was proposed for this item.

White testified that the owner's representative, Robert Delos Reyes, told him that the sixth floor of the SU Building is approximately 60 feet above the ground (Tr. 28). White stated that a fall from that height would probably result in disability and/or death (Tr. 29). The violation is, therefore, properly classified as "serious."

Two employees were exposed to the cited hazard; White testified that he observed one of them, Craig, for approximately 20 to 30 minutes (Tr. 27). White stated that he believed the gravity of the violation was high (Tr. 30). The proposed penalty included a 40% reduction based on McConnell's

small size; White was told that McConnell had approximately 50 employees, only 7 of whom worked at the SU Building work site (Tr. 31).

Based upon the gravity of the violation, the proposed penalty in the amount of $3,000.00 is affirmed.

Alleged Violation of §1926.1052(a)(3)

Serious citation 1, item 3 alleges:

29 CFR 1926.1052(a)(3): Variations in riser height or tread depth exceeded 1/4inch (0.6 cm) within a stairway system:

> a) At the east and west stairways between the first floor to the seventh floor, the tread depth for each step was not uniform in that an approximate four inch wide, 38 inch long, and two inch deep section of concrete had been eliminated from each riser for the nosing, exposing employees using the stairway between levels to the hazard of trips and falls.

Facts

CO White testified that in both the east and west side stairways, a section of each stair had been cut away to allow for the installation of nosing (Tr. 33, 53).The center of each step was cut down about two inches, and back approximately 4 inches (Tr. 33). The cutout extended to about 4 inches of the outer edge of the stair (Tr. 33). White videotaped the condition of the stairs from the landing between the second and third floors (Tr. 56; Exh. C-1). White did not go up the stairs, but believed, based on the representations of the people who accompanied him on the walkaround that the stairs were in the same condition up to the seventh floor (Tr. 57, 59). White stated that Bai Fei Hong Fei, the representative of Phoenix United, the general contractor, told him the stairs had been in the cited condition for about a week (Tr. 36-37).

Casey testified that he had inspected the northwest stairs, which only go up two floors, at the beginning of the job; at that time, 2x4 nosing timbers had been in place in the cut out areas (Tr. 150). Casey did not inspect the other stairs, which went from the third to sixth floor, because they had not been completed at the time McConnell started the contract (Tr. 151). Casey testified that he was unaware that the nosing timbers had been removed from the stairs (Tr. 152). Casey stated that the stairs were not McConnell's responsibility, and that their condition was created by some other subcontractor (Tr. 151-52).

CO White testified that when he held his closing conference with the general and sub-contractor's representatives, he told them that he would be issuing citations based on the condition of the stairs (Tr. 34). White testified that he asked these representatives to speak up if they did not believe

their employees used the stairs (Tr. 34). One company representative did come forward at that time; McConnell's representative, Marty Craig, did not (Tr. 34, 45).

At the hearing, however, Casey testified that, prior to the start of the job, he determined that McConnell's employees would use the vehicle ramp at the rear of the building to access their work areas (Tr. 147). Casey testified that McConnell's welding equipment was too heavy to take up the stairwells (Tr. 147).

White admitted that he did not see any of McConnell's employees using the cited stairs (Tr. 47). Casey admitted, however, that he did not direct his employees not to use the stairs, and that one of the stairwells was within about 50 feet of McConnell's work areas, while the ramp at the back of the building was between 60 and 200 feet away from those areas (Tr. 149, 161). In addition, Robert Delos Reyes, the owner's representative (Tr. 80), testified that he had seen McConnell's employees using the stairs (Tr. 81).

Discussion

The cited standard provides:

> Riser height and tread depth shall be uniform within each flight of stairs, including any foundation structure used as one or more treads of the stairs. Variations in riser height or tread depth shall not be over 1/4-inch (0.6 cm) in any stairway system.

The 2x4 inch cutout in each stair tread clearly exceeds the 1/4-inch variation in riser height and tread depth provided for in the cited standard. McConnell, however, objects to the citation on a number of grounds as set forth below.

Exposure. McConnell maintains that the Secretary failed to show, by a preponderance of the evidence, that its employees were exposed to the cited condition.

In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in zones of danger during either their assigned working duties, their personal comfort activities while on the job site, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Carpenter Contracting Corp.*, 11 BNA OSHC 2027, 1984 CCH OSHD ¶29,950 (No. 81-838, 1984).

Though McConnell may have expected that its employees would use the vehicle ramp at the rear of the building to access their work areas, it was foreseeable that employees who were not transporting heavy equipment would use any shorter available route to reach and to exit the sixth floor work areas. McConnell should, therefore, have anticipated that employees would use the closer stairwell when possible. That McConnell's employees did, in fact, use the shorter, closer route was confirmed by the

owner's representative Delos Reyes, and is supported by Marty Craig's failure to come forward during CO White's closing conference. Therefore, employee exposure has been established.

Knowledge. McConnell further contends that it had no knowledge of the cited condition.

In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Eng'd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986).

The CO's assertion that nosing timbers were removed from the first through seventh floor stairs about a week prior to the OSHA inspection is uncontradicted. From Marty Craig's failure to come forward during the closing conference, it is concluded that Craig was aware that the stairs were used. In addition, given the location of the stairs, it is more likely than not that Craig used the stairs. The record shows that Craig was, or should have been aware of their condition.

Assuming Craig never used the stairs, as lead man he had a duty to assure that the stairs were safe for use by his crew. Craig accompanied Casey during the initial inspection of the site, when the site specific plan was developed. The third to seventh floor stairs were not completed at that time. Craig should not have assumed that the stairs complied with OSHA safety requirements without first inspecting them. On these facts, the Secretary has established employer knowledge.

Multi-Employer. Finally, McConnell raises the limited multi-employer worksite defense, contending that it did not create the cited condition, and had no means to abate the hazard.

The Commission has held that in order to establish the defense, a subcontractor must show, by a preponderance of the evidence, that: 1) it did not create the violative condition; 2) it did not control the violative condition such that it could not realistically have abated the condition in the manner required by the standard; and 3) it made reasonable alternative efforts to protect its employees from the violative condition, or did not have, and with the exercise of reasonable diligence could not have had, notice that the violative condition was hazardous. *Capform, Inc.*, 16 BNA OSHC 2040, 1994 CCH OSHD ¶30,589 (No. 91-1613, 1994).

The record establishes the first two prongs of the defense; McConnell neither created nor controlled the cited hazard so as to abate the hazard in the manner contemplated by the standard.

The Commission has held, however, that in order to meet the third prong of the defense, the subcontractor must make some reasonable effort to protect its employees from a hazard. *Id.* McConnell introduced no evidence that any steps were taken. No efforts were made to prevent employees from using the stairs. CO White testified that Phoenix United representatives Fei and Romy Hadap both told him that none of the subcontractors on the site brought the hazardous condition of the stairs to their attention (Tr. 39-42). In *Capform, Inc.*, *id.*, the Commission held that the "reasonable" subcontractor must, at least, complain to the responsible contractor.

McConnell failed to take even the most basic steps to protect its employees, and so has failed to make out its affirmative defense. Accordingly, the violation is established.

Penalty

A penalty of $1,125.00 was proposed for this item.

White testified that the cutouts created a tripping hazard, which could have resulted in lacerations and/or broken bones (Tr. 34-35). White believed that the likelihood of an accident occurring was high, but rated the gravity of the violation as lower, because the likely injuries were less severe (Tr. 38).

The proposed penalty includes a 40% reduction based on McConnell's size and a 15% reduction for good faith (Tr. 38). The condition was remedied during the OSHA inspection (Tr. 38). Based upon the gravity of the hazard, a penalty in the amount of $500.00 is assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of $3,000.00 is ASSESSED.

2. Citation 1, item 3, alleging violation of §1926.1052(a)(3)is AFFIRMED, and a penalty of $500.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: July 10, 2000