Erection Co. (II)

SAFETY AND HEALTH

"Employee misconduct" defense

In order to establish the affirmative defense of employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated those rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. **….*In re Erection Co.* (II), BIIA Dec., 88 W142 (1990); *In re Jeld-Wen of Everett,* BIIA Dec., 88 W144 (1990)**

"Serious" violation

In order for a violation to be classified as "serious" there must be a showing that the employer had knowledge of the hazardous conduct or condition and that there was "a substantial probability that death or physical harm could result" from the violation. RCW 49.17.180(6). **….*In re Erection Co*. (II), BIIA Dec., 88 W142 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-23987-0. See also *Lee Cook Trucking & Logging v. Dep't of Labor & Indus*., 109 Wn. App. 471 (2001).]

"Willful" violation

In order to establish that a WISHA violation is "willful" the Department must demonstrate that it involved voluntary action, done either with an intentional disregard of or plain indifference to the requirements of the statute. **….*In re Erection Co*. (II), BIIA Dec., 88 W142 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 90-2-23987-0.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: THE ERECTION COMPANY	**)**	**DOCKET NO. 88 W142**
	)	
CITATION & NOTICE NO. 400062	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, The Erection Company, by
Oles, Morrison and Rinker, per
Mark F. O'Donnell

Department of Labor and Industries, by
The Attorney General, per
Elliott S. Furst, Assistant

This is an appeal filed by the employer, The Erection Company on October 11, 1988 from Citation and Notice No. 400062 dated September 22, 1988 which alleged one serious, willful, and repeated violation of WAC 296-155-225(1)(b), and assessed a penalty of $24,500.00, and one general violation of WAC 296-155-705(2)(a)(3) for which no penalty was assessed. **AFFIRMED AND MODIFIED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on February 13, 1990 which vacated Citation and Notice No. 400,062.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

This appeal arises from two fall protection violations contained in Citation and Notice No. 400062. The citation was issued after an investigation by the Safety and Health Division of the Department following the death of Michael Krall on July 22, 1988. On the date of his death, Mr. Krall was a steelworker working at the employer's construction site at the Pacific First Center Building in Seattle, Washington. As a result of this investigation, the Erection Company was cited for one serious, willful, and repeated violation of WAC 296-155-225(1)(b), and assessed a penalty of $24,500.00, and one general violation of WAC 296-155-705(2)(a)(3) for which no penalty was assessed.

On the date of his fatal fall, Michael Krall was working on the ninth floor of the project in downtown Seattle. He was involved in what is known as "decking" or "leading edge" work. This work involves laying metal sheets between steel beams. Concrete is later poured on these metal sheets to

form the floors of the building. At the time of his death, Mr. Krall was working in an area next to the elevator shafts. The fall distances to which he was exposed were more than 100 feet down the elevator shaft on one side and 12 feet down to the next floor in the opposite direction. Sellen Construction, the general contractor for the project, had installed safety nets throughout the elevator shaft area. It is undisputed that there were no "catenary" or safety lines installed in that area. It is also undisputed that Mr. Krall was wearing a safety belt. However, there is no evidence that he was tied off at the time of his fall. It is known that he fell down the elevator shaft while moving across a beam. For unknown reasons a portion of the safety netting across the shaft had been removed. It was never determined which of the many employers at the work site removed the netting. There was no evidence that The Erection Company had knowledge of the removal of a portion of the netting.

Louis Nelson, a safety inspector with the Department of Labor and Industries, performed the inspection of the site after the fatality. After inspecting the site and speaking with individuals at the scene, Mr. Nelson determined that Mr. Krall had neglected to use the safety devices available to him and had fallen as a result of his own carelessness. He also noted that the perimeter rail on the ninth floor had no mid-rail as required by the regulations. As a result of Mr. Nelson's investigation he recommended the issuance of Citation and Notice No.400062 from which this appeal was lodged.

The first violation related to Mr. Krall's fall. The employer was cited under WAC 296-155-225(1)(b). The relevant portion of the regulation states:

> Safety belts shall be used when workers are exposed to the hazard of falling from buildings, bridges, structures, or construction members such as trusses, beams, purlins, or plates at elevations exceeding 10 feet above the ground, water surface, or continuous floor level below.

The basis for this violation was that Mr. Krall was not using his safety belt and lanyard at the time of his fall.

A penalty of $24,500.00 was assessed based on the severity of the hazard, probability of a fall, the good faith of the company, size of the company, history of the company, and the number of employees exposed to the hazard. According to Mr. Nelson's calculations at hearing, the total adjusted penalty, however, should have been $2,250.00 rather than $2,450.00. This amount, due to the "willful" classification, should then be multiplied by 10 yielding a penalty assessment of $22,500.00.

In the Proposed Decision and Order our industrial appeals judge vacated both violations contained in the Citation and Notice. The second violation contained in the citation [the general violation of WAC 296-155-750(2)(a)(3) with respect to the missing mid-rail on the ninth floor perimeter

railing] was vacated by our industrial appeals judge because there was testimony from the employer that none of its employees were exposed to the hazard. The Department of Labor and Industries in its Petition for Review did not contest the vacation of this violation and accordingly we shall uphold the decision of our industrial appeals judge in vacating that item.

The far more problematic issue is whether the Department of Labor and Industries properly cited The Erection Company for a violation of the fall protection standards contained in WAC 296-155-255.

The record of proceedings establishes that before the Pacific First Center project was started the general contractor, Sellen, and the structural steel sub-contractor, The Erection Company, agreed that netting in conjunction with planking should be used for fall protection in certain areas. The safety nets were the method of fall protection to be used at the level where Mr. Krall was working. This, however, was only true of the elevator shafts. At all times when workers were more then ten feet above a surface they were required to tie off. At the time of Mr. Krall's accident, the elevator shaft, which had been fully netted the day before, was inexplicably missing one net. There was testimony that catenary lines should have been installed in the area where Mr. Krall was working. Gary Bradley, a steelworker familiar with the specific area, indicated that decking material needed to be moved into the area. The length of the decking material prevented installation of catenary lines before installation of the deck. It appears that the only means of fall protection available to Mr. Krall would have been to use his safety belt and lanyard to tie off to the beam which he was traversing. In order to "tie off" a worker takes a six foot long lanyard, wraps it around a beam, and attaches both ends to his safety belt. Photos taken of this area where admitted into the record as an exhibit. (Exhibits 26-32)

On the day that Michael Krall fell to his death, he was preparing steel beams for the placement of the deck. No decking was yet in place. The actual steel erection or connecting of steel beams was taking place three floors above. Gary Bradley, who was working on the floor below Mr. Krall, asked for some help from Mr. Krall. Mr. Krall told him he would be there in a moment. Mr. Krall then fell to his death down an unnetted ten foot square area of the elevator shaft. Mr. Thornburgh, the site superintendent, surmised that Mr. Krall had been removing a safety rail post which was in the way when he lost his balance and fell. Safety Inspector Nelson generally agreed with Mr. Thornburgh's theory.

Max Trevino, a safety coordinator for Sellen Construction, testified to some of the difficulties in properly tying off in the area where Mr. Krall was working. However, Mr. Trevino indicated that when

Mr. Krall fell he was in an area where he could have tied off. Mr. Trevino testified that, on the particular beam Mr. Krall was working, it was possible to wrap a lanyard around the beam while "cooning" the beam. "Cooning" is a preferred method of traveling along iron beams recognized in WAC 296-155-700(7)(b). Additionally, after his investigation, Louis Nelson, the safety inspector, concluded that Mr. Krall's fall was caused by Mr. Krall's own carelessness in failing to tie off when he could have done so. The Department's assertion in its Petition for Review that Mr. Krall could not have tied off to anything is incorrect and misconstrues Mr. Trevino's testimony.

Our industrial appeals judge concluded that The Erection Company, with the exercise of reasonable diligence, neither knew nor could have known that the safety net had been removed. She further concluded that the defense of employee misconduct raised by the employer was not relevant because, under the circumstances, the use of a safety belt by Mr. Krall was impractical. The violation was thus vacated. This determination, however, overlooks the fact that there would have been a safety violation whether or not the safety nets where in position. If Mr. Krall had fallen in the opposite direction of the elevator shaft it would have been a 12 foot fall to the next floor. We therefore conclude that Mr. Krall's presence in the area from where he fell, without a safety line attached, was a violation of WAC 296-155-225(1)(b) and, thus the citation must be affirmed.

The employer has argued that it should not have been cited for the violation based upon defenses of "impossibility" or "greater hazard". The Erection Company argues the placement of additional means to tie off or otherwise protect workers would have been impossible or would have created a greater hazard than already existed. Once again, the testimony of Louis Nelson and Max Trevino establishes that safety precautions of tying off could have been used and would have prevented the violation and Mr. Krall's death. Much of the testimony regarding whether or not catenary lines could have been used in the working areas is therefore inconclusive with regard to "impossibility" or "greater hazard" because Mr. Krall could have tied off by wrapping his lanyard around the beam which he was traversing.

The employer has also argued an "employee misconduct" defense to support vacation of the citation. The employee misconduct defense is directly contradictory to the employer's position that it would have been impractical or impossible to use catenary lines. It is also contradictory to the assertion that it would have been impossible for Mr. Krall to tie off.

The Erection Company's "employee misconduct" argument is based on the assertion that Mr. Krall knew that he should have tied off. His "misconduct" therefore should relieve the employer of liability for the violation.

This Board has recently embraced the "unpreventable employee misconduct" defense. In re Jeld-Wen of Everett, Dckt.No. 88 W144 (October 22, 1990). In that case we decided that the purpose of the Washington Industrial Safety and Health Act and the legislative intent of creating an industrial safety and health program which enforces standards equal to or exceeding those prescribed by the federal Occupational Safety and Health Act must be considered when determining the viability of the "employee misconduct" defense in Washington state. In the Jeld-Wen appeal we stated:

> RCW 49.17.180(6), which otherwise defines serious violations, provides that, where a violation involves a substantial probability that death or serious physical harm could result, 'a serious violation shall be deemed to exist . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.' A reasonable interpretation of the referenced statute leads us to the conclusion that it does not impose upon the Department of Labor and Industries the unreasonable burden of proving a negative. The burden of proving 'unpreventable employee misconduct' necessarily should rest with the employer. The employer has the necessary knowledge of workplace and work practices and is in the best position to establish the elements of this defense.

Jeld-Wen, supra, at 16.

See also Brock v. L. E. Myers Co., 818 F.2d 1270 (6th Cir. 1987). The "employee misconduct" defense may be asserted by an employer, but it is the employer's burden to establish all elements of the defense.

In the Jeld-Wen decision we also adopted a test to determine if the employer has met its burden in establishing the "employee misconduct" defense. We used the test set forth by the Occupational Safety and Health Review Commission in its decision Jensen Construction Company, 7 OSHC 1477 (1979). In that decision, the Commission set forth a four-part test which must be met in order for an employer to successfully establish the unpreventable employee misconduct defense.

> In order to establish the affirmative defense of unpreventable employee misconduct, an employer must show that it has established work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered.

Jensen Construction Company, supra, at 1479.

The element which is most relevant to our analysis of this violation is the fourth element described by the Commission in Jensen. The Erection Company has established that it has rules about tying off, that these rules have been communicated to the workers, and that steps have been taken to discover violations of the rules. However, The Erection Company has not established that it has effectively enforced the rules.

A review of a few cases in which the employee misconduct defense was asserted is helpful in analyzing the evidence in this case. In Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976), the citation for a trenching violation was vacated because of employee misconduct. There the employer had an outstanding safety program; the foreman had 21 years experience, had an accident-free record and had never been observed doing anything unreliable or unsafe. However, for some unknown reason, despite the express instructions of the company owner, and in the face of a number of warnings by fellow employees, the foreman entered an unshored ditch which collapsed, killing him. Likewise, in Pennsylvania Power & Light Co. v. OSHRC, 737 F.2d 350 (3rd Cir. 1984), the lineman/supervisor was extremely safety conscious, with an unblemished safety record. The company had demonstrated good faith in its efforts to comply with OSHA regulations, had an excellent overall safety program, had sponsored lineman training sessions, and had distributed information specifically aimed at the hazard which resulted in the lineman's death. The employer successfully defended the citation in these circumstances when the employee unexpectedly committed a dangerous act which violated the safety standards.

In light of the number of citations The Erection Company has received for violations of fall protection standards, The Erection Company can not avail itself of the "employee misconduct" defense. It is quite clear that although The Erection Company has a safety program that is thorough and adequate in theory, the program is not effective in practice. Unlike the Horne Plumbing & Heating Co. case or the Pennsylvania Power & Light Co. case, this employer does not have an outstanding safety record. Under these circumstances the employer has not established that its safety rules regarding tying off are effectively enforced. Since the employee misconduct defense asserted by the employer has not been established, the citation for the alleged violation must be affirmed.

This violation was classified as serious, willful, and repeated. It was classified as "serious" because of the probable severe injury or fatality which would result from any fall. It was classified as "repeated" because of the number of fall protection citations previously issued to this company. Due

to the company's prior knowledge of the regulation and its prior citations, Mr. Nelson concluded that the company had evidenced indifference to the requirements of the statute. Therefore the violation was classified as "willful".

In order for a violation to be classified as serious there must be a showing that the employer had knowledge of the hazardous conduct or condition. Knowledge is an essential element of the classification of a violation as "serious". RCW 49.17.180(6). See also Brennan v. OSHRC Raymond Hendrix d/b/a Alsea Lumber Co., 511 F.2d 1139 (9th Cir. 1975). For the same reasons that the employee misconduct was foreseeable, The Erection Company had knowledge, or could have had knowledge of the presence of the violation with exercise of reasonable diligence. Further, the Department must present evidence that demonstrates "a substantial probability that death or serious physical harm could result" from the violation; such evidence is obvious and unrefuted in the record. Likewise, evidence as to the company's prior violations of fall protection standards, relative to the "repeat" classification, was unrebutted on the record. The "serious" and "repeated" aspects of this citation have therefore been established.

The more problematic issue, and the one which received the most attention by the parties, is whether this violation was properly classified as willful.

This Board has adopted the following definition of a "willful violation" under WISHA: "a willful violation is one involving voluntary action, done either with an intentional disregard of or plain indifference to the requirements of the statute." In re R.L. Alia, Dckt. No. 86 W024 (October 16, 1987). This is the definition set forth by the Court of Appeals for the Ninth Circuit in National Steel & Shipbuilding Co. v. OSHRC, 607 F.2d 311 (9th Cir. 1979), which is used by the majority of the federal circuits, as well as the Occupational Safety and Health Review Commission.

A number of forums have deliberated on the meaning of "willfulness." The Court of Appeals for the Eighth Circuit, in St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840 (8th Cir. 1981), noted "the legislative history reflects a tension between the stated goal of promoting safe working conditions and the recognized limitation that the Act does not impose strict liability." 647 F.2d at 846, Footnote 11. Originally, the U.S. Senate bill provided only criminal penalties for a willful violation. Today, Washington's version of OSHA, WISHA, provides for criminal penalties where a violation is willful and the violation causes the death of an employee. RCW 49.17.190. Otherwise, civil penalties of up to $50,000.00 per willful violation may be assessed. RCW 49.17.180(1).

Violations have been upheld as "willful" where an employer's safety program was grossly inadequate. In IGC Contracting Co., 13 OSHC 1318 (1987), the company had no safety program whatsoever. In Secretary of Labor v. Aquastop Waterproofing & Painting Corp., 13 OSHC 2024(1988), the company not only lacked a formal safety program, but the company president also testified he was unaware of the existence of OSHA.

Willfulness has also been upheld where appropriate safety equipment had not been provided by the employer for the use of its employees. In Western Waterproofing Co., Inc. v. Marshall, 576 F.2d 139 (8th Cir. 1978), five employees were working on scaffolds without safety belts, which were not even at the jobsite. In some cases, employers have even removed safety equipment from the worksite. In IGC Contracting Co., supra, the foreman ordered removal of all guardrails around airshafts and stairwells, either because he needed the wood for another purpose, or he wanted to avoid possible damage to the walls by safety railing. See also Universal Auto Radiator Manufacturing Co. v. Marshall, 631 F.2d 20 (3rd Cir. 1980) (the employer intentionally removed a safety device which it had been ordered to install).

Willfulness may also be established by an employer substituting its own judgment as to whether safety equipment or procedures are required in specific situations. In Kent Nowlin Construction Co. v. OSHRC, 593 F.2d 368 (10th Cir. 1979), the contractor intentionally chose to ignore regulations regarding the deposit and storage of excavated material, rather than close parallel traffic lanes. In another trench case, the foreman consciously decided not to shore a trench because of the attendant difficulty in the presence of a water main pipe. F.X. Messina Construction Corp. v. OSHRC, 505 F.2d 701 (1st Cir. 1974). In Secretary of Labor v. Spaulding Lighting Inc., 13 OSHC 1847 (1988), an employer permitted a foreman to continue operating presses without safeguards or restraints for nearly three years after the first safety citation had been issued. The employer in Secretary of Labor v. Aquastop Waterproofing & Painting Corp., 13 OSHC 2034 (1988), did not provide safety instruction to his employees, because he did not believe they needed to be instructed on how to do their jobs.

The Department charges that The Erection Company is only paying lip service to the fall protection regulations. Citing other companies' safety programs, and emphasizing their disciplinary programs, the Department asserts that The Erection Company does not aggressively assure compliance with WISHA fall protection regulations. According to the Department, even though the

official company policy may be to comply with the fall protection rules, the unofficial policy is to allow the violations.

The Department argues that this unofficial policy is evident in The Erection Company's failure to take sufficient disciplinary action. It is then asserted that this failure should be the basis for finding a willful violation. In citing Secretary of Labor v. Spaulding Lighting, 13 OSHC 1847 (1988) in support of this proposition, the Department overlooks that the Spaulding case deals with failure to exercise control over a foreman. A foreman's conduct was imputed to the employer because the employer had knowledge of the violative conduct of the foreman and failed to correct the situation. In the circumstances of the present case, the fall protection problem relating to failure to tie off, permeates the entire industry. The enforcement task for The Erection Company is much greater than for the employer in Spaulding. The problem of making workers tie off is not an isolated instance where disciplinary action could have been directed at a single individual. In the citation appealed here, the worker was not a foreman; his conduct cannot readily be imputed to The Erection Company. The reasoning behind the Spaulding decision does not apply in this case.

The Department also argues that the facts in this case are similar to those found in Donovan v. Williams Enterprises, 744 F.2d 170 (D.C. Cir. 1984) in which the Federal Court upheld a finding that a fall protection violation was willful. In that case the job site in question had been inspected on several occasions and during each visit the specific violations were brought to the employer's attention along with the steps that the company should take to avoid these problems. In upholding the citation the court concluded:

> The Secretary's warnings and advice went unheeded and the violations continued. These facts alone are sufficient to establish 'intentional disregard' of and 'plain indifference' to OSHA's regulations. These facts, however, are not alone. There was substantial testimony by Williams' employees that they "frequently worked" without temporary floors or safety belts in the presence of company supervisors. Testimony offered by Williams' own president indicates his awareness of certain standards and his decision to forego compliance with those standards.

744 F.2d at 180.

In this case, although Mr. Thornburgh testified to frequently finding fall protection violations, there is nothing to show there was a decision to forego compliance. The testimony of Mr. Thornburgh indicates a program of disciplining workers or at least ordering them to tie off when discovered otherwise. The testimony of Adam Jones shows his concern for following the regulations in spite of

his belief that many are burdensome and impractical. Marlin Sande, a certified safety professional, reviewed the company safety record and safety program and found an increasingly aggressive stand on behalf of safety with a positive trend in fewer accidents. This evidence does not support a finding that the violation was willful. The circumstances here are distinguishable from those in Williams. There is not a sufficient showing that The Erection Company has made a conscious decision to forego compliance with fall protection standards.

This Board, in previously adopting the definition embraced by the majority of the federal courts, relies on the requirement that the Department must prove a willful violation by demonstrating voluntary action taken with an intentional disregard of or a plain indifference to the requirements of the statute. The Department has not met that standard here.

We agree with the Department's assertion that if an employer's safety program is a "sham" or an employer has an unofficial policy of allowing violations, that employer is properly charged with "willful" non-compliance. However, after careful consideration of this record we are not convinced that this employer's safety program is a sham. Nor are we convinced that this violation should be characterized as willful because, in the Department's view, the employer's enforcement of safety regulations is not sufficiently aggressive.

While the Department raised questions regarding The Erection Company's attitude towards fall protection regulations, the evidence, viewed as a whole, does not support the Department's position. Although the Department depicted the company as a high production firm which demands the most out of its employees, the inference that the company chose production over safety is not supported by the record.

The Erection Company's written safety program meets the standards of the industry. When a new employee arrives at a job, a safety sign-up sheet is given to the employee to sign; if necessary, the site superintendent goes over it with the new employee. Weekly safety meetings are held at the worksite; fall protection methods, as well as any other employee concerns, are discussed. Copies of all inspection reports are included in each employee's pay envelope. Site superintendents and foremen are directed to be vigilant regarding safety problems. Before a project is started, The Erection Company workers install all safety lines and cover any holes; if necessary, other workers assist them. As the project evolves, the safety equipment is modified.

Certainly, the company has a reputation among ironworkers as a "highballing" or "race horse" company, which sets a fast pace of work for its employees. Regardless, the entire industry requires

fast work; other companies require equally demanding work. Some of the company's employees were aware of the company's stated policy of terminating employees for violating safety rules; some were not. Although the Department emphasized that the company terminated a number of employees for not working fast enough, and relatively few for safety violations (and then only after a citation has been issued), the fact remains that the company did not allow its employees to violate safety rules with impunity. While the Department may indeed consider the company's disciplinary program to be lax, no regulation requires termination of an offending employee after a certain number of safety infractions. Certainly the Department must be cognizant of the enforcement problems due to the number of times each day that workers do not tie off in spite of the knowledge that they must do so. The Department must also be aware of the value of good workers to this employer and all employers in general. To expect employers in the steel erection industry to terminate employees with impunity for fall protection violations is unreasonable. Although we feel the Department is justified in citing the employer under these circumstances, to characterize the violation as willful without proving the employer encouraged or was plainly indifferent to the violation is not justified.

Further, the Department inspectors noted that the company had always responded as requested, and that the site superintendents had always been cooperative. The safety coordinator for the general contractor on the Pacific First Center project also observed that his contacts with The Erection Company's management regarding safety had been positive. Louis Nelson, the investigator who cited the company for the willful violation, even admitted that there was no evidence that the company was acting with any kind of indifference towards the safety of its employees. Any time he pointed out a hazard, it was immediately addressed. Additionally, it cannot be insignificant that at the same time the company's man-hours have been dramatically increasing, the accident rate has been dropping. If the company were insensitive to fall protection, surely the number of accidents would increase as the number of man-hours increased.

The Department insinuates that The Erection Company maintains an elite corps of about 30 ironworkers who are immune from sanctions for fall protection violations. According to this argument, the company is unwilling to terminate those skilled ironworkers who socialize with Adam Jones, the owner of The Erection Company. While Mr. Jones conceded that it is difficult to fire a highly valued employee, he has terminated those who flagrantly refuse to use available safety equipment. Because of the nature of the work, the company generally only uses experienced ironworkers.

The fall protection regulation at issue requires the use of safety belts, by the worker, when that worker is exposed to a fall of more than ten feet. Because of the nature of structural steel erection, this exposure is frequently transitory. In contrast to a trench, where shoring is required, or a power saw which needs a particular guard, the hazard which the regulations seek to eliminate is often of brief duration. The ironworker may well be tied off in one location, but not in another: the actual tying off is up to the ironworker. An ironworker may fasten and unfasten his lanyard 100 or 1000 times a day, depending upon the work and the circumstances at the time. Fred Thornburgh, the site superintendent at the Pacific First Center project, noted that precisely because a lot of the work is done in positions of short duration, an ironworker may just skip tying off. Ironworkers are traditionally proud of their ability to work hard and fast in a highly demanding industry. Their attitude toward their individual need for fall protection complicates both the employer's and the Department's enforcement efforts.

This is not a case where the company has no safety program: the company's program is on a par with others in the structural steel industry. The employer has not failed to supply safety equipment. Mr. Krall was wearing a safety belt when he fell. Nor is this a case where the employer substituted its judgment for that of the regulations - the employer agreed that the ironworkers should have been tied off. Furthermore, the fact that the employer immediately took steps to correct the problem demonstrates the fact that the employer cared about compliance with the regulations. This is not an employer who, when advised of a violation, is indifferent.

The limitations upon the employer's ability to insure 100% compliance in the structural steel industry were acknowledged in Century Steel Erectors Inc. v. OSHRC, OSHRC Dckt. No. 87 1348 (July 18, 1988). The administrative law judge noted:

> The secretary argued that the violation was willful because Century allowed its employees to continue to work without using safety belts and lines the day after the deceased worker fell to his death. However, simple carelessness or lack of diligence in eliminating a violative condition does not establish willfulness. Instead the record clearly showed that Century made safety belts and lines available, and the failure to require their use does not establish indifference to OSHA safety standards.

Century Steel Erectors, supra, at 1870-71.

While the Department has shown The Erection Company perhaps could improve the enforcement of its written safety program, the company's efforts should not be dismissed as "too little, too late." Our finding should not be interpreted as suggesting that The Erection Company need not

continue to aggressively enforce fall protection. It should be apparent that the employer must continue to aggressively enforce fall protection standards or face continual citations. We are simply finding that, although the violation at issue is clearly a serious, repeated one, it does not rise the level of a willful one. The Department has not established what the employer's safety program is a sham or that the employer otherwise acted with intentional disregard or plain indifference to the safety regulations. To the contrary, the employer has established that it has a comprehensive safety program with increasingly aggressive enforcement. Accordingly, the classification should be modified from "willful, serious repeated" to "serious repeated".

Correspondingly the penalty should be modified. According to the safety inspector's calculations at hearing, the total adjusted penalties should have been $2,250.00. Because we are declining to find that this was a willful violation of the regulation, this penalty amount should not be multiplied by ten. Therefore, the total penalty will be $2,250.00 rather than $22,500.00.

FINDINGS OF FACT

1. On July 22, 1988, an inspector of the Department of Labor and Industries inspected a worksite of The Erection Company at the Pacific First Center Building in Seattle, Washington.

   On September 22, 1988, the Department of Labor and Industries issued Citation and Notice No. 400062, which alleged one serious, willful, and repeat violation of WAC 296-155-225(1)(b), assessing a penalty of $24,500.00, and one general violation of WAC 296-155-705(2)(a)(3), for which no penalty was assessed, with a total penalty assessment of $24,500.00. The employer received the Citation and Notice on September 25, 1988.

   On October 11, 1988, the employer filed a notice of appeal with the Department of Labor and Industries.

   On October 27, 1988, the Department forwarded the notice of appeal and transmitted its file regarding the appeal to the Board of Industrial Insurance Appeals.

   On October 28, 1988, the Board issued its notice of filing of the appeal pursuant to the provisions of the Washington Industrial Safety and Health Act, and assigned it Docket No. 88 W142.

2. Prior to July 22, 1988, The Erection Company had repeatedly been cited for fall protection violations under the Washington Industrial Safety and Health Act for violations occurring at the various worksites in Seattle, Washington.

3. Between 6:55 a.m. and 7:10 a.m., on July 22, 1988, at a worksite of The Erection Company in Seattle, Washington, an employee of The Erection Company, Michael Krall, fell to his death down an elevator shaft.

4. On July 22, 1988, Michael Krall was working on the ninth floor of a worksite of The Erection Company, more than ten feet above the deck below him. From the point where he fell he could have tied off using his safety belt and lanyard.

5. At the time of the safety inspection of The Erection Company's worksite on July 22, 1988, there was no mid-rail on the safety railing around the ninth floor periphery of the temporary flooring. However, no employees of The Erection Company were exposed to the hazard.

6. The Erection Company has a comprehensive safety program designed to promote safety and compliance with the Washington Industrial Safety and Health Act. The employer enforces fall protection violations, but complete compliance requires cooperation of the steelworkers themselves.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. Citation and Notice No. 400062 issued on September 22, 1988 which alleged one general violation of WAC 296-155-705(2)(a)(3) and one serious willful repeat violation of WAC 296-155-225(1)(b) should be modified to vacate the general violation of WAC 296-155-705(2)(a)(3) and to charge one serious repeat violation of WAC 296-155-225(1)(b).

3. The penalty assessment in Citation and Notice No. 400062 issued September 22, 1988, should be modified to reflect a penalty of $2,250.00 for the serious repeat violation of WAC 296-155-225(1)(b).

It is so ORDERED.

Dated this 8th day of November, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member