BEFORE THE ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

STATE OF ALASKA, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF LABOR STANDARDS & SAFETY, OCCUPATIONAL SAFETY & HEALTH SECTION, Complainant,	)
v.	)
KIEWIT CORNERSTONE JV, Contestant.	) Docket No. 08-2239) Inspection No. 310852052) OAH No.08-0640-OSH

DECISION AND ORDER

I. Introduction

This matter arises from an inspection on September 10 and 11, 2008, of a construction site under the control of Kiewit Cornerstone JV (Kiewit). Following the inspection, the Alaska Department of Labor and Workforce Development, Division of Labor Standards & Safety, issued a single, two part citation to Kiewit, alleging a violation of the occupational safety and health standards set forth at 29 C.F.R. §1926.1052(b)(1) and (c)(1)(ii). Those standards prohibit foot traffic (except during stairway construction) on pan stairs with open treads, and require installation of stair rails. The division classified the violation as "serious" and assessed a monetary penalty of $525.00.

Kiewit filed notice of contest and a hearing was conducted on May 14, 2009. The division was represented by Assistant Attorney General Erin A. Pohland, and Kiewit was represented by its project manager, Kyle Welker, and its safety manager, Pat Seidel. The division called as witnesses compliance officer Dana Chapman and chief enforcement officer Steven Standley. Tony Link (site supervisor) and Joe Saccone (exterior supervisor) testified on behalf of Kiewit, as did Mr. Welker. All of the division's and Kiewit's exhibits were admitted into evidence, with the exception of an unsworn statement by Dave Phillips.[1]

After considering the evidence and the arguments of the parties, the Occupational Safety and Health Review Board makes the following findings of fact, conclusions of law, and order.

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[1] The division objected to admission of this statement on the ground that Mr. Phillips did not testify at the hearing, and the statement was withdrawn.

II. Findings of Fact

Kiewit Cornerstone JV was the general contractor on a project for construction of a Veterans' Administration outpatient clinic and regional office building, a sprawling two-story facility on a lot located at 1201 North Muldoon Road in Anchorage. The project involved multiple subcontractors. By early September, 2008, the steel frame of the building had been largely erected. On September 3, ironworkers employed by a subcontractor, Swanson Construction, began erecting a stairway in Zone C of the project. Construction of the stairway took several days. After initial installation of the steel frame, ironworkers using fall protection continued to work on the stairway, installing and leveling the landings and stairs and installing bolts and welds to ensure its stability. By September 10, Swanson's work on the stairway was largely completed. Kiewit's workers were to prepare the stairway for use by constructing a temporary stair rail and filling the metal pan treads with concrete. Pending completion of the work, the bottom step of the stairway was cordoned off with yellow tape fastened to two upright stanchions fashioned out of 2x4's.[2] The top step was blocked with a steel cable.

Beginning about the same time that Swanson's employees began work on the stairway in Zone C, employees of another subcontractor, B-E-K of Alaska, Inc. (B-E-K) arrived on the job.[3] All subcontractors' employees were required to attend weekly safety meetings conducted by Kiewit. Partially-constructed stairways that do not meet applicable safety standards are a well recognized safety hazard in construction worksites; workers are drawn to them, according to the testimony of Kiewit's site supervisor, Tony Link, "like bees to honey." At the weekly safety meeting on September 8, which was attended by several B-E-K employees, including foreman Mike Kozak,[4] Mr. Link told workers that until the stairways were made safe, they were to use ladders to access the second floor.[5]

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[2] The date on which the stanchions with the yellow tape were erected was not established, nor was the identity of the party that erected them. Photographs of the yellow tape in place were taken on September 10. Ex. 3-F, 3-H.

[3] B-E-K had only two workers on site on September 2, when it was just getting set up on the job site. Ex. 6, p. 1; Ex. 7, p. 1. Two apprentice carpenters were added on September 3, and two framers on September 4. Ex. 6, pp. 2-3. Two more framers were added on September 8. Ex. 6, p. 5; Ex. 5, p. 8.

[4] Six of the eight B-E-K employees on the site that day signed in to the meeting: Shannon Dulany [sp], Floyd Demoski, Peter Beck, and Greg, Pete and Mike Kozak. Ex. A, p. 3. Mr. Phillips apparently was on the payroll on September 8, but Kiewit's witnesses testified that it is not unusual for some workers not to sign in at such meetings. Mike Kozak had also attended the foreman's safety lunch on September 4. Ex. B, p. 5.

[5] Ex. A, p. 1.

On September 8, B-E-K's employees were building box headers and welding clips on the exterior of the building in the area of Zone C,[6] using a boom lift provided by B-E-K. On the morning of September 10, several B-E-K employees attended a new subcontractor orientation meeting.[7] One of the B-E-K employees at that meeting was Dave Phillips.[8] Two Kiewit supervisors, exterior superintendent Joe Saccone and project manager Kyle Welker, testified that Mr. Phillips spoke with them, in separate conversations, and asked about using the stairway to access the second floor, and that they told him that the stairway could not be used and that the proper way to access the second floor was by using the ladder.[9]

During the September 10 work day, workers employed by Kiewit were preparing for a series of concrete pours on the second floor of the structure which were scheduled for September 11 and 12, and which would include filling the stairway's pan steps.[10] Because the ladder to the second floor was located on the other side of the scheduled concrete pour, once the pour began the ladder would not provide access to the area that B-E-K was working in.[11] On the afternoon of September 10, Dana Chapman, a compliance officer for the Alaska Office of Occupational Safety and Health (AKOSH), arrived at the site for a routine programmed inspection of the project. She conferred with Kiewit personnel, but the project shut down for the day before she could conduct a walk-around. She returned the next day, September 11, which was the day of the concrete pour on the second floor.[12] Ms. Chapman toured the site with Mr. Welker and Kiewit's safety manager, Pat Seidel. She observed and photographed a worker, subsequently identified as Dave Phillips, step over the yellow caution tape and walk up the stairway;[13] one of the stanchions holding the yellow tape was on its side, providing unobstructed access to the stairway.[14]

Mr. Seidel verbally reprimanded Mr. Phillips, and in consultation with B-E-K's foreman confirmed that the boom lift could be used to access the exterior canopy on which Mr. Phillips was installing clips. The overturned stanchion with the yellow tape was placed back in its

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6 Ex. 6, p. 8; Ex. 7, p. 5.

7 The B-E-K employees who signed in to the meeting were Pete and Greg Kozak, Pete Beck, and Dave Phillips. Ex. A, p. 11; Ex. F, p. 11.

8 Ex. A, p. 11.

9 Ex. E, pp. 1-2.

10 Ex. 6, p. 10.

11 Attached as Appendix A is a rough, not to scale depiction of the work site prepared at the hearing by Mr. Link.

12 Ex. 6, p. 11.

13 Chapman testimony at 1:28:55.

14 Ex. 3-A.

upright position,[15] and Mr. Phillips returned to work, using the boom lift. On September 12, the yellow tape was replaced with red tape;[16] Kiewit employees installed mesh in the bottom of the pan treads, constructed a temporary stair rail out of 2x4's, and filled the pan treads with concrete.[17]

Kiewit's subcontractors had been informed that red tape would be used to mark off areas not to be used; yellow tape to mark off areas where caution was required, and that anyone crossing red tape would be disciplined.[18] Kiewit's subcontract with B-E-K required compliance with applicable federal Occupational Safety and Health Administration (OSHA) safety standards. All workers were required to attend a ten-hour OSHA training course prior to working on the project; Mr. Phillips had attended the training course on August 29.[19] Mr. Phillips was not disciplined for using the stairway in violation of the direct instructions of two Kiewit supervisors.

III. Discussion

An employer in Alaska must to everything necessary to protect the safety of employees,[20] including (1) complying with all occupational safety and health standards and regulations adopted by the division,[21] and (2) furnishing to each employee a place of employment that is free from recognized hazards that are likely to cause serious physical harm to its employees.[22] The division has by regulation adopted the bulk of the federal OSHA standards for the construction industry, 29 C.F.R. §1926; in particular, it has adopted 29 C.F.R. §1926.1052(b)(1) and 29 C.F.R. §1926.1052(c)(1)(ii).[23] These regulations respectively prohibit the use of a stairway with open pan treads (except during stairway construction), and require that all stairways be constructed with a stair rail.

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15 Ex. 4 (September 11 @14:34, 15:33-35).

16 Ex. 3-O. No testimony was elicited to establish the identity of the party that replaced the yellow tape with red tape. However, because Swanson had completed its work on the stairway, the preponderance of the evidence is that Kiewit personnel made that change.

17 There is some evidence that this work was begun on September 11. *See* Ex. 6, p. 11 ("Tuned up handrails and other areas for OSHA return."). However, based on the date and time stamps on the photographs in the record, the preponderance of the evidence is that the mesh and temporary stair rail were constructed on the morning of September 12, and that the pan treads were poured with concrete immediately thereafter.

18 Ex. 2, p. 4.

19 Ex. A, pp. 5-7.

20 AS 18.60.075(a).

21 AS 18.60.075(a)(1).

22 AS 18.60.075(a)(4).

23 8 AAC 61.1010(c).

The citation at issue in this case alleges that Kiewit violated 29 C.F.R. §1926.1052(b)(1)[24] and 29 C.F.R. §1926.1052(c)(1)(ii). With respect to the first alleged violation, Kiewit argues that it is relieved of liability under the affirmative defense of unavoidable employee misconduct. With respect to the second alleged violation, Kiewit argues that it discharged its duty under the law by setting up stanchions with yellow tape to limit access to the stairway.

A. General Legal Standards

1. Burden of Proof

To establish liability for a violation of applicable health and safety standards, the division has the burden of proof to show that a violation occurred. The burden of proof for affirmative defenses, including the defense of unavoidable employee misconduct, is on the party asserting the defense, by a preponderance of the evidence.[25] A fact is proven by a preponderance of the evidence when the fact is more likely true than not true.[26]

2. Unavoidable Employee Misconduct

To prevail on the affirmative defense of unavoidable employee misconduct, the contestant must satisfy four requirements.[27] First, the employer must have a work rule designed to prevent the violation. Second, the rule must have been adequately communicated by the employer to the employee. Third, the employer must take reasonable steps to discover violations. Fourth, the employer must effectively enforce the rule when violations are discovered.

B. Use of Staircase

1. B-E-K's Employee Violated 29 C.F.R. §1926.1052(b)(1)

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[24] AKOSH did not issue a citation against B-E-K for its employee's violation of 29 C.F.R. §1926.1052(b)(1). *See, e.g,* Fabi Construction Co., Inc. v. Secretary of Labor, 370 F.3rd 28, 39-40 (D.C. Cir. 2004) (demolition subcontractor liable for violation of 29 C.F.R. §1926.1052(b)(2) and (c)(1) by its own employees, despite the fact that subcontractor "neither installed nor controlled the stairway"); Superior Custom Cabinet Co., Inc., v. Occupational Safety and Health Review Commission, 158 F.3d 583 (5th Cir. 1998) (employer liable for violation of 29 C.F.R. §1926.1052(c)(1) by its employee, who used unsafe stairway while delivering cabinets to worksite). AKOSH guidelines allow it to cite more than one contractor for the same offense. See generally, AKOSH Field Operations Manual, §VII(J) at 3-24 (October 1, 2009) (available on the division's website).

[25] 8 AAC 61.205(i); *see* E&R Erectors, Inc. v. Secretary of Labor, 107 F.3d 157, 163 (3rd Cir. 1997); Riverdale Mills Corporation v. Occupational Safety and Health Review Commission, 29 Fed. App. 11, 17 (1st Cir. 2002).

[26] 8 AAC 61.205(i).

[27] *See, e.g.,* In Re Alcan Electric Engineering, OAH No. 07-0079-OSH at 4 (OSHRB 2008); In Re Arctech Services No. 02-2184 at 12 (OSHRB 2005); In Re Purely Alaska Water, Inc. No. 01-2166 at 7 OSHRB 2002). In these cases, we applied the test stated in Jensen Construction Company, 7 OSHD 1477 (OSHRC No. 78-5159,

29 C.F.R. §1926.1052(b)(1) states:

> Except during stairway construction, foot traffic is prohibited on stairways with pan stairs where the treads and/or landings are to be filled in with concrete or other material at a later date, unless the stairs are temporarily fitted with wood or other solid material at least to the top edge of each pan. ...

As Kiewit points out, the stairs in question had been initially erected on September 3, and they were still under construction at the time that Mr. Phillips trudged up them. Although the regulation provides an exception for foot traffic "during stairway construction," Mr. Phillips' conduct was nonetheless in violation of the regulation. The intent of the regulation is to prohibit foot traffic except for purposes of stairway construction. To read the regulation as permitting foot traffic for other purposes (*e.g.*, for access to other areas) would be nonsensical, since it would allow foot traffic (absent pan treads) for other purposes while the stairway is under construction, even though such foot traffic would be expressly prohibited (absent pan treads) after stairway construction. Accordingly, the regulation's reference to foot traffic "during stairway construction" is construed to mean foot traffic during stairway construction by the employee in question. Mr. Phillips did not use the stairway for stairway construction, but as a means of access to another area of the work site. Therefore, his conduct was in violation of 29 C.F.R. §1926.1052(b)(1).[28]

2. Kiewit Did Not Show Unavoidable Employee Misconduct

A. KIEWIT HAD A WORK RULE TO PREVENT THE VIOLATION

The first element of the affirmative defense of employee misconduct is that the employer must have a work rule designed to prevent the violation that occurred. Kiewit argues that it has two work rules that are designed to prevent a violation of 29 C.F.R. §1926.1052(b)(1): first, a written rule addressing access to areas of the construction site in which hazardous conditions are present; and second, an unwritten rule specifically addressing use of the stairway in Zone C.[29] As to the first rule, Kiewit asserts that "the [yellow] caution tape was appropriate...and consistent with our Tape and Barricade instructions given during our New Hire Orientation, numerous informational safety meetings, and other training."[30] As to the second rule, Kiewit asserts that one of its work rules "prohibited workers in usual conditions from using the stairs

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1979). *See generally*, Mark A. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW, §117 (4th ed. 1998) (hereinafter, "Rothstein").

[28] Kiewit has not denied that it may be held liable, for purposes of AS 18.80, for the conduct of its subcontractor's employee.

[29] Kiewit Closing Comments.

[30] Kiewit Closing Comments at 1.

while they were without filled step pans."[31] The division focuses on the second alleged rule, asserting that "[a]ll of the witnesses for [Kiewit] admitted that no written rule addressing the unfilled pan stairs exists."[32] The division adds that "the only written rules provided to Mr. Phillips...was a subcontractor safety manual which did not include any work rule specifically prohibiting using the pan stairs,"[33] and that "no evidence as to the specific content of [an OSHA outreach training program that Mr. Phillips attended] was presented."[34]

The evidence shows that Kiewit has a written work rule specifically addressing access to hazardous areas. Kiewit's written work rule specifically prohibits workers from entering an area barricaded with red tape, and states that workers may enter areas barricaded by yellow tape, with caution.[35] However, because the stairway was marked off with yellow tape, rather than red tape, and Mr. Phillips appears to have used exercised caution in using it, Mr. Phillips was not guilty of violating Kiewit's written rule, and the affirmative defense is inapplicable insofar as concerns Kiewit's written rule.

Although Kiewit did not present any evidence or testimony to show the existence of a written rule prohibiting use of stairs with empty pan treads, Kiewit did present evidence and testimony to support the existence of an unwritten work rule to that effect: the written report of the safety meeting and the direct testimony of Mr. Link establish that Kiewit had expressly informed employees that the stairway was not to be used as a means of access to the second floor until the stairway was completed and made safe for general use.[36] In addition, Mr. Link testified that instructions regarding the use of such stairs would be part of the standard OSHA course that Mr. Phillips had taken, as required by Kiewit. The preponderance of the evidence is that Kiewit had an unwritten work rule prohibiting use of the stairway as a means of access.[37]

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31 Kiewit Closing Comments at 2.

32 Division's Brief at 4.

33 Division's Brief at 4.

34 *Id.*

35 Ex. 2, p. 4 ("Proper signage for hazardous operations must be used and adhered to. Barricade tape will be used to flag off areas to protect other workers. Yellow tape will be used for caution when entering an area. Red tape will not be crossed. Any one caught crossing red tape will be disciplined."). *See also* Ex. 2, p. 3 ("A scaffold tag system will be used to identify safe work access to elevated platforms. (1) Red Tag – Do Not Use, not complete. (2) Yellow Tag - Use in conjunction with fall protection.").

36 We reject the division's suggestion that the rule was insufficiently clear, because it did not specifically refer to the use of stairways with unfilled pan steps. Division's Brief at 3, *citing* Secretary v. Mosser Construction Co., OSHRC Docket No. 89-1027 (1991); Secretary of Labor v. Gary Concrete Products, Inc., OSHRC Docket No. 86-1087 (1991). Those cases are distinguishable.

37 Because we conclude, below, that Kiewit did not effectively enforce the rule, we need not determine whether an unwritten rule suffices. In a prior case, we stated, "the employer must have a written rule." In Re Alcan Electric Engineering, OAH No. 07-0079-OSH at 4 (OSHRB 2008). In that case, the employer had a written rule,

B. KIEWIT ADEQUATELY COMMUNICATED ITS RULE

Kiewit argues that it communicated its rule regarding use of the stairs at the new hire orientation meeting, through the OSHA training course (required of all workers), and in the weekly safety meetings.[38]

The division argues that Kiewit did not adequately communicate the rule, because there is no evidence that Mr. Phillips attended the September 8 safety meeting at which that rule was discussed, and there is no evidence that the rule was discussed at the September 10 new subcontractor orientation meeting.[39] The division adds that Mr. Phillips' disregard of the rule, notwithstanding that it had been directly communicated to him by the Kiewit supervisor on site, shows that the rule was not adequately communicated.[40]

The division's arguments address whether Kiewit's efforts to communicate the work rule were adequate with respect to the particular individual who violated the rule. But the focus of the inquiry with respect to this element is not on any particular individual. Rather, this element "focuses on the employer's overall safety training, specific work instructions, and hazard warnings."[41] To the extent that the division focuses on Mr. Phillips' disregard of the rule, after he had been specifically and directly informed of its existence by Kiewit's on-site supervisor, the division's argument is misdirected: disobeying a direct instruction does not show failure to communicate, it shows willful disobedience.

Looking to Kiewit's overall program, it does not appear that Kiewit failed to adequately communicate its rule to workers. Kiewit's personnel testified that that this topic – the use of unfinished stairs – would have been covered in the standard OSHA training program. In addition, it was covered at the weekly safety meeting. Kiewitt has represented that it was covered in the new hire orientation.[42] In light of the record as a whole, we are not persuaded that Kiewit failed to adequately communicate its rule, which in addition to being generally communicated was directly and personally communicated to Mr. Phillips.

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and we did not have any need to consider whether an unwritten rule could suffice. Our statement in that case is therefore *dictum* and is not binding. We note that in a case cited by the division, Secretary of Labor v. Mosser Construction Co., OSHRC Docket No. 89-1027 (1991), the federal commission looked to the employer's unwritten rules, communicated verbally by instructions and training. We note that the lack of a written rule may be considered in determining whether the work rule has been adequately communicated.

38 Kiewit Closing Comments at 2.

39 Division's Brief at 5.

40 Division's Brief at 6.

41 Rothstein, §117(2) at 177.

42 Kiewitt Closing Comments at 1.

C. KIEWIT TOOK REASONABLE STEPS TO DISCOVER VIOLATIONS

Kiewit asserts that it has a robust program to detect the existence of hazardous conditions and violations of its work rules, including daily inspections, weekly inspections with the owner, and use of hazard recognition cards by workers.[43]

The division contends that these actions "do not lend support to the proposition that [Kiewit] took reasonable steps to prevent or discover violations," because Kiewit failed to prevent or discover the violation at issue.[44]

This element concerns efforts to discover violations when they occur, not efforts to prevent violations before they occur. More fundamentally, to the extent that the division and Kiewit address Kiewit's efforts to detect hazardous conditions, they disregard the fact that 29 C.F.R. §1052(b)(1) does not target the existence of a hazardous condition, but rather the conduct of an employee. It is undisputed that Kiewit was aware of the existence of the hazard posed by the stairs, and there was ample testimony regarding the vigilance of Kiewit's supervisors in inspecting the premises and encouraging workers, whether their own or a subcontractor's, to report apparent safety problems. Isolated unsafe conduct by individual employees is often transitory in nature, and Kiewit's supervisors cannot reasonably be expected to observe every instance in which a subcontractor's employees fail to act in accordance with their instructions. Kiewit's safety programs included its subcontractor's foremen and supervisors, and there is no evidence that B-E-K's employees were inadequately supervised.[45] In light of the record as a whole, we believe Kiewit's efforts to detect violations of its work rules by its subcontractors' employees were reasonable.

D. KIEWIT DID NOT EFFECTIVELY ENFORCE THE RULE

Kiewit argues that it effectively enforced its rules, both in general and in this specific instance. With respect to its general policy, Kiewit points to its new hire orientation meetings, its weekly safety meetings, and its disciplinary policy.[46] It argues that a verbal reprimand is typically sufficient to ensure compliance, and that written reprimands and removal from the worksite is used for employees who do not "get the message."[47] Mr. Phillips was verbally

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43 Kiewit Closing Comments at 2.

44 Division's Brief at 7.

45 *Compare, e.g.*, In Re Rainproof Roofing, LLC, No. 04-2203 (OSHRB 2006) (roofing contractor's supervision consisting of twice a day unscheduled visits was inadequate to detect worker misconduct).

46 Kiewit Closing Comments at 2.

47 Kiewit Closing Comments at 2.

reprimanded by Mr. Seidl after the infraction was observed, Kiewit says, and thereafter he "became a model worker."[48]

The division argues that Kiewit's failure to do anything more than to issue a verbal reprimand is inconsistent with its action in a subsequent instance of exposure to a fall hazard.[49] The division also notes that Kiewit did not show that the verbal reprimand was documented on Mr. Phillips' time card, as it should have been under Kiewit's disciplinary policy.[50] The division argues that Kiewit's enforcement of its safety program "is, at best, inconsistent," noting:

> Mr. Phillips disobeyed two direct orders to not use the stairs, lied about having used the stairs in the presence of the safety compliance officer, and placed himself in an imminent danger by using the unsafe pan stairs. Despite this, Mr. Phillips received no disciplinary action other than a verbal reprimand, in direct opposition to [Kiewit's] written safety policy.[51]

We find the division's last argument persuasive. The effectiveness of a safety program is highly dependent on firm and consistent enforcement. As Kiewit suggests, when an employee inadvertently violates a safety rule, or is unaware of the rule, a verbal reprimand and discussion may be an appropriate response in some cases. But when an employee disobeys a direct instruction regarding safety, the employee demonstrates willful disregard for workplace safety. To allow such conduct to pass with no more than a verbal reprimand sends a message to other employees, and to a subcontractor's supervisory personnel, that the employer does not place a high value on workplace safety. Kiweit's supervisors testified that they had authority to insist on the imposition of appropriate disciplinary actions with respect to a subcontractor's employees, up to and including prohibiting a worker from the job site. An employee's knowing disregard of the general contractor's direct, personal instructions regarding safety is unacceptable and warrants a sanction, whether the employee is the general contractor's or a subcontractor's. Simply put, the failure to impose any disciplinary sanction on Mr. Phillips is, under the circumstances of this case, sufficient to persuade us that Kiewit did not effectively enforce its own rule.[52] This element of the affirmative defense of unavoidable employee misconduct therefore fails, and the defense is therefore rejected.

B. Lack of Stair Rail

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48 Kiewit Closing Comments at 2-3.
49 Division Brief at 8, *citing* Exhibit D, p. 2.
50 Division's Brief at 8-9, *citing* Exhibit A, p. 10.
51 Division's Brief at 9.

29 C.F.R. §1926.1052(c)(1)(ii) states that all stairways must have a stair rail. Kiewit does not dispute that on September 11, the date of the citation, the stairway lacked a stair rail.[53] Kiewit argues, however, that the stairway was still under construction at that time.[54] During the time the stairway was under construction, Kiewit argues that it discharged its duty to provide a safe workplace by erecting the stanchions with yellow tape. By contrast, Mr. Standley testified that the general contractor's responsibility for the safety of the workplace required it to erect a physical barrier.[55]

While their characterization of the actions that needed to be taken differ, the parties' arguments reflect an implicit agreement that during the time that the stairway was under construction, if the measures that Kiewit used to restrict access to the stairway were inadequate, then Kiewit may be found liable for failure to provide a safe workplace, based on a violation of 29 C.F.R. §1926.1052(c)(1)(ii).[56]

With respect to a physical barrier, the division asserted that there is a regulation requiring physical barriers under the circumstances that existed in this case, but did not identify it.[57] Kiewit argues that a physical barrier would have created a risk of injury to workers who needed to access the stairway for construction purposes. In the absence of any showing that there is an express regulatory requirement for the erection of physical barriers at the bottom entry point to a stairway while it is under construction, we decline to impose such a requirement in this case. It is therefore unnecessary to determine whether such a barrier would have created a risk of harm greater than the risk of a fall from the stairway.[58] However, the absence of a physical barrier

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52 *See, e.g,* In Re Rain Proof Roofing, LLC, Docket No. 04-2203, at 4 (OSHRB 2006) (no evidence that employee was actually issued a disciplinary reprimand; employee misconduct not established). Mr. Link testified he had "no idea" whether the violation had been noted on Mr. Phillips' time card. Link testimony at 3:47:40.

53 The preponderance of the evidence is that after the pan treads were filled, a temporary stairrail was constructed, but that the temporary stairrail did not meet the applicable OSHA requirements for stairrails. Standley testimony at 2:30:00. Kiewit was not cited for that, however, and the only issue in this case is therefore whether the citation for the lack of a stairrail on September 11 should be sustained.

54 Kiewit Closing Comments at 1, 3.

55 Standley testimony at 2:36:15.

56 Alternatively, the division might have cited Kiewit for violation of the general safety standard. We note that no penalty was imposed for this violation.

57 In general, a guardrail or other fall protection is required on all unprotected sides and edges. 29 C.F.R. §1926.501(b)(1). This requirement, however, is inapplicable to stairways, which are governed by 29 C.F.R. §1926.1050. *See* 29 C.F.R. §1926.500(a)(2)(vii). 29 C.F.R. §1926.502(g) provides for controlled access zones for work on leading edges and in certain other special circumstances, not including stairways. Kiewit's employees testified that a physical barrier in the form of a steel cable was in place at the top of the stairway.

58 In general, to establish that a particular safety precaution will create a greater hazard than the hazard to which the applicable standard applies, an employer must show that: (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting workers are unavailable; and (3) a variance application would be inappropriate. In Re Johansson Plumbing Company, Docket No. 94-1042, at 5 (OSHRB

does highlight the importance of using appropriate warning signage as a means of restricting access.

In this case, we believe that the use of yellow tape held up by unattached stanchions was insufficient to discharge Kiewit's obligation to provide a safe workplace consistently with 29 C.F.R. §1926.1052(c)(1)(ii). As Mr. Link testified, incomplete stairways are a well-recognized construction hazard. As the general contractor on a multi-employer worksite, Kiewit was obliged to take steps to ensure that during the time that the stairway was under construction, only those employees who needed to be on the stairway for construction purposes were accessing it. The use of yellow tape attached to free standing stanchions was ineffective for that purpose. Other more effective measures were reasonably feasible.[59] We conclude that Kiewitt failed to adequately restrict access to the stairway, which was admittedly in violation of 29 C.F.R. §1926.1052(c)(1)(ii), and that it is therefore not discharged from liability for that violation.

IV. Conclusion

The division established violations of 29 C.F.R. §1926.1052(b)(1) and §1926.1052(c)(1)(ii). Kiewit has not shown that may not be held legally accountable for the conduct of its subcontractor's employee or for the existence of the hazardous condition, nor has it shown by a preponderance of the evidence that either violation was the result of unavoidable employee misconduct. Kiewit has not contested the amount of the penalty imposed. The division's citation, and the resulting penalty, are therefore AFFIRMED.

DATE: 7/6/2010 By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Timothy O. Sharp, Chairperson

Tomas A. Trosvig, Member

James Montgomery, Member

1995), *citing* ROTHSTEIN §121 at 169-171; In Re Steel Engineering and Erection, Inc., Docket No. 90-860, at 7 (OSHRB 1991), *citing* Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199, 205 (9th Cir. 1980).

[59] We need not decide what specific measures would have been sufficient. We note, however, that there are a variety of other measures that might have been taken. For example, the stanchions bearing the barricade tape – whether red or yellow – could have been affixed to the stair rather than free standing; a removable physical barrier could have been provided in addition to barricade tape; signing at the point of access could directed workers not to use the stairs without fall protection; during periods when the stairway was not actively being worked on, a physical barrier could have been installed; during periods when the stairway was being worked on, the foreman for the subcontractor doing the work could have been instructed to restrict access to his own workers; B-E-K's foreman could have been instructed to ensure that his workers did not use the stairway..

does highlight the importance of using appropriate warning signage as a means of restricting access.

In this case, we believe that the use of yellow tape held up by unattached stanchions was insufficient to discharge Kiewit's obligation to provide a safe workplace consistently with 29 C.F.R. §1926.1052(c)(1)(ii). As Mr. Link testified, incomplete stairways are a well-recognized construction hazard. As the general contractor on a multi-employer worksite, Kiewit was obliged to take steps to ensure that during the time that the stairway was under construction, only those employees who needed to be on the stairway for construction purposes were accessing it. The use of yellow tape attached to free standing stanchions was ineffective for that purpose. Other more effective measures were reasonably feasible.[59] We conclude that Kiewitt failed to adequately restrict access to the stairway, which was admittedly in violation of 29 C.F.R. §1926.1052(c)(1)(ii), and that it is therefore not discharged from liability for that violation.

IV. Conclusion

The division established violations of 29 C.F.R. §1926.1052(b)(1) and §1926.1052(c)(1)(ii). Kiewit has not shown that may not be held legally accountable for the conduct of its subcontractor's employee or for the existence of the hazardous condition, nor has it shown by a preponderance of the evidence that either violation was the result of unavoidable employee misconduct. Kiewit has not contested the amount of the penalty imposed. The division's citation, and the resulting penalty, are therefore AFFIRMED.

DATE: 7/16/2010 By: ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

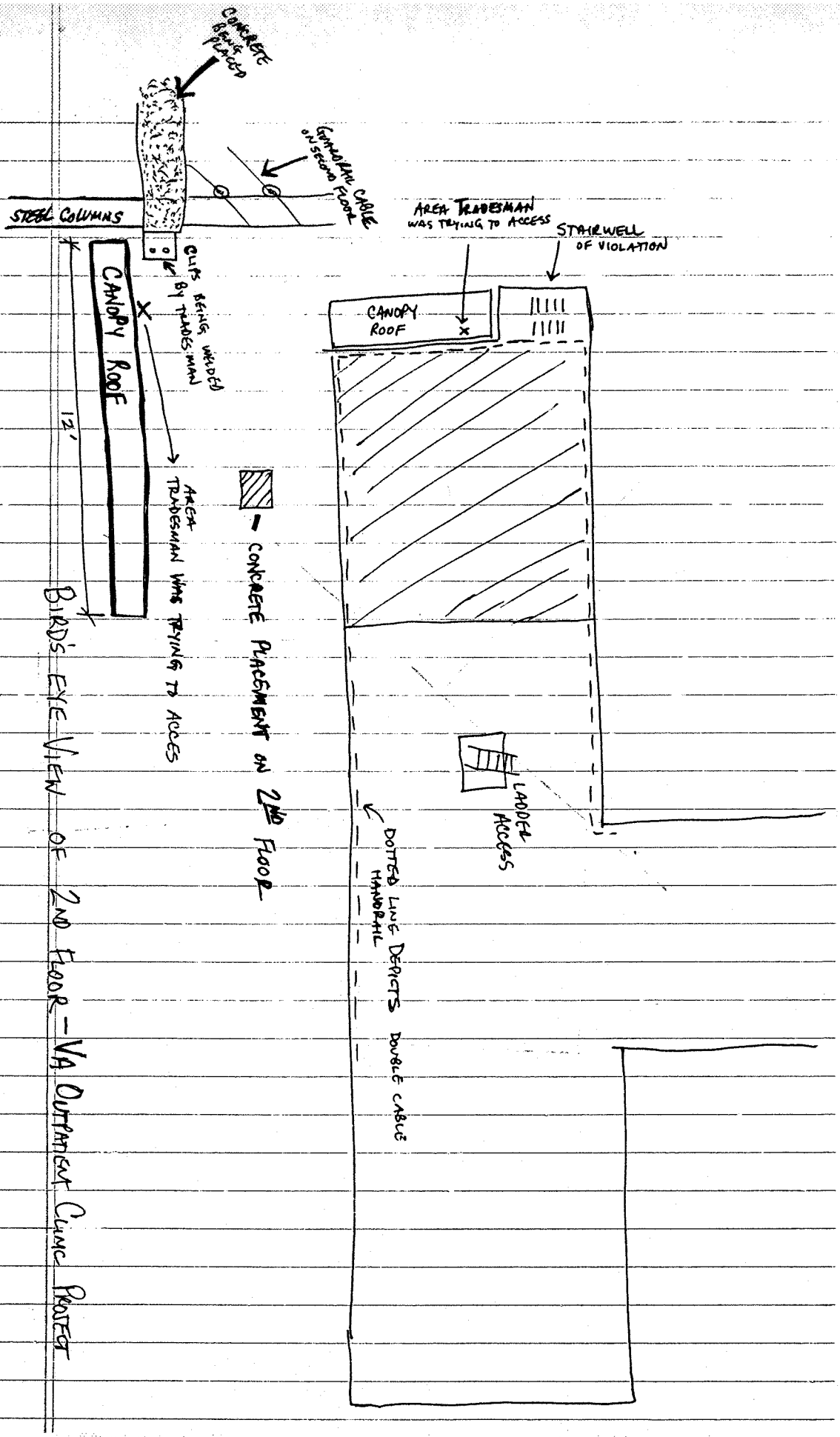
Timothy O. Sharp, Chairperson

Tomas A. Trosvig, Member

James Montgomery, Member

1995), *citing* ROTHSTEIN §121 at 169-171; In Re Steel Engineering and Erection, Inc., Docket No. 90-860, at 7 (OSHRB 1991), *citing* Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199, 205 (9th Cir. 1980).

[59] We need not decide what specific measures would have been sufficient. We note, however, that there are a variety of other measures that might have been taken. For example, the stanchions bearing the barricade tape – whether red or yellow – could have been affixed to the stair rather than free standing; a removable physical barrier could have been provided in addition to barricade tape; signing at the point of access could directed workers not to use the stairs without fall protection; during periods when the stairway was not actively being worked on, a physical barrier could have been installed; during periods when the stairway was being worked on, the foreman for the subcontractor doing the work could have been instructed to restrict access to his own workers; B-E-K's foreman could have been instructed to ensure that his workers did not use the stairway..


CONCRETE PLACED
GUARDRAIL CABLE ON SECOND FLOOR
STEEL COLUMNS
CLIPS BEING WELDED BY TRADESMAN
CANOPY ROOF
12'
AREA TRADESMAN WAS TRYING TO ACCES
AREA TRADESMAN WAS TRYING TO ACCESS
STAIRWELL OF VIOLATION
CANOPY ROOF
LADDER ACCESS
DOTTED LINE DEPICTS HANDRAIL DOUBLE CABLE
= CONCRETE PLACEMENT ON 2ND FLOOR
BIRD'S EYE VIEW OF 2ND FLOOR - VA OUTPATIENT CLINIC PROJECT
DRAWN BY: TONY LUNK SITE SUPERINTENDENT KIEWIT CONSTRUCTION

APPENDIX A