UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ARMSTRONG STEEL ERECTORS, INC.
Respondent.

OSHRC DOCKET
NO. 93-2691

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 28, 1994. The decision of the Judge will become a final order of the Commission on November 29, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 17, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. 10/28/94

Date: October 28, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2691

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. ARMSTRONG STEEL ERECTORS, INC., Respondent.	OSHRC DOCKET NO. 93-2691

APPEARANCES:

For the Complainant:

Betty Klaric, Esq., Office of the Solicitor,
U.S. Department of Labor, Cleveland, OH

For the Respondent:

Roger L. Sabo, Esq., Columbus, OH

DECISION AND ORDER

Barkley, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Armstrong Steel Erectors, Inc. (Armstrong), at all times relevant to this action maintained a worksite at the I-71 overpass at 4001 Ridge Road, Cleveland Ohio, where it was engaged in steel erection (Tr. 61-62). Armstrong has approximately 100 employees, seven of whom were employed at the I-71 worksite (Tr. 99). The Commission has held that construction is in a class of activity which as a whole affects interstate

commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Armstrong is, therefore, an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Pursuant to an August 23, 1993 inspection of Armstrong's Cleveland worksite, the Occupational Safety and Health Administration (OSHA) issued a "serious" citation, together with proposed penalties, alleging, in the alternative, violation of 29 C.F.R. §1926.28(a) and 1926.105(a). By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 21, 1994, a hearing on the merits was held in Cleveland, Ohio. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1926.105(a)

Citation 1, item 1 alleges:

1926.105(a) where employees were performing work duties on a bridge greater than 25 feet above the ground the employer did not provide safety nets where the use of scaffolding systems, catch platforms, and static/catenary lines in conjunction with safety belts or other harnessing systems was impractical.

> 4000 Ridge Road Overpass to Route 71: Employees were exposed to greater than 25 foot falls without fall protection while detailing an undecked bridge.

Facts

OSHA Compliance Officers (CO) approaching Armstrong's worksite at the I-71 overpass observed and videotaped a number of Armstrong employees on the unguarded steel girders (Tr. 67-68, 79-80; Exh. C-2). One employee working on a float scaffold with an impact wrench was tied off (Tr. 129); however, the majority of the workers, although they had lanyards and harnesses, were not using them (Tr. 70; Exh. C-2). Two of those workers, identified as Armstrong employees Sabo and Dietz, were welding rockers from the top of two bridge piers (Tr. 71-73, 148, 160, 168; Exh. C-2, C-5 through C-9, C-13). A third unidentified worker laid cross bracing between two girders (Tr. 71; Exh. C-2). A fourth walked unprotected on the girders above the pier where Dietz was working (Tr. 72; Exh. C-2).

CO David Bunton testified that prior to the hearing he returned to the bridge site to measure the height of the piers on which Sabo and Dietz were working (Tr. 77-78). Bunton

found that each of the piers were taller than the 25 foot calibrated engineering rod he had with him (Tr. 78-79).

Armstrong's stated company policy is that ironworkers are free to move about the steel until they reach their work stations (Tr. 121). When performing work from a stationary position, however, Armstrong employees are required to tie off (Tr. 121, 216, 251, 288).

Sabo and Dietz both testified that they did not use fall protection while moving about on the iron (Tr. 182, 192). Sabo admitted that he was not using fall protection while welding on the day of the inspection (Tr. 174-76). Dietz maintained that he was tied off "more often than not" (Tr. 186), and stated that he believed he was tied off at all times when he was welding (Tr. 189). However, Charlie Blake, Armstrong's foreman, testified that on the day of the OSHA inspection, Dietz admitted he was not tied off (Tr. 257, 265).

Discussion

In order to establish a violation of §1926.105(a), the Secretary must establish that Respondent's employees were exposed to falls in excess of 25 feet and that the use of safety harnesses and lanyards was practical. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶30,059, (No. 89-2883 & 89-3444).

The evidence establishes that Armstrong employees were exposed to falls from heights over 25 feet while moving on the steel to access their work areas.

Complainant also established that it would have been practical to provide continuous fall protection with a safety belt and lanyard system at this worksite. CO Bunton testified that continuous fall protection is practical (Tr. 100-102), and is in use by at least one other company in the steel erection industry (Tr. 136). At the time of the inspection, the vertical bridge members had been erected (Tr. 291). Bunton stated that it would have been practical to install static or catenary lines at that point (Tr. 100-102). Specifically, Bunton described a glider system, which allows uninterrupted travel on the catenary line by means of a ball in groove, which allows a lanyard to slide around stanchions (Tr. 329-331).[1] Further, such system could be installed in the girders while they were on the ground prior

[1] Bunton also testified that it would have been practical to erect scaffolding under the portion of the I-71 bridge over the median strip (Tr. 165), or to suspend a catch platform from the bridge (Tr. 166). At the time of the inspection, some planking was in position (Tr. 101, 151-52; Exh. C-2).

to their erection on the bridge. Russell Duskey, Armstrong's manager of structural steel, admitted that the stanchions for such a system could be installed on the girders on the ground prior to raising them to their vertical position (Tr. 296).

Roy McIntosh, Armstrong's vice president testified that the erection of structural steel on the I-71 bridge project was incomplete at the time of the OSHA inspection. The main beams had been erected, but cross frames were still being installed. McIntosh stated that installation of catenary lines prior to the completion of structural steel erection is infeasible (Tr. 225). McIntosh, who admitted he was not an expert in either steel erection (Tr. 225), or in safety matters (Tr. 225-27, 238-39), could not explain why installation was not practical prior to installation of the cross frames.

Nothing in the record establishes that the crossbraces must be bolted up before static lines are installed. At the time of the inspection, some stanchions and catenary lines had been erected though they did not extend into the areas where Armstrong's employees were working (Tr. 74, Exh. C-2). In addition, Foreman Blake testified that cables were installed following the OSHA inspection, and that employees were able to perform their job duties. (Tr. 262-63, 266). The undersigned finds, therefore, that a catenary line could have been installed, and that employees walking the steel could have been tied off at the time of the OSHA inspection.[2]

Finally, this judge notes that the evidence in this case indicates that it is the common practice in the steel erection industry for ironworkers to travel from point to point without continuous fall protection (Tr. 134-35, 142-44, 289). Industry practice, however, though relevant, is not dispositive. To hold otherwise would allow an entire industry to avoid liability by maintaining inadequate safety. *See State Sheet Metal Co.*, 16 BNA OSHC 1155, 1993 CCH OSHD ¶30,042 (90-1620 & 90-2894, 1993); *Farrens Tree Surgeons Inc.*, 15 BNA

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[2] Armstrong specifically maintains that the use of safety belts is impractical for ironworkers in the process of placing crossbraces. Crossbraces are large pieces of angle iron weighing from 100 to 190 pounds apiece, which must be carried by two ironworkers walking on separate girders (Tr. 267, 292). Respondent maintains that an ironworker using a catenary line would be forced to set down his load, unhook and rehook his safety harness at each location where the line attaches to a girder (Tr. 293-94).

Respondent's contentions need not be addressed here, however, as none of the employees observed or cited by OSHA were carrying crossbraces.

OSHC 1793, 1992 CCH OSHD ¶29,770, (No. 90-998, 1992). In addition, individual industry participants would be free to ignore new developments in the field of employee health and safety.[3]

Employee Misconduct

Armstrong raises the affirmative defense of unpreventable employee misconduct, arguing that the violation of its stationary tie off policy by employees Sabo and Dietz justifies vacation of the cited violation.

Even were Armstrong to establish the defense, however, the outcome of this matter would be unaffected, because the citation is affirmed based solely on the absense of fall protection for ironworkers in motion. Therefore, Respondent's affirmative defense, will not be considered.

Greater Hazard

Armstrong also argues that installing fall protection poses a hazard to the employees who must work unprotected on the steel to install the safety cables or catch platforms (Tr. 217, 224). Duskey also stated that catenary lines were hazardous because ironworkers forgot they were tied off and were tripped up by the stanchions (Tr. 301).

In order to establish the affirmative defense of a greater hazard, 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 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Armstrong admits it never applied for a variance. Duskey testified that Armstrong felt that it was the job of the international ironworker's union to do so (Tr. 305-06).

Armstrong failed to make out the affirmative defense of greater hazard. Because Armstrong failed to establish the third prong of the defense, the other elements need not be addressed here.

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[3] Here, none of Armstrong's supervisory employees were familiar with the safety glider system (*See* testimony of Duskey, Tr. 302; McIntosh, Tr. 227; Blake, Tr. 261).

Penalty

A fall from a height over 25 feet would most probably result in serious injury or death (Tr. 119). The cited violation, therefore, was properly characterized as serious. Respondent stipulates that in the event a serious violation is found, the proposed penalty of $2,500.00 is appropriate (Tr. 109-10). A penalty of $2,500.00 will be assessed.

Alleged Violation of §1926.28(a)

Because a violation of §1926.105(a) was found, the alleged alternative violation of §1926.28(a) need not be addressed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

Order

1. Serious citation 1, item 1, alleging violation of §1926.105(a) is AFFIRMED, and a penalty of $2,500.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: October 21, 1994