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. CLEVELAND ELECTRIC ILLUMINATING CO., Respondent.	OSHRC Docket No. 91-2198

DECISION

BEFORE: WEISBERG, Chairman and MONTOYA, Commissioner.*

BY THE COMMISSION:

Cleveland Electric Illuminating Company ("CEI"), a public utility, operates a training facility at its Clinton Substation facility in Brooklyn, Ohio. At issue here is a citation alleging that CEI violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") by failing to provide fall protection to employees undergoing training at heights up to 36 feet above ground. Administrative Law Judge Edwin Salyers affirmed the citation. For the reasons stated below we affirm his decision.

I. *Background*

Following an inspection, the Secretary issued a citation alleging that on March 18-20,

*Commissioner Foulke has recused himself from this case.

1991, CEI violated section 1910.132(a)[1] by requiring employees to "traverse on 4" wide angle-iron rails of a steel structure (bridge) at heights up to 36' without fall protection . . . ."

Five employees were involved in a CEI training program, which CEI has offered since 1971, that attempts to simulate the conditions employees will face when working at electrical substations. Following classroom instruction and practice walking on angle iron structures on the ground, the employees are required to either walk or side-step[2] across 2- to 4-inch-wide steel latticework bridge structures at heights of 8, 25, and 36 feet. After achieving a comfort level while crossing one level, the trainees progress to the next higher level. They are not provided with any form of fall protection. The structures were fitted with ropes that the trainees could hold onto, but they were informed that these were merely there to increase their confidence while crossing the bridge, and were not safety ropes. The employees were generally discouraged from using the ropes and, on the third day, the ropes were removed. Some of the trainees refused to cross without ropes. As a final test, the trainees were asked to cross a 56-foot tall structure, but they refused, with or without ropes.

Eugene Saurwein, an electrical supervisor who was one of the training instructors, stated that no trainee has fallen during his seven years as an instructor. Although one employee testified that he felt intimidated by Saurwein during the training, the evidence shows that, while Saurwein exhorted the trainees to cross the various heights, they were

---

[1]The standard provides:

> **§ 1910.132 General requirements.**
>
> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation[,] or physical contact.

[2]Under this method, the employee holds onto the top rail, with his feet on the bottom rail, and steps sideways across the bridge.

allowed to proceed at their own pace and were never forced to cross a level if they felt uncomfortable. During training, one employee caught his toe and tripped but prevented himself from falling by grabbing the structure.

The employees involved in the citation were experienced electrical installers, each of whom had been in his current position for three to four years. However, none had yet received climbing training.[3] Despite their failure to complete the training, none of the employees were removed from their positions as electrical installers. Saurwein testified that, had the employees been raw trainees, rather than experienced employees, their refusal to cross at the 56-foot level would have resulted in their failing the course and returning to their previous jobs.

CEI's justification for the lack of fall protection was explained by a number of witnesses. Craig Kaspar, a CEI general manager, testified that repair and construction work at substations sometimes requires electrical installers to walk the bridges without fall protection. Saurwein and Morris Mach, a former electrical installer who is product manager for a company that makes video-based training films, testified that the normal way for experienced climbers to traverse a substation structure was to walk the top of the bridge without holding on. Because the substations are highly electrified, it is not feasible to use safety nets to protect these employees. As a result, employees must be psychologically prepared to "walk the steel." An employee who freezes while on the steel must be rescued, thereby exposing himself and his rescuers to the danger of falling.

Robert G. Kaplan, a psychologist qualified as an expert in the "psychology of fear," testified that CEI's training program was appropriate and necessary to enable employees to work at heights without fall protection. In Dr. Kaplan's view, such exposure to anxiety-producing situations is absolutely necessary to alleviate fear. Kaplan testified that CEI's training program helps its participants deal with the normal fear of heights. He especially approved of the way the training progresses from walking at increasing heights with handholds available to walking at increasing heights without the handholds. In Dr. Kaplan's

---

[3]They had been scheduled for such training when first hired as electrical installers, but the session was cancelled due to bad weather.

view, individuals will perform physical tasks best at an optimal level of anxiety. Dr. Kaplan believed that an employee who had gone through a program such as CEI would be better prepared to deal with the anxiety associated with climbing a 56-foot structure, and would be far less likely to freeze, than an individual who had never been exposed to that situation. According to Dr. Kaplan, using fall protection during a training program such as CEI's would prevent the trainees from learning how to manage anxiety and would endanger their safety.

The employees who were engaged in the training testified that they had never seen any other employee free-walk[4] on the steel bridges. They stated that they would usually be taken directly to their work area on the substation by aerial equipment (*i.e.*, crane bucket), or would get to their work area by moving within the angle iron latticework. They also testified that although employees tie-off when they get to their work stations on a bridge, they must often untie their belts to move between the electrical switches they are working on.

II. *Judge's Decision*

Judge Salyers affirmed the item as serious and assessed a $5000 penalty. He held that section 1910.132(a) applied to the cited condition, that the Secretary established that a fall from a height of 36 feet is a recognized hazard likely to result in death or serious physical injury, and that CEI knew of the exposure.

The judge found two flaws with CEI's claim of "psychological" infeasibility. First, he noted that the employees chosen for the program were experienced employees who had not shown any difficulties coping with heights. The judge found that, if the purpose of the training was to desensitize employees to heights, the participants should have been employees who had such difficulties. To choose employees who had no problems working at heights needlessly exposed them to a serious fall hazard.

---

[4]Free-walking is walking along the angle irons of the bridges without the use of fall protection or any form of support, such as holding on to overhead irons.

The second flaw found by the judge arose from Dr. Kaplan's testimony that the program is ineffective if employees are not "required" to free-walk without fall protection. Since Saurwein testified that employees are given the option of walking while holding on to the ropes, the judge found that providing no fall protection cannot be the essential element of the training program.

The judge concluded, however, that notwithstanding these flaws, the defense must fail because there is no Commission precedent for psychological infeasibility.

III. *Discussion*

A.

To establish a violation of section 1910.132(a), the Secretary must establish that the employer had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard warranting the use of personal protective equipment. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993 CCH OSHD ¶ 30,045, p. 41,232-33 (No. 88-1250, 1993), *rev'd on other grounds*, 31 F.3d 653 (8th Cir. 1994); *Armour Food Co.*, 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD ¶ 29,088, p. 38,881 (No. 86-247, 1990). Evidence of industry custom and practice will aid such a determination, but it is not necessarily determinative.

We find that the Secretary has established that the employees undergoing training were exposed to a hazard warranting the use of personal protection equipment. In fact, CEI does not dispute that its employees were exposed to a serious fall hazard and that it was physically feasible for the employees to be protected by safety belts.

CEI has not shown, however, that the training of the five employees would be frustrated by the use of safety belts. First, there was no evidence that the electrical installer's job required work without fall protection. The employees' duties may involve free-walking, but such occasions are infrequent and, when they do occur, employees can utilize methods other than free-walking (*i.e.* crawling, side-straddling, walking inside the latticework) to reach their work stations. There was evidence that, on occasion, the electrical installers would have to unhook their safety belts to make short movements between work locations on a bridge. However, during such movements, they would either walk between the

latticework, crawl, hold on to the steel above them, or use other methods to reduce the risk of falling. Both Kaspar and Saurwein testified that employees did free-walk the steel, but then conceded that other methods of crossing usually are available.[5] Second, the record did not establish that not using belts was an essential element of the training. The trainees were urged, but not required, to free-walk without using the ropes. Despite their failure to complete the course, they were allowed to remain electrical installers because, according to CEI, they were already proven, experienced employees. As the judge properly noted, this "optional" element is inconsistent with CEI's assertion that training without fall protection was necessary for these employees to work safely.

We therefore find that CEI had reason to know that the five employees being trained on the date of the inspection were exposed to a fall hazard requiring the use of personal protective equipment.[6] Because the evidence also establishes that CEI did not require the use of such equipment,[7] we find that CEI failed to comply with section 1910.132(a).[8]

---

[5]In this regard, Saurwein testified as follows:

> Q. How often is it that you would absolutely have to walk the top of the bridge because there is no other way to get to the work area
> A. Not real often.

[6]Chairman Weisberg agrees that CEI failed to comply with section 1910.132(a) on March 18-20, 1991 with regard to the five employees at issue here. However, he would also find based on the evidence presented that CEI's entire program of training at heights without fall protection violated the standard. The Chairman would treat CEI's defense of "psychological infeasibility" as a claim that employees will be exposed to a greater hazard if they are not trained without fall protection. *See, e.g., Spancrete Northeast, Inc.*, 16 BNA OSHC 1616, 1618, 1994 CCH OSHD ¶ 30,366, p. 41,888 (No. 90-1726, 1994), *aff'd*, No. 94-4043 (2d Cir. Oct. 14, 1994). In his view, CEI has failed to effectively rebut the testimony of the employees concerning the requirements of their jobs and the hazards that they are necessarily exposed to in performing them. Therefore, CEI has failed to show there is an on the job need that justifies the hazard of exposing employees to a fall without any protection in the name of training. In this respect, he notes the testimony that on the few occasions involving free-walking, methods other than free-walking were available to the employees. Additionally, regarding the training program as a whole, the Chairman notes that an inexperienced employee would have failed the course if he had refused to walk at any level, even the highest level of 56 feet, without fall protection.

[7]We note that safety nets are not a form of personal protective equipment and, therefore, cannot be required by the standard. However, had CEI provided nets, it would have

(continued...)

B.

Characterization and Penalty

We find the $5000 penalty proposed by the Secretary and assessed by Judge Salyers to be appropriate. When determining an appropriate penalty, the Commission must consider the gravity of the violations, the size of the employer, its good faith and safety history. Section 17(j) of the Act, 29 U.S.C. § 666(j).[9] The evidence establishes that CEI is a large company with a history of previous violations. The violation was also of high gravity. A fall from the 36-foot bridge would have resulted in death or serious physical injury. While CEI's desire to train its employees does indicate good faith, we find that factor

---

[7](...continued)
eliminated the fall hazard and there would have been no violation of 29 C.F.R. § 1910.132(a).

[8]The Secretary cited CEI under section 5(a)(1) of the Act, the general duty clause, in the alternative. Citation under the general duty clause was inappropriate at the time the citation was issued because section 1910.132(a) was specifically applicable to the fall hazard. *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 1981 CCH OSHD ¶ 25,551 (No. 13390, 1981). We note, however, that to establish a violation of section 5(a)(1), the Secretary must prove that: (1) a condition or activity in the employer's workplace presented a hazard to employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Kastalon, Inc.*, 12 BNA OSHC 1928, 1931, 1986-87 CCH OSHD ¶ 27,643 p. 35,973 (No. 79-3561, 1986)(consolidated); *Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605, p. 35,871 (No. 82-388, 1986). The evidence establishes that the hazard of trainees falling from the towers during training was recognized and that a fall from the heights involved would cause death or serious physical harm. Moreover, the record demonstrates that the hazard could be abated either by using safety nets or safety belts. Therefore, if the standard were found not to apply to the hazard, we would find that the record demonstrates a violation of the general duty clause.

[9]That section provides:

> The Commission shall have the 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 of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

to be adequately reflected by a penalty that is $2000 below the maximum of $7000 provided under section 17(a) of the Act.

IV. *ORDER*

Accordingly, the judge's decision affirming a serious violation of 29 C.F.R. § 1910.132(a) is AFFIRMED and a penalty of $5000 is ASSESSED.

Stuart E. Weisberg
Chairman

Velma Montoya
Commissioner

Dated: October 31, 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. CLEVELAND ELECTRIC ILLUMINATING CO., Respondent.	:	Docket No. 91-2198

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on October 31, 1994. **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.

October 31, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-2198

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

Kenneth B. Stark, Esq.
Duvin, Cahn & Barnard
Erieview Tower 20th Floor
1301 East Ninth Street
Cleveland, OH 44114

David T. Kotecki, VP
Utility Workers Union of America
Local 270
4205 Chester Avenue
Cleveland, OH 44103

Office of
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondent,

UNITED UTILITY WORKERS OF AMERICA,
Authorized Employee Representative.

OSHRC DOCKET NO. 91-2198

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 November 4, 1992. The decision of the Judge will become a final order of the Commission on December 4, 1992 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 24, 1992 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

DOCKET NO. 91-2198

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. /SKW

Date: November 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2198

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

William S. Kloepfer
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Kenneth B. Stark, Esq.
Duvin, Cahn & Barnard
Erieview Tower 20th Floor
1301 East Ninth Street
Cleveland, OH 44114

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No.: 91-2198
CLEVELAND ELECTRIC ILLUMINATING COMPANY, Respondent,	:	
and	:	
UNITED UTILITY WORKERS OF AMERICA, Authorized Employee Representative.	:	

Appearances:

Sandra B. Kramer, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Kenneth B. Stark, Esquire
Duvin, Cahn and Barnard
Cleveland, Ohio
For Respondent

Mr. David Kotecki
For Authorized Employee Representative

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Cleveland Electric Illuminating Company (CEI) contests a citation issued by the Secretary alleging a serious violation of 29 C.F.R. § 1910.132(a), or, in the alternative, a serious violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act). CEI is a public utility which supplies electricity to customers in northeast Ohio. The alleged

violation occurred during a training session for electrical installers held from March 18 to March 20, 1991. The electrical installers were required to traverse steel bridge structures at heights of up to 36 feet without fall protection. CEI asserts that compliance with the standards cited is infeasible.

The Secretary had previously cited CEI for exposing its employees to falls during its training program in 1984. A complete understanding of the present case requires that the history of the previous case be related. In that case, the Secretary cited CEI for the serious violation of a construction standard, § 1926.951(b)(1), for failure to provide fall protection for apprentices during training exercises in which they were required to walk back and forth across open bridges elevated 25 to 56 feet above the ground. CEI defended itself on two grounds: That the construction standards did not apply to its training program, and that it was necessary to perform the training without fall protection in order to simulate real working conditions. Training on bridges without fall protection, CEI argued, would psychologically prepare the employees for working on real substations. Without this training, employees would have a greater likelihood of "freezing" under actual work conditions. Judge Paul Brady rejected CEI's first argument, finding that the construction standards did apply to CEI's training program. He accepted the company's second argument, however, and concluded that CEI was not in violation of 29 C.F.R. § 1926.95(b)(1) because the training program was necessary to instill confidence in CEI's employees.

The Review Commission reversed Judge Brady's decision in *Cleveland Electric Illuminating Co.*, 13 BNA OSHC 2209, 1989 CCH OSHD ¶ 28,494 (No. 84-593, 1989), *rev'd sub nom., Cleveland Electric Illuminating Co.*, 910 F.2d 1333 (6th Cir. 1990). The Commission agreed with Judge Brady that the construction standards applied to CEI's training program. *Cleveland,* 1989 CCH OSHD at pg. 37,759. The Commission disagreed with Judge Brady's conclusion that CEI's training program did not violate 29 C.F.R. § 1926.951(b)(2) and reversed his decision. The Commission stated: "We find nothing in the Occupational Safety and Health Act, in Commission precedent, or in this record that would justify exposing employees to a hazard in the name of training." *Cleveland,* 1989 CCH OSHD at pg. 37,759.

CEI appealed the decision to the United States Court of Appeals for the Sixth Circuit. The court reversed the Review Commission's decision in *Cleveland Electric*

Illuminating v. OSHRC, 910 F.2d 1333 (6th Cir. 1990), on the grounds that "OSHA has failed to establish the nexus between the training activity and a particular construction site as required by *Brock v. Cardinal Industries, Inc.*, 828 F.2d 373 (6th Cir., 1987)." The majority opinion did not address the question of whether it was appropriate to train the employees at heights above six feet without providing them with fall protection. In his dissenting opinion, Judge Merritt disagreed with the majority opinion that CEI's employees were not involved in construction work during the company's training sessions. Judge Merritt further commented on the issue of whether it was reasonable for CEI to train its employees by exposing them to heights without providing them with fall protection. Judge Merritt pointed out that CEI presented no evidence supporting the psychological theory underlying its training technique, *i.e.*, that it prevents "freezing," and that CEI failed to show that fall protection was infeasible.

The present case involves a similar fact pattern to the previous one, but the parties have each taken note of the previous CEI case and altered their approaches in the litigation of this case. The Secretary chose to cite CEI under a general industry standard, 29 C.F.R. § 1910.132(a), or, in the alternative, under the general duty clause, § 5(a)(1), thereby avoiding the construction standards that the Sixth Circuit ruled were inapplicable to CEI's training sessions. For its part, CEI presented the testimony of an expert witness, a psychologist, to shore up its infeasibility defense.

The essential facts are not in dispute. CEI's System Construction and Maintenance Department operates, maintains, and constructs the distribution and transmission system within CEI's service area. CEI operates approximately 210 substations within the transmission and distribution system. The substations vary in height from 12 to 110 feet, and operate at voltages up to 345,000 volts (Tr. 345-347).

CEI requires that all of its mechanics and electrical installers participate in a training program on structure climbing. The program is normally taken by apprentice mechanics and installers. Five electrical installers, however, had completed their apprenticeship without having attended the training program on structure climbing (Tr. 383). Electrical installer Donald C. Reeves testified that he was scheduled to attend the training program when he first started at CEI, "[b]ut, the weather was bad, so they cancelled it" (Tr. 16). It was three

years before he participated in the program (Tr. 13-14). He participated in the March 18-20, 1991, program session that gave rise to the present case.

The Secretary called as witnesses four of the five electrical installers who participated in the March 18-20, 1991, session: Reeves, Raymond D. Reed, Dennis Propst, and William A. Stern. All four employees testified that they had been electrical installers for approximately three years at the time of the training course (Tr. 13, 135, 188, 228). Eugene Saurwein was the principal instructor for the training session (Tr. 54). The training program began with classroom instruction and practice walking on an angle iron structure on the ground (Tr. 140, 193, 234). The angle iron on which the employees walked was approximately two inches wide (Tr. 44, 145).

After walking on the angle iron structure on the ground, employees were required to free walk across the top of the angle iron bridge structures at heights of 8 feet, 20 feet, and 36 feet. While the employees crossed the structures, no fall protection was provided, other than a layer of wood chips spread below the structures (Tr. 61, 140, 198, 234). Guide ropes were installed along the sides of the bridge structures but the employees were told that the ropes were to be used as a guide and not as fall protection (Tr. 19, 142, 234). The employees were encouraged not to use the ropes (Tr. 142, 236).

All five employees refused to attempt to traverse the structure at the 55-foot level. All four of the employees who appeared as witnesses testified that the performance of their jobs had never required them to free walk across the top of the substation structures. Reeves testified that he normally uses aerial equipment or ladders to get to the top of the structures (Tr. 29-30). He stated, "And, from that point on, you cross the structure in the safest way you can, whether it be if you are inside the structure itself, belted to it or whatever. But, I have never yet seen a situation where it would be necessary for me to get up on top of that structure and walk across it" (Tr. 30).

Reed testified that free walking across a structure would not be using "common sense" (Tr. 157). Asked if he had ever free walked across a substation structure in a work situation, Reed replied, "No, I have never had to. I have never been in that situation where I've had to. If the boss is there, you don't do it; you'd better not" (Tr. 157). Like Reeves, Reed generally uses high reach equipment or ladders to access the substation structure, and

then walks inside of the structure (Tr. 156-157). Reed stated, "I have never walked upright like they wanted us to do here. I've crawled across" (Tr. 166).

Propst also testified that he had never free walked across the top of substation structure. He uses high reach equipment and ladders for access to work stations in the field or he may go through the center of a bridge, or straddle it. He had never seen anyone free walk across a structure (Tr. 214-216).

Stern also stated that he had never had to free walk across a substation structure (Tr. 238). He also uses aerial lifts and ladders to access the structure and then belts off to the structure (Tr. 238-239).

In contrast, CEI's witnesses testified that free walking across substation structures was routinely done by experienced electrical installers. Craig Kasper, CEI's general manager of the System Construction and Maintenance Department, testified that electrical installers "will almost always walk the top of the bridge where they're comfortable, and that is the way they consider to be the safest way, they will walk the top of the bridge" (Tr. 317). Eugene Saurwein, CEI's electrical supervisor and the instructor for the training program, testified that, "Our experienced climbers, where they can, they walk on the tops of the bridges" (Tr. 424). Morris J. Mach, product manager for NUS Training Corporation, worked in the electric utility industry prior to his employment with NUS Training Corporation. He testified that when he worked for Gulf States, he and his co-workers "walked the steel . . . Particularly in construction, that's just normal practice" (Tr. 477).

The Secretary cited CEI for the serious violation of 29 C.F.R. § 1910.132(a), which provides in pertinent part:

> Protective equipment . . . shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of . . . environment . . .

The Review Commission has held that 29 C.F.R. § 1910.132(a) applies to fall hazards. *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1982 CCH OSHD ¶ 25,982 (No. 77-1545, 1982).

The Secretary contends that during the training program, CEI could have required the employees to use safety belts tied off to safety lines or that CEI could have provided

safety nets below the level of the structure which the employees were required to traverse. Both Kasper and Saurwein conceded that it was possible to rig safety nets under the structures during the training program (Tr. 363, 447).

> To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence.

Seibel Modern Manufacturing & Welding Corp., 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, pg. 39,678 (No. 88-821, 1991). In the present case, the Secretary has established that 29 C.F.R. § 1910.132(a) applies to CEI's training program, and that its requirement for protective equipment was not met. She also established that five employees were exposed to falls of up to 36 feet. A fall from a height of 36 feet is a recognized hazard, likely to result in death or serious physical injury. CEI knew of the employees' exposure. The Secretary has established a *prima facie* case that CEI was in serious violation of 29 C.F.R. § 1910.132(a).

CEI asserted the affirmative defense of infeasibility. "The Commission has held that an employer who has failed to comply with an occupational safety or health standard may avoid liability for that noncompliance by establishing that compliance was infeasible under the circumstances. *Cleveland*, 1989 CCH OSHD at pg. 37,761. The infeasibility (or impossibility) defense has a long history under the Act: "From the outset of the Act's enforcement, the Commission has been faced with employee's claims that *technological* or *economic* problems precluded compliance with cited standards." *Seibel*, 1991 CCH OSHD at pg. 39,682. (emphasis added). The foregoing quotation establishes that the infeasibility defense has always dealt with physical, technological, or economic difficulties that compliance with the cited standard would create. In the present case, CEI seeks to carve out a new exception under the infeasibility defense, that of *psychological* infeasibility.

CEI called Dr. Robert G. Kaplan, a clinical psychologist specializing in stress-related problems, as an expert witness (Tr. 506). Dr. Kaplan explained the psychological basis for "freezing" that immobilizes some people who are exposed to heights (Tr. 508):

> When an individual is overwhelmed by anxiety, they are subject to a panic reaction, and in the sense of a panic reaction, one of the types of reactions they can do is freeze and become immobilized.

Two methods used by Dr. Kaplan to help people overcome anxiety over exposure to heights are stress inoculation and systematic desensitization. Stress inoculation is "based on the concept that an individual exposed to a stressful situation at a lower level intensity will become inoculated . . . so that they will be able to tolerate a higher level of stress later on . . . (Tr. 509-510). In systematic desensitization, the individual is also exposed to gradually more stressful situations. "As they become more relaxed with the lower levels of stress-provoking situations, they will then move on to a higher level, and then they will continue to expose themselves to that higher level of anxiety until they master that level, and then they will proceed on through the hierarchy until they reach levels which had previously been overwhelming" (Tr. 510-511). Dr. Kaplan stated that providing fall protection, such as a safety line or safety nets, would defeat the purpose of the training: "You would take away the element of anxiety because they know that if they fall, there's a safety net there . . . You remove the ability of the participants to tolerate anxiety at higher levels . . . (Tr. 536).

Dr. Kaplan's testimony was unrefuted, and there is no reason based on the record to doubt the psychological soundness of the stress inoculation and systematic desensitization theories. There are two problems, however, with CEI's incorporation of these theories in its training program.

First, Dr. Kaplan stated that freezing, the condition which CEI asserts it is seeking to prevent with its training program, occurs "when someone is overwhelmed by anxiety" (Tr. 509). Yet according to the testimony of the four employees who underwent the training, none of them had ever experienced any overwhelming anxiety regarding heights in their previous three years of climbing substations (Tr. 35-36, 92, 149, 189, 242). The only anxiety regarding heights that these employees felt occurred during the actual training program, when they believed Saurwein was attempting to intimidate them into traversing the structures in an unsafe manner. Reeves stated, "I was feeling very intimidated and, the intimidation itself was making me nervous and leery of heights . . ." (Tr. 85). Reed also testified that the atmosphere created by Saurwein was disturbing: "Well, he asked each one

of us if we were going to come up individually, [to the 55 foot level]. I told him there had been some arguing back and forth and back and forth about this, the safety of it and that. By then I was sufficiently agitated enough, I didn't feel it was safe for me to go up there" (Tr. 146). Stern testified that the five employees refused to attempt the 55 foot level because they believed it to be unsafe (Tr. 238).

The record establishes that at least four of the five employees, who had worked in the industry for three years prior to the training program, had never had any difficulties coping with heights. They were then required to participate in a training program during which they felt intimidated and agitated by Saurwein's bullying manner. Their anxiety was created, not by the heights, but by the pressure brought to bear on them to free walk the structures, a method they believed to be unsafe. If the purpose of stress inoculation and systematic desensitization is to help employees avoid freezing by overcoming overwhelming anxiety regarding heights, then the participants in the program should be people who, in fact, have an overwhelming anxiety regarding heights. Five employees who had no previous difficulty coping with heights were needlessly exposed to serious fall hazards.

The second flaw with CEI's infeasibility defense is that the program's implementation is not consistent with Dr. Kaplan's theory. While Dr. Kaplan stated that the program is ineffective if employees are not required to free walk without fall protection, Saurwein testified that he does not require the employees to do so. Rather, he testified that he "give[s] them the option" (Tr. 429). If free walking without fall protection is an option, then it cannot be the essential element of the training program that CEI claims it to be.

The flaws in CEI's program notwithstanding, the company's defense must ultimately fail because it is not recognized under the established infeasibility defense. There is Commission precedent for technological and economic infeasibility, but none for psychological infeasibility.

CEI concedes that it would have been easy to rig safety nets below the structures on which the employees trained. CEI does not contend that the use of nets would result in an economic burden. CEI's claim that safety nets would impair the psychological efficacy of the training program does not fall within the parameters of the infeasibility defense.

The Secretary has established that CEI was in serious violation of 29 C.F.R. § 1910.132(a). The Secretary proposed a penalty of $5,000.00. The Commission is the final arbiter of the penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir., 1973). Under section 17(j) of the Act, the Commission is required to find and give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. Based upon these factors, it is determined that a penalty of $5,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rules of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that

1. The citation for the serious violation of 29 C.F.R. § 1910.132(a) is affirmed and a penalty of $5,000.00 is assessed.

EDWIN G. SALYERS
Judge

Date: October 26, 1992