UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NATIONAL CLEANING CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 91-3279

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 January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 1993 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 February 3, 1993 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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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. /skw

Date: January 14, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3279

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. NATIONAL CLEANING CONTRACTORS, INC., Respondent.	OSHRC Docket No. 91-3279

Appearances:

Elizabeth Ashley, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

David Arndt
Harry Danik
National Cleaning Contractors, Inc.
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

National Cleaning Contractors, Inc. (National), is a window cleaning company. National contests a citation issued to it by the Secretary on August 21, 1991. The citation alleged that National committed a serious violation of § 1910.28(g)(8) of the Occupational Safety and Health Act of 1970 (Act), for failure to provide adequate fall protection to its employees. The citation resulted from an inspection of one of National's worksites

conducted on August 12, 1991, by the Occupational Safety and Health Administration (OSHA). National denies that it violated the cited standard.

OSHA compliance officers Gus Georgiades and Andris Pratins inspected respondent's operations at the BP Building in Cleveland, Ohio, on August 12 in response to an employee complaint of an imminent danger (Tr. 17). Three National employees were in the process of washing windows on the east face of the BP Building (Tr. 20) They were on a two-point suspension scaffold that was suspended from the building's roof by wire ropes attached to two davits (Tr. 30-31). When the compliance officers first arrived, the scaffold was at approximately the thirty-first floor of the thirty-eight story building (Tr. 20, 91).

Upon arrival at the worksite, Georgiades and Pratins went to the roof of the BP Building's parking garage, which was attached to the main building. From this location, they observed respondent's employees on the scaffold for approximately fifteen minutes and noted that National had two independent safety lines provided for the three employees. All three employees were wearing safety belts (Tr. 20-21).

When the scaffold had descended to approximately the seventh floor, the compliance officers caught the employees' attention and had them lower the scaffold to the garage roof level. Georgiades then held an opening conference with the crew foreman, Gerald Hochschild (Tr. 28).

Subsequently, the Secretary charged National with a serious violation of a provision of the scaffolding standard, § 1910.28(g)(9). The cited standard provides in pertinent part:

> Each workman shall be protected by a safety lifebelt attached to a lifeline. The lifeline shall be securely attached to substantial members of the structure (not scaffold), or to securely rigged lines, which will safely suspend the workman in case of a fall.

The Secretary contends that National's violation of this standard is twofold: First, for the better part of the fifteen minutes that the compliance officers observed them, National's employees were not tied off at all; and, second, when the employees finally did tie off, one of them tied off to the scaffold. These contentions will be dealt with in order.

Georgiades testified that, as the scaffold descended the east side of the building, he observed that none of the three employees was tied off. Georgiades suspected that they were not tied off when he first saw them, but he became certain of it when the scaffold

reached about the tenth floor (Tr. 26). When the scaffold was at about the tenth floor, two of the employees attached their lanyards to the two independent safety lines, while the third employee attached his lanyard to the scaffold (Exh. C-1; Tr. 27). Georgiades speculated that the employees tied off at this point because they noticed that they were being observed by the compliance officers (Tr. 77). The employees worked for about five more minutes before the compliance officers had them come down (Tr. 68).

Pratins corroborated Georgiades' testimony. He, too, stated that the employees were not tied off until they noticed Georgiades and Pratins watching them: "I noted they observed us standing down below, I think, because all of a sudden there was scurrying around. I watched the one employee on the right hand side turn around and attach his life line" (Tr. 92).

Georgiades interviewed the employees when they arrived at the garage roof level. He testified they acknowledged to him they had not been tied off (Tr. 30). All of the employees stated they were familiar with the OSHA regulations and knew they were supposed to be tied off (Tr. 29).

Two of the three employees who were on the scaffold testified at the hearing. Gerald Hochschild, the crew leader and foreman, testified he and his crew were tied off the entire time they were working (Tr. 231). Richard Starcher, the other employee who testified, agreed with Hochschild that the crew had been tied off (Tr. 277). Both Hochschild and Starcher testified that as they descended, the wind began blowing harder. At about the eighth floor, Starcher, who weighed less than Russ Empene, the third crew member, unhooked from the independent safety line and attached himself to the scaffold. Empene, who had been tied off to the scaffold, switched over to the independent safety line. Hochschild remained tied off to the second independent safety line (Tr. 230, 235, 264-265, 277). The switch was made because the crew decided that it was safer for the lighter man to be anchored to the scaffold (Tr. 278).

The testimony of the two compliance officers is directly contradicted by the testimony of the two National employees. National points out that the compliance officers made their observations at a considerable distance from the scaffold. [National claims they were 60 feet from the scaffold; Georgiades estimated the distance to be between 40 to 50 feet (Tr. 74)].

Unfortunately, the only photograph made of the employees on the scaffold was taken after the compliance officers thought the employees had tied off (Exh. C-1).

Georgiades and Pratins were adamant that they clearly observed the three employees working while not tied off (Tr. 75, 102-103). But even if the compliance officers could have been mistaken about what they thought they saw, Georgiades testified that the employees admitted to him that they had not been tied off until the scaffold was at about the tenth floor. Hochschild and Starcher each denied making such a statement (Tr. 228, 268).

The conflicting testimony on this point requires a credibility determination by the court. In making such a determination a court may consider not only the demeanor of the witnesses, as observed during the course of their testimony, but also any motives they may harbor which might tend to shape this testimony. This court detected no "tell-tale" signs in the demeanor of any of the witnesses (nervousness, evasiveness, etc.) which would clearly signal an intent to deceive. On the motive question, however, the scales tip in favor of the Secretary. Georgiades and Pratins as compliance officers for the Secretary are obligated to conduct an objective investigation of the facts in each case and are under no compulsion to take extraordinary measures to manufacture evidence. The court realizes that instances may occur when an overzealous investigator may exceed the limits of propriety but, in the experience of this particular judge, these occurrences are extremely rare and easily detectable when the culprit is exposed to the scrutiny of the court. The court is convinced in this case that the Secretary's compliance officers had no ulterior motives and conducted an objective investigation. On the other hand, the respondent's witnesses, both of whom were still employed by respondent at the time of the hearing (Tr. 214, 260), may well have felt pressure (real or imagined) not to render testimony adverse to their employer. This circumstance has special significance in the case of Hochschild, respondent's foreman, who would be in violation of a company rule by permitting employees to work on the scaffold without being tied off, and quite naturally reluctant to admit this circumstance in open court. While recognizing that credibility determinations are more "art than science," this court believes the testimony of the Secretary's witnesses should prevail over that of respondent's.

The Secretary makes a less controversial case regarding its second contention that independent safety lines were not provided for each of the employees and that one of

National's employees was impermissibly tied off to the scaffold. She was greatly aided on this issue by National's own witnesses.

National admitted in its answer that one of the employees was tied off to the scaffold. Starcher testified that he had tied off to the scaffold when he switched places with Empene, who initially had been tied off to the scaffold (Tr. 262). Foreman Hochschild testified that he had permitted the employees to tie off to the scaffold and that he would allow it again given the same circumstances (Tr. 250, 253). Furthermore, National's director of personnel, David Arndt, and its division manager, Harry Danik, acting *pro se* for National, repeatedly elicited testimony from their own witnesses that it was National's policy to have the third man on the scaffold tie off to the scaffold (Tr. 179, 188, 190, 244, 256, 290, 312).

National attempted to present a greater hazard defense. "To establish a defense of greater hazard, an employer must prove that (1) the hazards created by compliance with a standard are greater than those of noncompliance, (2) other means of protecting employees from the hazards are not available, and (3) a variance is not available or application for a variance is inappropriate." *Seibel Modern Mfg. & Welding Co.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442 at 39,681 (No. 88-821, 1991).

National presented no evidence, nor did it claim that it had sought a variance or that one was inappropriate. Therefore, this defense must fail. In addition, National failed to prove that providing each of the three employees with his own independent safety line was a greater hazard than tying off to the scaffold. The hazard created by an employee tying off to the scaffold is that, if one of the wire ropes suspending the scaffold breaks, the employee could be bashed against the building as the scaffold swung on the remaining wire rope. If both wire ropes break, the employee would be attached to the scaffold as it fell to the ground (Tr. 28). National claims that the hazard created by using three independent safety lines is that the lines could become tangled, causing a delay while someone went up and cut off the bottoms of the lines (Tr. 196, 228-229). The hazard created by noncompliance with the standard is the possibility that one or both of the wire ropes could break, resulting in death or serious physical injury. The hazard created by compliance with the standard is the possibility that the lines could become tangled, resulting in an inconvenient delay. The

gravity of the hazard created by noncompliance greatly outweighs the hazard of compliance. National has failed to prove a greater hazard defense.

In its posthearing brief, National asserted that any violation of the Act committed by the company was the result of unpreventable employee misconduct. This defense was not developed during the hearing. Furthermore, it is abundantly clear from the record that the employees were following company policy in violating the standard and not engaging in isolated, unforeseeable behavior.

To prove the affirmative defense of unpreventable employee misconduct, the employer must show that it had established a work rule designed to prevent the violation, adequately communicated those work rules to its employees (including supervisors), taken reasonable steps to discover violations of those work rules, and effectively enforced those work rules when they were violated. *Pride Oil Well Service*, 15 BNA OSHC 1809 at 1816, 1992 CCH OSHD ¶ 29,807 at 40,585 (No. 87-692, 1992). National does have a written safety rule in its *Safety Procedures Manual* that addresses the standard in issue (Exh. C-7, p. 19, #2): "Each person must wear an approved safety belt or body harness and be attached to an approved safety rope grab system onto an independent safety line system at all times while working on a scaffold." The testimony of all four of National's witnesses established, however, that this safety rule was ignored with impunity by everyone employed by National.

Edward Beard, one of National's window cleaners and its shop steward, testified that having an employee tie off to the scaffold is "usually how it is done" (Tr. 179). When Beard was asked about National's own safety rule, this dialogue ensued (Tr. 188):

> BEARD: Two drop lines are coming down. As long as two men are tied to those. If you have a third party on the scaffold he can be tied to a lanyard line. That means a cable running off the back line of it or direct to the scaffold.
>
> Q.: Is that the manner in which you have been trained to perform your job for National Cleaning?
>
> BEARD: Yes.

Q.: That is you are the third individual on a scaffold--

BEARD: That's the way we have always done it.

Clearly, the requirements of National's own safety rule had not been communicated to Beard. This misunderstanding is even more striking given the fact that Beard is one of three employees responsible for safety at National and that Beard actually conducts National's monthly safety meetings (Tr. 168-169). Beard also failed to understand the employer's responsibility for ensuring safety on the job, instead placing the burden on the employee (Tr. 195): "If I wanted to be a fool and say, 'Yes, I will go out there and work this and not be hooked up,' that would be on me." Beard's testimony leaves no doubt that tying off to the scaffold is not unpreventable employee misconduct (Tr. 190): "That's the way we have been doing it. *It is policy.* It is the way it has always been."

Hochschild and Starcher both testified they believed they were permitted to tie off to the scaffold (Tr. 244, 279). Hochschild not only admitted that he had permitted his crew to tie off to the scaffold on the day of the inspection but also declared that he would permit it again, adding only that, "If you are going to get fined for it, I sure wouldn't do it" (Tr. 255).

Clearly, National's employees were not familiar with National's work rule regarding independent safety lines. In its brief, National attempts to blame the three employees for the violation, claiming that Hochschild was not actually a foreman for the purposes of imputing his knowledge to the employer. This argument is without merit. First, Hochschild was called as a witness by National, who did nothing to dispute his testimony that he was the crew foreman (Tr. 214). Hochschild was repeatedly referred to as the foreman throughout the hearing, and these references were never challenged by National. Second, the record makes it abundantly clear that it was National's policy to allow the third employee on a scaffold to tie off to the scaffold. Jeff Anderson, another National window cleaner called by National, was questioned about National's work practice (Tr. 312-313):

Q.: Have you ever tied off directly to a scaffold for National Cleaning?

ANDERSON: Yes.

Q.: Is National Cleaning aware that you have tied off directly to a scaffold, specifically directly to a two-point suspension scaffold?

ANDERSON: Yes.

Q.: Is your foreman aware of that?

ANDERSON: Yes.

Q.: Are upper management officials aware that you tie off directly to a scaffold?

ANDERSON: Yes.

Q.: Have you ever been reprimanded for tying off directly to a scaffold?

ANDERSON: No.

The violation of § 1910.28(g)(9) cannot be attributed to unpreventable employee misconduct. The employees were merely following company policy in having the third crew member tie off to the scaffold. National was in serious violation of the cited standard.

Penalty Determination

The Commission is the final arbiter of 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, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Upon due consideration of the relevant factors, it is determined that a penalty of $1,875.00 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 Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

That the citation alleging a serious violation of § 1910.28(g)(9) is affirmed and a penalty of $1,875.00 is assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: January 7, 1993