UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 93-1507
RUHLIN COMPANY,	:	
Respondent.	:	

DECISION

Before: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

On August 19, 1994, Administrative Law Judge James H. Barkley issued a decision pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"), that granted to Ruhlin Company an award for certain expenses, including $47.04 for mileage to and from two hearings, $10.00 for parking fees at the hearings, and $788.05 for a transcript.[1]

The Secretary of Labor asserts on review that the travel expenses, *i.e.*, mileage and parking, are not compensable pursuant to the EAJA[2]. The Secretary further asserts that most of the cost of the transcript is not compensable because, pursuant to the EAJA, a

[1]We note that, in his decision, the judge awarded a total of $875.09 for expenses. Reviewing the record, we find $30 of that amount to be unaccountable. We view this discrepancy as a typographical error and find that the judge intended to allow $845.09 for expenses.

[2]The judge also awarded $975 in attorney's fees. Neither party has disputed that portion of the award and, therefore, we accept it.

company is not entitled to compensation for those portions of the litigation upon which the Government either prevailed or was substantially justified.

The dispute regarding the recoverability of travel costs arises from an ambiguity in the EAJA which states that

> "[F]ees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees. . . .

5 U.S.C. § 504(B)(1)(A).

Those circuits that have addressed the issue have split over whether the above language is an exclusive listing of recoverable costs and, therefore, whether travel expenses are recoverable under the EAJA[3]. The Sixth Circuit, the circuit in which this case arises, has not directly addressed the issue. However, in *Holden v. Bowen*, 668 F. Supp. 1042 (N.D. Ohio 1986), a case which arose in the Sixth Circuit, the district court explicitly found travel costs to be recoverable under the EAJA.

We agree with the majority of the Circuits that have held travel expenses to be recoverable. Allowing the recovery of the reasonable and necessary expenses of an attorney in a specific case which are customarily charged to the client is, in our view, consistent with

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[3]Travel expenses have been disallowed in both the Tenth and District of Columbia Circuits on the grounds that the statute provides an exclusive list of the expenses compensable under the EAJA. *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986), and *Massachusetts Fair Share v. Law Enforcement*, 776 F.2d 1066, 1069-70 (D.C. Cir. 1985). On the other hand, the Federal, Second, Eighth, Ninth, and Eleventh Circuits have held the specific items listed in the statute to be only examples of recoverable expenses and have allowed the recovery of travel expenses. *Oliveira v. United States*, 827 F.2d 735 (Fed. Cir. 1987); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9 (2d Cir. 1986); *Kelly v. Bowen*, 862 F.2d 1333 (8th Cir. 1988); *International Woodworkers, Local 3-98 v. Donovan*, 792 F.2d 763 (9th Cir. 1986); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988).

We note that the courts that have addressed the issue were considering 28 U.S.C. § 2412(d)(2)(A), the judicial counterpart of 5 U.S.C. § 504(b)(1)(A). Both sections contain essentially the same language, however, and should be interpreted in the same manner. *See Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1909, 1987-90 CCH OSHD ¶ 29,144, p. 38,958 (No. 86-978, 1990)(consolidated).

the EAJA's statutory objective of encouraging small employers to defend their rights against unjustified governmental action. *Kelly v. Bowen*, 862 F.2d at 1333; *Central Brass*, 14 BNA at 1909, 1987-90 CCH OSHD at p. 38,958. Accordingly, Ruhlin is entitled to recover $57.04 for the mileage and parking included in its petition.

In general, the cost of a transcript is awardable only for those portions relevant to items eligible for an EAJA award. *Cf. Sperry Rand v. A-T-O, Inc.*, 58 F.R.D. 132, 138 (E.D. Va. 1973)(no costs awarded for unnecessary portions of a trial transcript). Where, as here, the employer is entitled to compensation for less than all items, the employer, not the Commission, must establish the portion of the transcript for which it is entitled to be reimbursed. *See Central Brass*, 14 BNA OSHC at 1906-08, 1987-90 CCH OSHD at pp. 38,956-7 (attorney's time sheets did not designate items or category of violation).

We note that there are two viable methods for determining transcript costs when a party is entitled to an EAJA award for only part of a case. For shorter transcripts, the most direct approach would be to count the number of pages relevant to the compensable item. However, we recognize that in those few cases involving long transcripts, this method may be unduly burdensome and costly for the parties. Accordingly, in cases with long transcripts, it may be more feasible to rely on an approximation with respect to the items in which the employer prevailed and the Secretary was not substantially justified. In our view, it is impractical to formulate any hard and fast rules governing when either method should be used. Rather, there should be flexibility to apply the method best suited for the individual case.

We also would emphasize, as previously noted, that the burden is on the employer to establish the facts necessary to enable the Commission and its judges to fashion an appropriate award. Where this burden is met, it is up to the Secretary to rebut the employer's showing. While the Commission will resolve disputes over the relevant portions of the transcript, it should not expend its resources by counting pages where the employer

has failed, in the first instance, to present the facts required to fashion an appropriate award.[4]

In its EAJA application, Ruhlin sought reimbursement for the cost of the entire transcript. It did not try to determine what portion of the transcript involved the reimbursable item. The Secretary, however, has claimed that approximately 8 percent of the transcript was relevant to the item. The Secretary's determination is consistent with our own assessment of the transcript. Accordingly, we accept the Secretary's determination. The record shows that the total cost of the transcript was $788.05. Ruhlin is entitled to 8 percent of that amount, $63.04.

Accordingly, the Judge's decision is MODIFIED to allow Ruhlin to recover $57.04 in mileage and parking fees and $63.04 for the transcript, for a total of $120.08 for expenses. In all other respects, the Judge's award is AFFIRMED.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

DATED: 2/15/95

[4]Chairman Weisberg notes that Commissioner Montoya's suggestion that the Commission use a "lodestar" for apportioning "transcript costs" is without judicial precedent. The "lodestar" method has of necessity been used to determine reasonable attorney's fees, but never in connection with transcript costs. The transcript itself shows the number of pages that relate to the citation items on which the employer prevailed. The test is how much of the transcript, how many pages, actually relate to the specific citation item, not how complex or difficult one "subjectively" determines the citation item may be. In fact, the complexity of the issue may have no bearing whatsoever on the number of pages devoted to it. The degree of difficulty is an appropriate yardstick for diving competition, but not for apportioning transcript costs.

MONTOYA, Commissioner, concurring and dissenting:

I heartily agree with my colleagues' decision to adopt the majority view that the language of 28 U.S.C. § 2412(b) and 28 U.S.C. § 2412(d)(2)(A) should be construed to allow attorney travel costs in Commission proceedings. This result is particularly gratifying here, where the Secretary's petition cited only those authorities that support his strict reading of the Equal Access to Justice Act, 5 U.S.C § 504 ("EAJA") to allow only those expenses specifically mentioned in 28 U.S.C. § 2412(d)(2)(A): *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986) (costs for travel expenses are not authorized by EAJA); *Massachusetts Fair Share v. Law Enforcement*, 776 F.2d 1066, 1069-70 (D.C. Cir.1985) (taxi fares and travel expenses not eligible for award); *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211, 223-24 (D.C.Cir. 1984) (no costs allowable for taxi fares). Though these cases clearly represent the minority position, an unwary respondent might not have brought this to our attention.

However, I must disagree with my colleagues' decision to apportion the transcript in accordance with the page count submitted by the Secretary. While it is true that some courts have apportioned transcript costs on a per-relevant-page basis, I would reject that approach for the Commission. First, this method requires an essentially subjective determination as to which individual pages are and are not relevant to the allowable item. Transcripts invariably include pages on which the foundation for more than one citation item is laid. While such pages are inextricably intertwined with all pages on which those items are discussed, the method accepted by the majority here tends to award only the *minimum* number of pages on which the allowable items themselves are discussed.

Second, the page-counting method also threatens to involve both the parties and the Commission in extraordinarily complex and time-consuming analyses of lengthy transcripts in the future. Particularly in light of this case, in which we have seen a willingness on the part of the Secretary to expend resources when little, if anything, is to be gained, I would not invite the parties to engage in this inherently time-consuming and inefficient method of transcript apportionment in subsequent cases.

Rather, I would apportion all such attorney costs according to the "lodestar" method the Commission adopted for apportioning attorney fees in *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1987-90 CCH OSHD ¶ 29,144 (Nos. 86-978 & 86-1610, 1990). There, we apportioned the costs of attorney's fees according to the relative difficulty of the citation items and, thus, the reasonable time required to complete each item. See also *William B. Hopke Co.*, 12 BNA OSHC 2158, 2160, 1986 CCH OSHD ¶27,729 (No. 81-0206, 1986), holding that the hearing judge is to determine a reasonable award based on his expert opinion as to the complexity of the item and the novelty of the issues presented and, thus, the reasonable time required to complete each item.

In determining the EAJA award below, Judge Barkley held that the citation in question, that alleged failure to provide frequent and regular inspections of the job site as required by 29 CFR § 1926.20(b)(2), was neither novel nor complex. I agree, and would also say that the item alleging inadequate fall protection pursuant to 29 CFR § 1926.105(a) was more difficult than the one before us. However, I consider the difficulty of the item before us to be on a par with the third item, which alleged unguarded rebar pursuant to 29

CFR § 1926.701(b). Accordingly, I would make a 25 percent allocation for each of these items, and would therefore award Ruhlin 25 percent of the cost of this transcript, or $195.

Velma Montoya
Commissioner

Date: 2-15-95

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-1507
RUHLIN COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 15, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

February 15, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-1507

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Benjamin T. Chinni, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Michael R. Stith, Esq.
The Ruhlin Company
6931 Ridge Road
PO Box 190
Sharon Center, OH 44274

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

Secretary of Labor,
Complainant,

v.

The Ruhlin Company,
Respondent.

Docket No. 93-1507

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 1, 1994. The decision of the Judge will become a final order of the Commission on October 3, 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 September 20, 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
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. 9/8KA

September 1, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-1507

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Michael R. Stith, Esq.
The Ruhlin Company
6931 Ridge Road
PO Box 190
Sharon Center, OH 44274

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. Speer Boulevard
Room 250
Denver, Colorado 80204-3582

PHONE:
COM (303) 844-3409
FTS (303) 844-3409

FAX:
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR, Complainant, v. THE RUHLIN COMPANY, Respondent.	OSHRC DOCKET NO. 93-1507

*CORRECTED ORDER

Respondent, The Ruhlin Company (Ruhlin), submits an application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), adopted at §2204 *et seq.* of the Commission's Rules of Procedure.

Under the EAJA, a prevailing party meeting the basic requirements for eligibility is entitled to an award of attorney fees and other expenses, unless the Secretary shows that her position was substantially justified or that special circumstances make an award unjust. 5 U.S.C. §§504(a)(1), 504(b)(1)(B); *William B. Hopke Co.*, , 12 BNA OSHC 2158, 1986 CCH OSHD ¶27,729 (No. 81-0206, 1986). Ruhlin represents, without contradiction, that it is an *incorporated business with a net worth of less than $7 million, employing not more than 500 employees. Ruhlin is the prevailing party as to both items 1 and 2 of "serious" citation 1, alleging violations of §§1926.20(b)(2) and 1926.105(a). The issue here is whether the Secretary was substantially justified in pursuing those two items.

The test of whether government action is substantially justified is essentially one of reasonableness in law and fact. *Pierce v. Underwood,* 108 S.Ct. 2541, 2550 (1988). *Hocking*

Valley Steel Erectors, Inc., 11 BNA OSHC 1492, 1983 CCH OSHD ¶25,824 (80-1463,1983). That is, there must be in the record some basis of fact from which a violation can be reasonably inferred. The evidence, however, need not be uncontradicted. If reasonable people may fairly differ as to whether certain evidence establishes a fact in issue, it must be deemed substantial. "Substantial justification" is more that a scintilla, but less than a preponderance. *John W. McGrath Corp. v. Hughes,* 264 F.2d 314 (2d Cir. 1959).

Citation 1, item 2, Alleged Violation of §1926.105(a)

This regulation requires fall protection. The facts underlying this item were undisputed; the uncontradicted evidence established that the employees of Ruhlin's subcontractor, Middle States Steel, walked the cited steel structure under construction without 100% fall protection. The issue on which this item turned was the actual or constructive knowledge of Ruhlin, the general contractor.

While the preponderance of evidence indicated that Ruhlin was without actual or constructive knowledge of the subcontractor's violations, there was some evidence from which employer knowledge could have been inferred. Accordingly, the Secretary was substantially justified in bringing these facts before the Commission.

Citation 1, item 1, Alleged Violation of §1926.20(b)(2)

This regulation requires frequent and regular inspections of the job site by a competent person. Complainant produced no evidence of any specific deficiencies in Ruhlin's inspection program. The testifying Compliance Officer was not familiar with Ruhlin's inspection plan, but relied entirely upon citation items as evidence that frequent and regular inspections were not made by a competent person.

In order to determine a violation of the cited standard, the Secretary must inquire into the frequency of the inspections and the competency of the person conducting the inspections. The fact that the Compliance Officer observed what, in his opinion, were violative conditions without further inquiry into the employer's inspection program is not a substantial justification for alleging a violation of this standard.

As Complainant made no attempt to ascertain the facts necessary to prove a violation of the cited standard prior to bringing it to hearing, its position cannot be found to have been substantially justified. Fees and expenses expended in defense of this item shall be

awarded.

Amount of the Award

Ruhlin has documented attorney fees in excess of $9,000, and expenses in the amount of $845.09. Neither fees nor expenses were apportioned by citation item.

The Commission has held that the hearing judge must determine a reasonable fee based on the complexity of the case and the novelty of the issues involved, utilizing his knowledge, expertise and experience in occupational safety and health law. *William B. Hopke Co., supra* at 2160. The issue concerned here is neither novel nor complex, occupying 2 pages of Ruhlin's 15 page brief. The undersigned finds that Ruhlin's counsel might reasonably have been expected to expend 8 hours, investigating, trying, researching and briefing this item. An expenditure of 5 hours documenting and drafting the EAJA petition is deemed reasonable.

Attorney fees in the amount of $975.00 (13 hours X $75.00/hr.) are awarded. Actual costs in the amount of $875.09 are awarded.

James H. Barkley
Judge, OSHRC

Dated: Auugst 19, 1994

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
RUHLIN COMPANY
Respondent.

OSHRC DOCKET
NO. 93-1507

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 May 6, 1994. The decision of the Judge will become a final order of the Commission on June 7, 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 May 26, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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. 5/6/94

Date: May 6, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1507

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Benjamin T. Chinni
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Michael R. Stith, Esq.
The Ruhlin Company
6931 Ridge Road
PO Box 190
Sharon Center, OH 44274

James H. Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 N. Speer Boulevard
Room 250
Denver, Colorado 80204-3582

PHONE:
COM (303) 844-3409
FTS (303) 844-3409

FAX:
COM (303) 844-3759
FTS (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

THE RUHLIN COMPANY,
Respondent.

OSHRC Docket No. 93-1507

APPEARANCES:

Janice L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio

Michael R. Stith, Esq., The Ruhlin Company, Sharon Center, Ohio

Before: Administrative Law Judge James H. Barkley

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, Ruhlin Company (Ruhlin), at all times relevant to this action maintained a worksite at CR 151 South Avenue Bridge, Youngstown, Ohio, where it was engaged in construction as a general contractor. Ruhlin admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Between March 31 and April 9, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Ruhlin's Youngstown worksite

(Tr. 29). As a result of the inspection, Ruhlin was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 30, 1993, a hearing was held in Cleveland, Ohio, on the cited violations. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violation of §1926.105(a)

Citation 1, item 2 alleges:

29 CFR 1926.105(a): Safety nets were not provided when workplaces were more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts was impractical:

The employer did not provide safety nets where employees were exposed to falls while connecting, bolting up, walking on structural steel beams or performing other duties associated with the erection of the bridge.

"OR IN THE ALTERNATIVE"

29 CFR 1926.29(a): Employees did not use appropriate personal protective equipment to prevent falls such as, but not limited to, static and/or catenary lines in conjunction with safety belts and lanyards while the employees were walking on structural steel beams, bolting up or performing other duties associated with the erection of the bridge:

Among other methods feasible and acceptable to correct this hazard are, but not limited to, the use of ladders, scaffolds, catch platforms, scizzor (sic) lifts, rotating and articulating lifts.

Facts

On March 31, 1993, Compliance Officer Gus Georgiades videotaped construction of the South Avenue bridge from the south side of the river, approximately 500 feet from the project (Tr. 32, 40; Exh. C-4, C-5, C-6, C-29). Employees of the structural steel subcontractor on site, Middle States Steel (Tr. 310-11), were moving north to south across the top of girders, across a "pic," or temporary walkway between girders, (Exh. C-13), and attempting to make connections without benefit of fall protection (Tr. 33-39).

Ruhlin, the general contractor, did not consent to OSHA's entry on March 31; a warrant was obtained and Georgiades conducted an inspection of the South Avenue worksite on April 2, 1993 (Tr. 49, 54). On that date, there were no ironworkers on the steel (Tr. 57). Georgiades observed no permanent fall protection other than stanchions and a hand line on the eastern row of girders (Tr. 56-57; Exh. C-7 through C-14, C-29). Georgiades returned to the site on April 6 and April 9, 1993. On April 6 he noted additional one half inch cable strung below the top of one girder (Tr. 69, 78; Exh. C-15). Georgiades testified that the cable was inadequate to serve as a catenary line; workers tied off below the level of their feet would still be exposed to falls of over six feet (Tr. 79-80). On April 9 Georgiades found that the hand line had been extended across the north abutment, and that an additional wire rope was strung below the top of a girder (Tr. 87).

Scott Palmer, a journeyman ironworker with Middle States, testified that in March and April of 1993 he worked on the South Avenue bridge (Tr. 168-71). Palmer was issued a safety belt and lanyard and had a bridge clamp to tie onto where there was no catenary line (Tr. 184). Palmer stated that 98 to 99 percent of the time he was tied off while making girder splices (Tr. 195-198, 203). Palmer admitted, however, that "99 percent of the time" there was no line to attach to while accessing the work area, and that he would "free walk" north to south on the girders (Tr. 190). He also stated that at times he did not tie off while actually working (Tr. 180, 182).

David Palmer testified that no handrails were provided on the pics he used for crossing the girders from east to west (Tr. 216), and that he did not tie off when traveling from point to point (Tr. 218, 223, 227).

Ruhlin's field superintendent, James Underwood, met daily with supervisory personnel from each subcontractor to review safety procedures (Tr. 290). Specifically Underwood stated that he had explained Ruhlin's policy of requiring 100% fall protection with John Daley, president of Middle States Steel (Tr. 304). Underwood testified that he also discussed fall protection with Harvey Meyer, Middle States Steel's superintendent, at least three times prior to the start of steel

erection and again on the day girder assembly began (Tr. 291-97, 331-32; Exh. R-2, R-3).

Underwood, a "competent person" for purposes of the regulation, stated that he inspected the South Avenue bridge worksite daily (Tr. 308). Underwood testified that he inspected Middle States' steel erection operation every day that Middle States was on site (Tr. 309). Underwood testified that he never noted a fall protection violation during his inspections of those operations (Tr. 309, 319). Underwood stated that on the day steel erection began he observed Middle States employees attach a line under the top flange of a girder; he understood ironworkers would walk the bottom flange while tied off to that line (Tr. 299-301, 343). Ironworkers he observed on the steel were using lanyards attached to cables or a bridge clamp (Tr. 328). Underwood stated that based on his observations and the representations of Middle States' supervisory personnel, he believed that ironworkers were tied off 100% of the time (Tr. 327).

When OSHA first visited the worksite on March 31, 1993, Underwood had not yet performed his daily inspection (Tr. 315, 337). Underwood and Jeffrey Peecook, Ruhlin's safety manager, inspected Middle States' operation after speaking to CO Georgiades (Tr. 317-18). Neither saw any evidence that ironworkers were not tied off, and were assured by Middle States' superintendent that the ironworkers were working safely (Tr. 318, 368, 370, 372). Following the OSHA inspection Peecook issued a letter to Middle States reminding them of their obligation to use fall protection (Tr. 366-68).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991).

In regards to multi-employer worksites, the Commission has stated that:

> The duty we imposed upon a general contractor in *Grossman Steel & Aluminum Corp.* and *Anning-Johnson Co.* is a reasonable one; that is, we will

not hold a general contractor liable for violations which it could not reasonably be expected to detect or prevent.

Knutson Constr. Co., 4 BNA OSHC 1759, 1761, 1976-77 CCH OSHD ¶21,185, p. 25,481 (No. 765, 1976), *aff'd,* 566 F.2d 596 (8th Cir. 1977). Moreover, the general contractor's duty to detect and prevent violations is not conterminous with that of the employer creating, or immediately responsible for correcting, the hazard. In the exercise of reasonable diligence, a general contractor may rely in part upon the assurances of subcontractors with expertise in their areas, so long as it has no reason to believe that the work is being performed unsafely. *See; Blount International, Ltd.*, 15 BNA OSHC 1987, 1992 CCH OSHD ¶29,854 (No. 89-1394, 1992); *Sasser Electric and Manufacturing Co.*, 1984 CCH OSHD ¶26,982 (No. 82-178, 1984).

Here, the record is replete with evidence of Ruhlin's attempts to ascertain that 100% fall protection would be provided to Middle States' workers. Underwood familiarized himself with the types of protection to be provided and found them satisfactory.[1] The testimony that Ruhlin's own inspections failed to disclose ironworkers working without fall protection is accepted; the ironworkers' testimony indicates that while making connections, they did tie off, eschewing fall protection mainly when moving from one worksite to the next, a small portion of the workday.

The undersigned finds that Ruhlin exercised reasonable diligence in attempting to detect violations, and that Complainant failed to establish Ruhlin's actual or constructive knowledge of the cited hazard. Citation 1, item 2 will be vacated.

Alleged Violation of §1926.701(b)

Citation 1, item 3 alleges:

29 CFR 1926.701(b): All protruding reinforcing steel, onto and/or into which employees could fall or come against, was not guarded to the hazard of impalement:

The rebar located at the bridge abutment, north side, was not guarded.

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1 CO Georgiades did not state any objections to walking on the bottom flange of the girders while tied off to a catenary line strung below the top flange.

Facts

On April 2, CO Georgiades observed unguarded one inch reinforcing steel approximately 20 inches from the north abutment of the bridge protruding approximately three feet out of the ground (Tr. 63-67; Exh. C-3, C-7). The rebar was in plain sight, and had been in place since the concrete was poured in December or January (Tr. 346). The jobsite, though closed down for the winter, had been reopened since the second or third week of March (Tr. 346-47).

Georgiades testified that ironworkers had to make connections at the north abutment; on March 31 he saw employees going onto the steel at that location (Tr. 136, 161). Employees Scott and David Palmer testified that they gained access to the bridge at the north abutment and that a ladder had been braced against the rebar to provide access to the beams (Tr. 172-73, 215). Underwood was aware that ironworkers had to be in the area of the unguarded rebar in order to place the girders (Tr. 345).

Employees could fall from the abutment to the rebar, suffering impalement injuries to the eye or to internal organs which could result in permanent disability or death (Tr. 137).

The violation was abated on April 5, 1993 by Ruhlin (Tr. 77).

Discussion/Penalty

The evidence establishes the cited violation and Ruhlin's constructive knowledge thereof. A penalty of $1,750.00 was proposed.

Section 17(j) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business or the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

The Commission has further instructed:

> These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus.,* 15 BNA OSHC 1481, 1483, 1992

CCH OSHD ¶29,582, p. 40,033 (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*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Ruhlin is a large company, with over 200 employees (Tr. 128). Complainant's proposed penalty contains a 10% reduction for Ruhlin's prior history (Tr. 128). No evidence of bad faith was adduced at trial; the violation was promptly abated (Tr. 325). The gravity of the cited violation was correctly assessed as high. All of Middle States Steels' employees were exposed to the unguarded rebar every time they accessed or exited their worksite. The injury which could have been sustained in a fall would in all probability have been severe. The likelihood of a fall from the abutment is greater than that of a fall into the rebar from the ground.

Taking into consideration the relevant factors, the proposed penalty is found appropriate; $1,750.00 will be assessed.

Alleged Violation of §1926.20(b)(2)

Citation 1, item 1 states:

29 CFR 1926.20(b)(2): The employer did not initiate a program that provided for frequent and regular inspections of the jobsite, materials and equipment, by competent person(s) designated by the employer:

On site: In that during the course of the OSHA inspection, alleged violations of 29 CFR 1926 were documented which a competent person should have identified and had corrected during the course of the required frequent and regular inspections of the jobsite.

The cited standard provides:

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

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

Complainant in this matter presented no evidence evaluating Respondent Ruhlin's safety programs or inspection schedules, but relied wholly on the existence of the two §1926 violations cited above to prove its case. The undersigned finds that in the absence of any evidence suggesting the contents of an adequate program, the mere existence of the alleged violations, even where proved, is insufficient to establish a violation of §1926.20(b).

Ruhlin's safety program provided for daily inspections of the jobsite by a competent person. As discussed in item 2 above, the testimony establishes that Ruhlin exercised due diligence in supervising the steel erection operation. The persistence of the rebar violation at item 3, though affirmed, may be attributed to causes other than a failure to inspect[2], and this judge declines to draw from it an inference that inspections were neither frequent nor regular.

Item 1 will be dismissed.

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. Citation 1, item 1 is VACATED.

2. Citation 1, item 2 is VACATED.

3. Citation 1, item 3, alleging violation of §1926.701(b) is AFFIRMED and a penalty of $1,750.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: April 29, 1994

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2 CO Georgiades testified that Underwood was aware of the unguarded rebar, but had come late to the South Avenue bridge site and hadn't gotten around to guarding it yet (Tr. 143-44).