United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. American Bridge Company, Respondent.	OSHRC Docket No. **09-0130**

Appearances:

Joseph B. Luckett, Esquire, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

Mary Ann DiIanni, Esquire, Cohen & Grigsby, P.C., Pittsburgh, Pennsylvania
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

American Bridge Company (AB) is engaged in the construction of bridges and other structures throughout the United States. On June 13, 2008, AB was constructing two bridges at the Kentucky Dam, near Grand Rivers, Kentucky when an ironworker fell approximately 70 feet from a steel girder. As a result of the fatality, the Occupational Safety and Health Administration (OSHA) inspected the project and issued serious and willful citations to AB on December 11, 2008. AB timely contested the citations.

The serious citation alleges AB violated 29 C.F.R. § 1926.307(d)(1) (item 1) for failing to guard a winch pulley in the barge area; 29 C.F.R. § 1926.550(a)(9) (item 2a) for failing to barricade the swing radius of the crane; 29 C.F.R. § 1918.55(c)(1) (item 2b) for failing to guard the swing radius of the crane; 29 C.F.R. § 1926.759(a) (item 3) for failing to secure bolt buckets against accidental displacement; and 29 C.F.R. § 1926.760(d)(1) (item 4) for failing to supervise the installation of horizontal lifelines and protect them against being cut or abraded. The serious citation proposes a total penalty of $20,000.00.

The willful citation alleges AB violated 29 C.F.R. § 1926.760(b)(1) for failing to protect employees exposed to fall hazards of approximately 70 feet while working without fall protection. The willful citation proposes a total penalty of $70,000.00.

The hearing was held on September 29-30, 2009 in Paducah, Kentucky. The parties stipulated jurisdiction and coverage (Tr. 10). The parties also announced settlement of the violations alleged in the serious citation (Tr. 8). The terms of the parties' stipulation of partial settlement dated November 2, 2009 are approved and incorporated into this decision.

The issues remaining in dispute involve the alleged willful violation of §1926.760(b)(1). The parties filed post hearing briefs.

AB denies the violation of §1926.760(b)(1), the willful classification and the reasonableness of the proposed penalty. AB also asserts unpreventable employees misconduct because of the employee's failure to utilize his fall protection equipment.

As discussed more fully, the violation of § 1926.760(b)(1) is affirmed as serious and a penalty of $6,000.00 is assessed.

The Inspection

AB's is engaged in the business of constructing bridges and other structures. AB's principal place of business is in Coraopolis, Pennsylvania. AB employs approximately 500 employees. As a union employer, AB hires craft employees from the local union halls (Tr. 216, 348).

In September 2005, AB contracted as prime contractor with the U.S. Army Corps of Engineers (Corps) for the Tennessee Valley Authority to perform the construction work on the "superstructures" project at the Kentucky Lock and Dam located near Grand Rivers, Kentucky. The project involves routing the existing P & L Railway lines and U.S. Highway 62/641 from crossing the Kentucky Lock and Dam to the construction of new railroad and highway bridges across the Tennessee River below the dam. When completed, the new bridges would span approximately 2,000 feet. AB's steel erection work for the new bridges began in May 2007 and was continuing as of the date of the hearing. The Corps is responsible for enforcing the contract requirements (Exhs. R-1, R-2; Tr. 23-24, 51-53, 267).

The contract provision most germane to this case requires AB's ironworkers to utilize 100 percent fall protection when working more than 6 feet above the ground. This provision was incorporated into AB's *Site Safety & Health Plan.*

According to Corps civil engineers, George Ellis (supervisor) and Stephen Moneymaker, AB's ironworkers, almost from the beginning of the project, were repeatedly observed working without fall protection when working above 6 feet in situations such as unloading the girders from trucks or pontoons. These instances involved heights of approximately 15 feet or less. When observed, the Corps documented the incidents and notified AB supervisors who told them the matter would be handled (Exhs. C-1, C-3, R-8; Tr. 26-28, 38, 71-72).

On June 13, 2008, approximately fifteen AB ironworkers were securing steel girders on a concrete column at the river's edge. The girders were hoisted into place by a crane. Each girder on a column (pier), referred to as "haunch girder," contained a bottom half and a top half which were installed separately. When joined, the girder was 14 feet high. The girders were spaced approximately 10 feet apart and consisted of five parallel lines across the column. To hold the girders in place, cross-bracing, spaced approximately 16 feet apart, was installed between each line of girders. The bottom flange of each girder which ironworkers used to walk on, was 18 inches wide (Exhs. C-4, C-5; Tr. 120, 172-173, 321, 326).

At approximately 10:00 a.m., the bottom portion of girder line 1 had been bolted to the column and the top half of the girder was being placed for bolting to the bottom half. The crane was holding the top half of the girder slightly above the bottom half to get it aligned. The top half had not been bolted to the bottom half. The raising crew, who was responsible for connecting the steel together as it came up, was on the girder to set the top half and cross bracing. Foreman Joey Walker was on top of girder line 2 directing the crew's work (Tr. 101-102, 118, 124, 286).

James Jones, a journeyman ironworker, while on the flange, inside of girder line 1, between girder lines 1 and 2, was moving from the end of the girder toward the column to help install a cross brace. According to witnesses, when Jones stepped off a gusset plate, his leg buckled and he fell approximately 70 feet to his death. Jones had been employed by AB for approximately one year on the bolt-up crew which, on the day of the accident, was assisting the raising crew (Tr. 34, 103, 151).

OSHA compliance safety officer Michelle Sotak investigated the accident after another compliance officer had initiated the investigation.[1] Based upon OSHA's investigation, the citations including the willful citation alleging a violation of § 1926.760(b)(1) were issued to AB.

Discussion

Alleged Violation

The Secretary has the burden of proving a violation of § 1926.760(b)(1) and must show:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

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

There is no dispute that on the day of the accident, Jones, who was wearing a safety harness with a lanyard, apparently unhooked his fall protection equipment before he fell. Ironworker Todd Tyler testified that Jones untied his lanyard from a retractable, stepped down from a gusset plate on the girder, lost his balance and fell (Tr. 151). AB foreman Joey Walker told OSHA that when he saw Jones stumble, he "was waiting for his lanyard to catch him." He "expected Jones to fall into his lanyard" (Tr. 242-243).

Willful Citation No. 2
Item 1 - Alleged willful violation of § 1926.760(b)(1)

The citation alleges that "on or about June 13, 2008, employees were exposed to fall hazards of approximately 70 feet while working without fall protection." Section 1926.760(b)(1) provides

> Each connector shall: Be protected in accordance with paragraph (a)(1) of this section from fall hazards of more than two stories or 30 feet (9.1 m) above a lower level whichever is less.

[1]AB's claim of bias by the OSHA inspector because she relied upon the written findings of the Corps and did not conduct an independent investigation, is rejected. AB failed to assert the affirmative defense of unreasonable inspection under § 8(a) of the Occupational Safety and Health Act (Act) in its answer or subsequent pleadings and therefore the defense is deemed waived. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). Also, the use of other sources as a basis for a citation does not render the inspection or subsequent citation unreasonable. There is no showing the inspection failed to substantially comply with the statutory requirement or that AB was prejudiced. AB supervisors were interviewed and allowed to state their position (Exhs. C-15, C-16, C-17). Although aspects of the inspection could have been more complete, such conclusion is based upon hindsight and a review of the trial record. Such hindsight does not establish that the citation issued lacked substantial justification or reflect inspector bias. *Gem Industrial, Inc.*, 17 BNA OSHC 1185 (No. 93-1122, 1995).

Although the citation alleges "employees," the record fails to show that any employees, other than Jones, were not fully utilizing their fall protection equipment on June 13, 2008.

The general requirement under OSHA for employees engaged in steel erection activity is that if the employee is more than 15 feet above a lower level, the employee must be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems. *See* § 1926.760(a)(1). If the employee, however, is engaged as a "connector," the requirement of §1926.760(b)(1) for fall protection applies to fall hazards of more than two stories or 30 feet, whichever is less. At heights between 15 and 30 feet, the connector must be provided with a personal fall arrest system, positioning device system or fall restraint system and wear the equipment necessary to be able to be tied off; or be provided with other means of protection from fall hazards in accordance with §1926.760(a)(1). *See* §1926.760(b)(3).

There is no dispute that AB's ironworkers including Jones were working as "connectors" when installing the top half of the girder on June 13, 2008. A connector is defined at §1926.751 as "an employee who, working with hoisting equipment, is placing and connecting structural members and/or components."

The record establishes, without dispute, the application of the steel erection standard at §1926.760(b)(1),[2] the exposure of the ironworkers on June 13, 2008 to a fall hazard of approximately 70 feet while installing and bolting the girder, and the failure of Jones to utilize his fall protection equipment at the time of the accident. The Secretary, therefore, has met her burden of proving that the cited standard applies, the terms of the standard were not met, and employees were exposed to a fall hazard of more than 30 feet.[3]

The element of employer knowledge is also established by the record. In order to show an employer's knowledge, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engd Form Co.*,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986).

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[2]"Steel erection" is defined at §1926.751 as "the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection."

[3]Issues not briefed are deemed waived. See *Georgia-Pacific Corps.*, 15 BNA OSHC 1127 (No. 89-2713, 1991).

AB did not have actual knowledge of Jones' failure to utilize his fall protection equipment. Jones was wearing his safety harness and lanyard. There is no evidence that Jones was observed by supervisory personnel not being tied off on the day of the accident or on an earlier date.

However, foreman Walker's statement that he expected Jones to fall into his harness when he saw him stumble indicates that Jones was in plain view of Walker. At the time of the accident, Walker was standing on girder line 2 supervising the erection of the top half of girder line 1. He was approximately 20 feet from where Jones and the other crew members were working on girder line 1 (Tr. 172-173). Also, Walker told OSHA that there were times when he was not tied off and he had "seen people not tied off, maybe passing a point going around something maybe just not tied off." Walker told OSHA that there were not enough retractables for the employees to work (Exh. C-17; Tr. 179).

An employer can have constructive knowledge of a violation if it is shown the employer failed to use reasonable diligence to discern the presence of the violative condition. *Pride Oil Well Serv*., 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). "Reasonable diligence" involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent the occurrence of violations. *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003).

In this case, AB should have known of Jones' failure to fully utilize fall protection equipment on the Kentucky Dam project. Ironworkers, Shane Lyman, Ricky Smith, and Todd Tyler, testified they had observed other ironworkers not tied off on repeated occasions prior to the accident (Tr. 108, 131, 154). Also, prior incidents documented by the Corps put AB on notice that ironworkers were not fully complying with the 100 percent fall protection rule. Corps engineer Moneymaker testified that prior to the accident, he had observed "AB employees not tied off sometimes daily, sometimes weekly. At various times I saw AB employees not tied off when steel was started - I would report it to their safety officer/superintendent/or general foreman" (Tr. 64-65).

The Corps even issued a warning to AB on November 28, 2007 that:

> On numerous occasions there have been observations of your personnel not abiding with the requirement of 100% tie-off when work at heights greater than six feet. There have been several discussions with the site safety officer and field supervision on this

> issue and it appears to still be a problem. This office expects your site safety officer and your project and field supervisors to strictly enforce this contract requirement. It is expected that if a worker is observed to not be in 100% compliance with this requirement, that the work in that area be stopped and the worker removed from the site and be suspended for the remainder of that day and the following day. Repeat offenders will be permanently removed from the project. Field supervision found to not be strictly enforcing this requirement could also face removal and replacement from this project.
> (Exh. C-1).

Also, constructive knowledge is shown by AB supervisors. General superintendent Mike Wade told OSHA that "on occasion seen ees' not tied off" (Exh. C-15). Similarity, general foreman Larry Tussey stated to OSHA, "I have seen guys not tied off" (Exh. C-16).[4] He stated that "the only time they cheat is when they are walking." Tussey was also observed not tied off (Tr. 67).

Thus, the record establishes AB's constructive knowledge of the ironworkers' failure to utilize fall protection. There is no showing by AB of adequate supervision of the ironworkers and that it took adequate measures to prevent their failure to utilize their fall protection. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel.[5] *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). When a supervisory employee has constructive knowledge of the violation conditions, knowledge is imputed to the employer. *Dover Elevator Co*. 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

AB's violation of § 1926.760(b)(1) is established.

Unpreventable Employee Misconduct

[4]Although Tussey did not sign his interview, he did not refute that he gave the statement. Tussey admitted that he not only saw employees not tied off but he also was not tied off on at least one occasion (Tr. 337-338).

[5]Foreman Walker is considered a supervisor. An employee who has been delegated authority to direct the work of another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos 86-360 86-469, 1992).

AB asserts that the violation of § 1926.760(b)(1) was the result of employee misconduct. AB claims its work rule requires the 100 percent utilization of fall protection which was enforced through training and its disciplinary program.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

OSHA agrees AB has an appropriate fall protection rule. For the Kentucky Dam project, the rule required 100 percent fall protection when exposed to a fall hazard in excess of 6 feet. Compliance with such a rule would also mean compliance with OSHA's fall protection rule for steel erection. AB Safety Director Henry Mykich authored the site safety plan for the Kentucky Dam project which incorporated the 100 percent rule above 6 feet (Exhs. R-8, R-11; Tr. 341).

The record also shows that the ironworkers including Jones received training on the fall protection rule. AB's safety training programs included initial orientation as well as weekly toolbox safety meetings (Exhs. R-9, R-10, R-13; Tr. 344-346). The safety orientation by AB covered, among other items, general construction rules, code of safety practices, and a review of the company safety rules including the fall protection rule. The weekly toolbox talks discussed various topics including fall protection. During his employment, Jones attended 26 toolbox safety meetings and fall protection topics were discussed 19 times. Ironworker Todd Tyler testified that the ironworkers had been doing this work for a long time and did not need to be given instruction because "we knew what to do as far as making the piece and what had to be done" (Tr. 153).

As to its disciplinary program, AB supervisors, Wade and Tussey, testified that they had verbally warned employees with respect to the tie off rule (Tr. 300, 331-333). Mykich testified that the company disciplinary procedure incorporated in the Kentucky Dam site plan requires action against an employee who has committed a "knowing" infraction of a safety rule (Tr. 365). If it was unknowing, a written warning would not be mandated under the site plan.

The record shows that written warnings for infractions were issued to two ironworkers prior to the accident; Jason Donaldson on May 29, 2008 and foreman Troy Crawford on February 26, 2008 (Exhs. R-5, R-15; Tr. 300-302, 365-367). Superintendent Wade stated he directed a written

warning to Donaldson for not wearing a harness. Donaldson was laid off the next day for lack of work. This was the incident documented by the Corps which involved an ironworker at a height of more than 30 feet (Exh. C-3).

AB's unpreventable employee misconduct defense is rejected. The record lacks evidence of AB's monitoring for hazardous conditions including the failure to utilize fall protection. Also, its disciplinary program was not shown to be uniformly enforced.

AB failed to show it exercised reasonable diligence in the monitoring the employees' use of fall protection equipment while engaged in steel erection. AB's *Site Safety & Health Plan* requires (1) the Project Safety Specialist to conduct daily safety and health inspections of the site and maintain a written log, (2) the Construction Superintendent to observe each foreman's operation once each day, (3) the Project Manager to make periodic audits of the project, (4) each Foreman and General Foreman to oversee assigned work areas to detect hazards, and (5) the Corporate Safety Director to conduct and document periodic audits of the project (Exh. R-8, p. 30). There is no evidence these inspections or audits were conducted by the appropriate AB supervisor as outlined by the site plan.

Also, to prove adequate enforcement an employer must present evidence of having a disciplinary program that was effectively administered when a safety work rule violation occurs. In this case, no one, including the superintendent, appears to have known what the disciplinary program required. Many ironworkers were observed not using fall protection.

Despite Mykich's testimony that only "knowing" infractions require disciplinary action, a reasonable reading of AB's written discipline program as set forth in its *Site Safety & Health Plan*, suggest otherwise. The *Plan* requires, in part:

> When there is willful misconduct on a job site - whether it is a violation of a safety rule or any other work rule - disciplinary action must be taken.
>
> Safety Bulletin No. 29 outlines the Company's three step disciplinary procedure. Following the observance of an infraction of an established work rule, a written warning shall be given to the employee. Subsequent infractions shall result in a written warning with suspension and eventual discharge from the project. However, depending on the severity of the infraction, immediate suspension or discharge may be warranted. (Exh. R-8, p. 27).

By the use of "shall" any infraction of a project safety rule, such as the failure to utilize fall protection, could require at least a written warning.

Also, the record shows the supervisors and employees did not understand the disciplinary program and it was not followed. The established work rule on the project required 100 percent fall protection above 6 feet. There is no mention of a verbal warning in AB's disciplinary policy. According to General Superintendent Wade, the disciplinary policy required first a verbal warning, followed by a written warning and then termination (Tr. 299). However, although he had observed Tyler without fall protection on several occasions, he had only issued him verbal warnings, never a written warning (Tr. 318). He testified that he issued verbal warnings to employees and two written warnings to all employees on the project (Exh. R-7; Tr. 300). Even accepting Safety Director Mykich's testimony that the policy applies to "knowing" infractions, a worker's violation of a 100 percent fall protection rule would appear to have to be knowing. It is hard to imagine a situation where it would be unknowing.

AB's employee misconduct defense is rejected.

Willful Classification

The Secretary alleges AB's violation of § 1926.760(b)(1) was willful. "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc*., 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997).

The Secretary considers AB's violation of § 1926.760(b)(1) showed plain indifference to employee safety. She argues that plain indifference is established by the observations of the Corps, the difficulty of ironworkers in utilizing their fall protection equipment, and the inadequate enforcement by AB of safety violations. The issue is whether the record establishes AB's plain indifference to the requirement for fall protection during steel erection.

Jones was wearing appropriate fall protection and was utilizing his lanyard until he unhooked it immediately before he fell. There is no showing other ironworkers on the crew that day were not fully utilizing their fall protection equipment.

With regard to the Secretary's claim of plain indifference, the record is insufficient to support a classification of willful.

1. Observations by the Corps

The Secretary argues the prior incidents of employees' failure to utilize fall protection documented by the Corps shows AB's plain indifference. During the period of approximately May 2007 to June 2008, the Corps identified approximately five instances where it advised AB of the lack of fall protection by its employees.[6] AB was repeatedly advised by the Corps that employees were violating the 100 percent tie off rule above 6 feet. Corps engineers' Ellis and Moneymaker testified that problems began on the first day of steel erection in May 2007 and continued until the accident in June 2008. Ellis was so concerned that he wrote a letter to AB on November 28, 2007 warning that any further violation of the tie off rule could result in the work being stopped and the violating employee removed from the project.

Contrary to the Secretary's assertions, the Corps' observations fail to establish AB's plain indifference to employee safety or to compliance with OSHA's steel erection requirements. Of the incidents documented by the Corps, only one ironworker (Donaldson) was at a height of more than 30 feet. He was exiting the stair tower at Powerhouse Island without a fall protection harness (Tr. 76). The remaining documented incidents involved fall hazards of less than 15 which were contrary to the 6-foot contract rule of the Corps but not OSHA's steel erection standards. Also, there is no showing the incidents documented by the Corps involved connectors or employees performing steel erection not utilizing fall protection more than 30 feet or even more than 15 feet.

Corps engineer Ellis testified that his complaints regarding the lack of fall protection only involved employees not tied working below 15 feet. Neither the QARs nor the letter from the Corps showed instances where AB violated OSHA's 30-foot steel erection rule for connectors (Tr. 42-43). Corps engineer Moneymaker testified that he only reported the one instance of more than 30 feet in the QAR. Moneymaker did not know if further action was taken by AB. He admitted that with the exception of one instance on May 29, 2008, none of the entries in his QAR involved situations above 30 feet (Tr. 86-92). The record shows that the May 29 incident cited by the Corps was followed by the issuance of a written warning by AB to the employee (Donaldson) for failure to follow AB's fall protection rule. Donaldson was laid off the following day (Tr. 94, 300-302).

[6]AB's claim of bias by the Corps because of its interest in shifting responsibility and blame for the accident is rejected. The court finds that the witnesses from the Corps were merely performing their jobs in ensuring compliance with the contract provisions. Any exuberance shown by Ellis' and Moneymaker in describing AB's work is more due to the lack of experience in supervising bridge projects and their mistaken belief the Corps' 6-foot rule was the same as OSHA's steel erection requirements (Tr. 34-36, 41, 84-85).

Also, the Corps never recommended that AB's work stop on the project (Tr. 95). In fact, the Corps wrote in its *Safety Gram* that:

> The Kentucky Lock staff and contractors personnel have been diligent in enforcement of strict safety requirements regarding personal protection equipment and fall arrest systems (Exh. R-4).

For the purpose of a willful classification, there is a difference between the employees who violated the Corps 6-foot rule and the OSHA's 30-foot rule. The incidents documented by the Corps do not establish plain indifference to employee safety while performing steel erection activities in accordance with OSHA's steel erection requirements.

2. ___Difficulty in Using Fall Protection Equipment

The Secretary argues that the ironworkers were sometimes unable to secure their fall protection equipment and therefore, AB showed plain indifference to the use fall protection. According to the Secretary, AB did not take adequate steps to ensure that ironworkers were always capable of using fall protection. Walker told OSHA that there were not enough retractables for the employees to tie off (Tr. 179). The employees who testified stated that they had difficulty being tied off when they moved through the cross braces. They claimed that there was no place for Jones to tie off when he moved through a cross brace just before he fell. Also, no one was on top of girder line 2 to help him with his retractable and the bolt holes in girder line 1 could not be used because the top half of the girder was being set and it would snap the lanyard's hook (Tr. 114).

The Secretary's arguments are not supported by the record and fails to show plain indifference. It is noted that the other approximate 14 ironworkers on the day of the accident were not shown without fall protection. Jones also was apparently tied off immediately before he "unhooked" his lanyard. There is no showing Jones was not tied off prior to the accident or at any other time during his employment.

On the day of the accident, there were a number of locations according to AB where Jones could have tied off including the bolt holes in the top flange of the lower girder on girder line 1 and the cross frames with the use of retractables. Also, the bolt holes in girder line 2 were available as anchorage points to tie off for the ironworkers on girder line 1 (Tr. 115, 125, 286-289, 328-329).

According to witnesses, the top half of girder 1 had not been set in place on the bottom half (Exh. C-4; Tr. 115, 286). There was a gap between the girder sections which allowed sufficient

space for hooking the lanyard (Tr. 291, 331). According to Wade, the hook on the lanyard would not have interfered with the setting of the top half of the girder because it was not set (Tr. 298). Ironworker Shane Lyman testified that the bolt holes in the top flange of the lower girder were available for Jones to tie off before the top girder was set. Although ironworker Ricky Smith said the piece was being set when the accident happened, he later admitted that he did not have first hand knowledge of the configuration of the girders and he was not in a position to see Jones. He agreed that photographs of the site showed that the piece was not set and there was a large space between the sections (Tr. 143, 145-146). Ironworker Tyler acknowledged that he did not know the amount of space between the sections but agreed that if there was a big gap, the bolt holes could be used as anchorage points to tie off (Tr. 162). Lyman, Smith and Wade agreed that the signal man on the day of the accident would not have directed the section to be moved if an ironworker was out on the girder tied off. The signal man's job was to make sure all ironworkers were clear before the piece moved (Tr. 114, 143, 298-299).

Also, OSHA's claim that there was an insufficient number of retractables is not supported (Tr. 178). OSHA presented no evidence that there was a need for every ironworker to have a retractable available to him (Tr. 237). According to superintendent Wade, there were sufficient amount of retractables because "not every employee involved in steel erection need to have a retractable" (Tr. 292-293). There were, also, at least two alternatives to the use of retractables for tying off; the bolt holes in girder line 1 and the bolt holes in girder line 2 (Tr. 288-289).

AB's plain indifference is not established because there were adequate places for ironworkers to tie off.

3. ___AB's Failure to Enforce

According to the Secretary, AB's plain indifference is shown by its failure to enforce the fall protection rule. AB supervisors on-site observed employees not tied off and did not enforce the rule in accordance with its disciplinary program. No AB employee was ever suspended even though the Corps continued to report infractions of the fall protection rule. The employees only received verbal warnings. The Secretary claims AB's concern was getting the work done, not employee safety, and employees knew that there would be no repercussions from failing to tie off.

Again, the Secretary's evidence is not sufficient to show plain indifference. The citation, in this case, involves an alleged violation of OSHA's steel erection requirements for connectors.

For the most part, the violations documented by the Corps were of the project's 6-foot rule at heights less than 15 feet. The infractions did not involve violations of OSHA's steel erection requirement for connectors.

Although ironworkers testified to observing employees not tied off, there was no showing the incidents involved connectors at heights above 30 feet while engaged in steel erection. Ironworker Lyman stated it was "not often occurrence" for him to observe other employees not tied off (Tr. 108). When asked if he saw employees not tied off, Smith stated that "everybody cut a corner every now and then" (Tr. 131). These observations do not show the employees were involved in steel erection activities as connectors. Also, it is noted Smith testified that he fell into his retractable when he was working at a height of approximately 30 feet (Tr. 128). Tyler's testimony that he saw employees not tied off on a daily basis, is not given weight because he did not identify the work being performed or the heights were above 30 feet. Also, it is noted Tyler was involuntarily placed on a no hire list by AB (Tr. 148).

AB issued a general written warning to all employees on November 28, 2007 (Exh. C-18). Also, written warnings were issued to two employees including Donaldson and foreman Crawford (Exhs. R-5, R-15). Donaldson was laid off the next day for lack of work (Tr. 79, 94).

Wade told Sotak that he enforced a 100 percent fall protection policy (Tr. 250). Wade and Tussey testified that on occasion, they had verbally warned employees with respect to the tie off rule (Tr. 300, 331-332). Safety director Mykich testified that this did not violate the AB policy on-site which he authored (Tr. 364). As stated, he claims the disciplinary policy provides for written warnings if the infraction was "knowing." If it was "unknowing," a written warning was not required. Although as discussed, the plan can be read otherwise, Mykich's explanation is reasonable. Also, Tussey testified that he never had any problems with employees not tying off above 15 feet and never had to warn the same employee twice (Tr. 332-333).

An employee's failure to comply with the project's 6-foot fall protection rule does not establish AB's plain indifference to OSHA's steel erection rule for connectors. A willful classification is not found.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business,

history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

AB is a large employer with approximately 500 employees and is not entitled to credit for size. AB is also not entitled to credit for history because it received serious citations in the proceeding three years (Tr. 216-217). AB is entitled to credit for good faith based upon its safety program which included work rules and safety training. Mykich testified that as Safety Director, he complies a report which tracks the safety performance for each project. The safety record for AB at the Kentucky Dam project in 2005 to the date of the accident was good. In the 100,000 man-hours that were worked during that time period, there were zero lost time work related injuries. Most of the man-hours were worked during the two years (2007 and 2008) when steel erection was ongoing (Exh. R-14; Tr. 358-359).

A penalty of $6,000.00 is reasonable for serious violation of § 1926.760(b)(1). There is no dispute Jones was not properly utilizing fall protection. His fall was 70 feet. His supervisor was within 20 feet when the accident occurred and in plain view. Jones' exposure was of a relative short duration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing 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 upon the foregoing decision, it is ORDERED that

Serious Citation no 1:

1. Item 1, alleged serious violation of § 1926.307(d)(1) is affirmed as other than serious, and a penalty of $1,500.00 is assessed pursuant to the parties' stipulation of partial settlement.

2. Items 2a and 2b , alleged serious violations of § 1926.550(a)(9) and § 1918.55(c)(1) are withdrawn by the Secretary pursuant to the parties' stipulation of partial settlement.

3. Item 3, alleged serious violation of § 1926.759(a) is withdrawn pursuant to the parties' stipulation of partial settlement.

4. Item 4, alleged serious violation of § 1926.760(d)(1) is affirmed with the withdrawal of instance (a), and a penalty of $2,500.00 is assessed pursuant to the parties' stipulation of partial settlement agreement.

Willful Citation no. 2:

1. Item 1, alleged willful violation of § 1926.760(b)(1) is affirmed as serious, and a penalty of $6,000.00 is assessed.

\s\ Ken S. Welsch
KEN S. WELSCH
Administrative Law Judge

Date: March 1, 2010