United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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Notice of Decision

In Reference To:

Secretary of Labor v. PARAMOUNT ADVANCED WIRELESS, LLC,
OSHRC Docket No. 09-0178

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on **{June 21, 2010}**. The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless with that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party that is adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. ***A petition may be filed with this Judge within ten (10) days from the date of this notice. There after, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing.*** See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
One Lafayette Center
1120 20th Street, N.W. - 9th Floor
Washington, D.C. 20036-3419

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. 2200.91 (51 Fed. Reg. 32026, Sept. 8, 1986). It is appended hereto for easy reference, as are related rules prescribing post-hearing procedures.

Covette Rooney
Judge, OSHRC

DATED: June 10, 2010
Washington, D.C.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street., N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. PARAMOUNT ADVANCED WIRELESS LLC., Respondent.	OSHRC Docket No. 09-0178

APPEARANCES:

For the Complainant:
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For the Respondent:
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Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), to review a citation issued by the Secretary of Labor ("Secretary"). The citation alleges that respondent, Paramount Advanced Wireless, LLC. ("Paramount" or "respondent") committed a serious violation of the Act by failing to comply with the standard at 29 C.F.R. § 1926.501(b)(1) on the grounds that "Employees were working on a communication tower 60 feet above the ground without any fall protection." The Secretary proposes a penalty of $7,000.00 for the violation.

BACKGROUND

Paramount is a limited liability corporation that erects and maintains wireless communication towers. On July 18, 2008, it was upgrading a free-standing wireless tower[1] by replacing its sub-diagonals structural members. (Tr. 27, 206) To accomplish its task, Paramount deployed a crew of three climbers and a foreman. The job required respondent's climbers to unbolt the old diagonal, lower it, then hoist up the new diagonal and bolt it in. Replacement of each diagonal took about an hour because the diagonals were large and contained lots of bolts in each flange. (Tr. 206) To replace the sub-diagonal members of the tower, work was performed horizontally. (Tr. 206, 219) The climbers would remain at approximately the same height throughout the placement and were not required to ascend or descend the tower to perform the placement. (Tr. 206, 219) However, when they were required to ascend to or descend from the tower they would use a climbing ladder affixed to the tower. (Tr. 112, 113, 203, 215)

Employees, Zack Cocker and Gerry LeClercq, were attached to the tower while working at the 60-foot level (Stipulation #7). A third employee, identified as Maurice, was located on the ladder of the tower at a lower level. (Tr. 49) The employees were wearing full body harnesses, shock absorbing lanyards, positioning lanyards, anchor straps, a Fisk Descender[2], and a carabiner[3]. (Tr. 45, 110, 211, 213-214)

Respondent has a 100% tie-off rule. (Tr. 169) Under this rule, climbers are required to be attached at all times to an anchor point. When moving on the tower, the climber moves to his new position, hooks to an anchor point and releases the old anchor point, with the process being repeated until the climber arrives at his destination. (Tr. 198)

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[1]The evidence demonstrates that there are two types of towers: monopole (guyed) and free-standing (unguyed). Unlike a free-standing tower, guyed towers are held erect by guyed wires. The tower here was a 280-foot tall, three legged, free-standing tower, also referred to as a lattice work tower. (Tr. 24, 111, 113, 127, Exs. C-3, C-4) All the evidence in this case relates only to free-standing towers.

[2]A Fisk Descender is a descent device that can also be used for repelling, positioning, and rescue. (Tr. 121)

[3]A carabiner is an oval shaped device that can be hooked through another loop and attached to a fall restraint. It is often used in mountain climbing. (Tr. 129)

On July 18, 2009, the foreman, Eric Rodig, was hoisting some drinking water by rope to Maurice. He noticed that Gerry LeClercq was on the tower, having a conversation with Zack Cocker. Everybody was tied off. After sending up the water, Foreman Rodig walked back to the water cooler to get himself a drink. About 15-20 seconds after the foreman turned from looking up, Gerry LeClercq fell to his death. (Tr. 213)

As a result of the accident, the Secretary conducted an inspection of the worksite which resulted in the issuance of a citation for a serious violation of 29 CFR §1926,105(a)[4] or, in the alternative, 29 CFR § 1926.501(b)(1)[5]. The Secretary proposed a penalty of $7,000 for the alleged violation. At the conclusion of the hearing, I granted respondent's motion for a directed verdict, dismissing the alleged violation of 29 CFR §1926,105(a) on the grounds that the record contained no evidence either on safety nets or that the use of the other devices enumerated in the standard were impractical[6]. (Tr, 250-251) Accordingly, the only item remaining is whether respondent violated 29 CFR § 1926.501(b)(1) and, if so, the appropriate penalty.

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[4]The standard provides:
§ 1926.105 **Safety nets.**

(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surface where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

[5]The standard provides:
§ 1926.501 **Duty to have fall protection.**

* * *

(b)(1) *Unprotected sides and edges.*
Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

[6]In her brief, the Secretary moves for reconsideration of the dismissal. The Secretary argues that, besides requiring the use of safety nets when the enumerated preferred methods are infeasible, the standard also requires that if one of those methods can be used, they should be used. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161 (No. 90-2894, 1993). However, as will be discussed, *infra,* the record amply demonstrates that respondent's employees used adequate methods of fall protection. Accordingly, the Secretary's motion for reconsideration is denied.

DISCUSSION

A. The Violation

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The parties do not dispute that the cited standard is applicable to respondent's worksite. It is also not disputed that, by virtue of working on the towers, respondent's employees were exposed to the hazard of falling covered by the standard. Therefore, the issues before the Commission are (1) whether respondent's employees were properly protected at all times from the fall hazard addressed by the standard and (2) if so, whether respondent could have known of the hazard with the exercise of reasonable diligence.

1. Compliance with the standard.

The Secretary does not dispute that respondent's employees were outfitted with appropriate fall protection when going to their work locations and for performing their work activities. Rather, it is the Secretary's position that Gerry LeClercq was using the Fisk Descender to perform a controlled descent. The Secretary contends that when using the Fisk Descender to descend, the employee must be protected with a hooked up second line and rope grab[7] that would serve as a back-up line should the Fisk Descender fail. Respondent's employees were not utilizing either a second line or a rope grab. Therefore, the Secretary contends that the employees were not properly equipped with an appropriate fall arrest system in violation of the cited standard.

Central to the Secretary's position is her belief that the only purpose of the Fisk Descender is for a controlled descent[8]. The record does not support this conclusion. Contrary to the Secretary's contention, the

[7]A rope grab is a device that serves as an automatic brake on the back-up line should the Fisk Descender fail and put the employee into a free fall.

[8]For example, in her opening brief, the Secretary states that "there is no reason for employees to have a Fisk Descender as part of their equipment since its only purpose is to be used as a descent control device." (Secretary's opening brief at p.7)

Fisk Descender Manual plainly states that "This equipment is used for applications including repelling, *work positioning*, and rescue operations." (Ex. C-24 at p. 3, ¶ 1.1)(emphasis added) Indeed, the Compliance Officer (" CO") agreed that a Fisk Descender could be used as a positioning device when used in conjunction with a positioning lanyard or shock absorbing lanyard. (Tr. 122) Moreover, the CO also agreed that a rope grab is not necessary when a Fisk Descender is used in such a fashion. (Tr. 122) This is consistent with the testimony of Foreman Rodiq and respondent's owner, Michael Moskowitz, both who testified that a Fisk Descender can be used as a positioning device when used in conjunction with a positioning or shock absorbing lanyard. (Tr, 177-178, 224-225)

The Secretary bases her conclusion that Mr. LeClercq was descending at the time of his fall on conversations the Compliance Officer had with climber Zack Cocker, foreman Eric Rodiq and Michael Moskowitz. According to the CO, Zack Cocker told her that he and Mr. LeClercq walked across the diagonals and positioned their lines and that LeClercq was going to descend into position in order to reach the diagonal member that they were going to work upon. (Tr. 43, 93-94) During her conversations with Foreman Rodig, the CO asserts that she was told that each climber had only one line (Tr. 51) and that, at the time of the accident, the employees used a Fisk Descender to reach the work that needed to be done. (Tr. 94) Furthermore, at the hearing, Foreman Rodiq testified that if Mr. Leclercq had been descending from the tower to the ground, he would use "his rope and a Fisk." (Tr. 214) The CO also testified that Mr. Rodig told him that employees sometimes used the Fisk Descender in lieu of a rope grab because the rope grab would hit employees in the head. (Tr. 56) The CO further stated that another project manager, Al Barnes, who was not at the site, told her that, although he wasn't familiar with this type of telecommunications tower, employees would normally use a rope grab on such towers. (Tr. 59-60) Finally, the CO testified that, at the closing conference, Mr. Moskowitz told her that employees should have been using a rope grab. (Tr. 100)

Much of the CO's testimony was disputed at the hearing. Although Zack Cocker did not testify, when confronted by the CO's assertion that Mr. Cocker told her that they had been descending, Mr. Rodig explained "I'm sorry, but I'm, I'm not Zack Cocker. I was the foreman. And there was no controlled descending by anybody, at any time." (Tr. 219) Mr. Rodig also firmly denied that he told the CO that the employees were descending. Rather, he explained that the employees would get up and down the tower by climbing the ladder. (Tr. 219) When asked about his comment that he used a Fisk Descender in lieu of a

rope grab because the rope grab would hit him in the head, the foreman replied that "I said that I've used Fisks in the past for positioning mainly because it [the rope grab] hit me in the back of the head a lot." (Tr. 221)

At the hearing, Mr. Moskowitz denied telling the CO that a rope grab was needed at the day of the accident. (Tr. 204) Rather, he testified that he would expect employees to descend by using the ladder. (Tr. 204) In any event, he testified that even if an employee was descending from a tower, it would not always be necessary to use a second line. Rather, fall protection could be maintained by using "a shock absorbing lanyard, a positioning lanyard, or a safety line, or any other means of fall protection." (Tr. 198)

The credible testimony of Foreman Rodiq and Michael Moskowitz demonstrates that the deceased was provided and used appropriate fall protection equipment and, that at the time of the fall, he was in the process of positioning himself. While he might have been moving down the tower to a lower diagonal or to a lower position on the tower he was already on, there is no evidence, aside from the statements recalled by the CO, that he was engaged in a controlled descent. Moreover, the CO agreed that an employee could safely tie off and move around the diagonals while maintaining 100% fall protection by attaching his lanyards to the diagonals or other parts of the tower. (Tr. 124) Indeed, assuming *arguendo*, that Mr. LeClercq was engaged in a controlled descent, the ComTrain[9] Training Manual, which was developed by the tower climbing industry, recognizes a second line with a rope grab as the most frequently used, but not only acceptable method of back-up fall protection when using a Fisk Descender. (Ex. R-6, p. 91)

It is clear from the record that the Secretary's misconception regarding the purposes of Fisk Descender colored her view of the statements obtained from Zack Cocker, Foreman Rodiq and Michael Moskowitz. Similarly, it is apparent that, although the CO understood that the Fisk Descender could be used for positioning, she misinterpreted the statements she obtained. For example, she recollected that Mr. Rodiq told her that he used the Fisk Descender in lieu of a rope grab, because the rope grab would hit him in the back of the head. This statement makes no sense if Mr. Rodiq was referring to using a Fisk Descender as a controlled descent device because, for such usage, a rope grab is used *in conjunction with* a

[9]ComTrain is an international trainer for tower climbing and rescue programs. In existence for about 10 years, they are recognized by the large telephone carriers, broadcasters, and large international tower companies as being a qualified company to train people in tower climbing and rescue. (T. 173) All of respondent's tower climbers are ComTrain certified. (Tr. 174)

Fisk Descender[10]. However, the statement does make sense if the employee is using the Fisk Descender instead of the rope grab as a positioning device. Indeed, this comports with Foreman Rodiq's explanation that he used Fisk Descenders in lieu of rope grabs for positioning. (Tr. 221)

The CO's accuracy in transcribing the statements obtained by respondent's employees was also placed into question by her demonstrated misunderstanding of her conversation with Al Barnes. According to the CO, Mr. Barnes stated that he was more familiar with monopole towers than with the stand-alone towers that were at issue in this matter. (Tr. 60) However, Mr. Barnes denied making such a statement. Rather, he pointed out that, during his career, he has worked on hundreds of stand-alone towers. (Tr. 235-237) He flatly denied telling the CO that he was more familiar with monopole towers, and speculated that "She must have misunderstood me." (Tr. 239) I find nothing in the record to suggest that Mr. Barnes had cause to misrepresent the level of his expertise either to the CO or to this court. That the CO misunderstood this basic fact, casts doubt on her recollection and interpretation of the statements of Rodiq, Cocker, Moskowitz and Barnes, most of which were made during the tumultuous period after the accident[11].

Given the Secretary's fundamental misconception regarding the use of a Fisk Descender, the CO's demonstrated propensity to misinterpret the statements given to her by the witnesses, and finding nothing to suggest that the witnesses were anything but truthful, I credit the testimony of Eric Rodiq and Michael Moskowitz over that of the CO. Therefore, I find that the preponderance of the evidence establishes that the deceased was not engaged in a controlled descent at the time of the accident. Rather, he was positioning himself to continue his work. The evidence also establishes that the Fisk Descender can be used as a positioning device and, when so used, employees can be properly protected by using both positioning and shock-absorbing lanyards, which were both provided and used by respondent's employees. (Tr. 225)

Accordingly, I find that the Secretary has failed to establish by a preponderance of the evidence that respondent's employees were not provided with adequate fall protection.

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[10]What would make sense is if the CO recollected Mr. Rodiq saying that he decided to dispense with a rope grab because it would hit him in the head, rather than saying that he used the Fisk Descender *in lieu* of a rope grab. But that was not her recollection.

[11]In this regard, I note that Mr. LeClercq's body was still at the site when the CO arrived at the scene of the accident. (Tr. 23-26)

Although the Secretary failed to establish that respondent did not provide appropriate fall protection equipment to its employees, the record further demonstrates that the accident was more likely than not caused when Mr. LeClercq failed to maintain 100% fall protection and somehow detached himself from the anchor point on the tower[12]. This failure was a violation of the standard's mandate that employees "be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." In its defense, respondent asserts that, with reasonable diligence, it could not have known of the violation because Mr. LeClercq's failure to maintain 100% fall protection was the result of an unpreventable, idiosyncratic and unforeseeable incident of employee misconduct.

2. Unpreventable Employee Misconduct

Once the Secretary has made a prima facie showing of a violative condition, the employer can establish, as an affirmative defense, that the violative condition was the result of unpreventable employee misconduct. To establish the defense, the employer must show that it had a thorough safety program which was adequately communicated and enforced and that the violative conduct of the employee was a departure from a uniformly and effectively communicated and enforced safety rule. *Brock v. L.E. Myers Co.,* 818 F.2d 1270, 1277 (6th Cir. 1987); *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991). The employer must also show that it has taken steps to discover violations. *Pride Oil Well,* 15 BNA OSHC 1809, 1815 (No. 87-692, 1992); *R Zoppo* Co., 9 BNA OSHC 1392, 1395 (No. 14884, 1981).

The record shows that respondent is a safety leader in the tower climbing industry. Finding that there were no OSHA safety regulations specifically applicable to the hazards in the tower industry, respondent, together with four other companies, formed the National Association of Tower Erectors (

written by national organizations and international companies. (Tr. 170, Ex. R-1) Among the requirements of the policy is that requires that each crew member take a written examination on proper climbing procedures. (Ex. R-1 at 33, 36) Moreover, the policy calls for regular inspections to monitor the effectiveness of the safety program (Ex. R-1 at p. 10) and requires 100% fall protection for employees. (Ex. R-1, p. 30) It also contains a progressive disciplinary policy that imposes (1) a verbal warning with note in file; (2) a written warning signed by the employee with a note in file; (3) suspension with a given time period or termination; and (4) termination. (Ex. R-1 at p. 9) Mr. Moskowitz testified that respondent has never had to discipline an employee for failure to follow the fall protection rules because they have never had an incident where an employee violated the policy. (Tr. 172) However, employees have been disciplined and terminated for other safety violations ranging from wearing ripped clothing (which Mr. Moskowitz testified could pose a safety hazard) to failure to wear hard hats. (Tr. 182)

Paramount also follows the ComTrain tower climbing program. (Ex. R-6) As noted, *supra* at n.9, ComTrain is an international trainer for tower climbing and tower rescue programs. (Tr. 173) All of respondent's climbers are required to be ComTrain trained before they are allowed to step off the ground. (Tr. 174, Ex. R-7)

The record further establishes that respondent requires that the crew holds a toolbox meeting every morning, where they look at the site and conditions and discuss what they will be doing that day. (Tr 188) Such a toolbox meeting was held by Foreman Rodiq on the morning of the day of the accident. (Tr. 211) The foreman then fills out a Daily Hazard Assessment. (Tr. 189) The Assessment filled out at the toolbox meeting on the day of the accident clearly requires that employees maintain 100% fall protection and was signed by all employees who were on the site. (Ex. R-3) After the meeting, the foreman also fills out a Pre-Construction Hazard Identification and Rescue Plan. (Tr. 188, Ex. R-2) Before work begins, the employees fill out and the foreman reviews a daily personal protective equipment (PPE) log, where employees check off that they've received the appropriate PPE for their tasks. (Tr. 191-192, Ex. R-4) All these forms were properly completed on the day of the accident and establish that respondent's employees were provided with all appropriate fall protection equipment.

Finally, the record shows that the employees were properly supervised while on the tower. Just before the accident, Foreman Rodiq was hoisting water for Maurice. (Tr. 213) While hoisting the water, he

observed that Zack Cocker and Gerry LeClercq were properly tied off. (Tr. 213) The foreman then returned to the truck to obtain some water for himself, when Mr. LeClercq fell from the tower. (Tr. 213) Mr. Rodiq estimated that the approximately 15-20 seconds elapsed between his observation of the two employees and the accident. (Tr. 213)

Indeed, the Secretary does not allege any failure in respondent's safety training, supervision or enforcement program. Rather, the Secretary asserts only that respondent's defense must fail because its own supervisory personnel did not require that employees use a secondary line and rope grab. However, as discussed, *supra*, the Secretary failed to establish by a preponderance of the evidence, that a secondary line and rope grab were necessary to maintain appropriate fall protection. Accordingly, I find that, on this record, respondent established that the accident was an unforeseeable event caused by the idiosyncratic actions of the employee who, for some unknown reason, unhooked himself from his fall protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

For reasons set forth above, it is **ORDERED** that the citation for a Serious Violation of Section 5(a)(2) of the Act for noncompliance with 29 C.F.R. § 1926.501(b)(1) and the proposed penalty are **VACATED.**

SO ORDERED

Covette Rooney
Judge, OSHRC

Dated: 21 JUN 2011

Washington, DC

§ 2200.91 Discretionary review; Petitions for discretionary review; Statements in opposition to petitions.

(a) *Review discretionary.* Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his own motion or on the petition of a party.

(b) *Petitions for discretionary review.* A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the 10-day period provided by § 2200.90(b)(2). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within 20 days after the date of docketing of the Judge's report. The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

(c) *Cross-petitions for discretionary review.* Where a petition for discretionary review has been filed by one party, any other party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a cross-petition for discretionary review. The cross-petition may be conditional. See paragraph (b) of this section. A cross-petition shall be filed with the Judge during the twenty days provided by § 2200.90(b) or directly with the Executive Secretary within 27 days after the date of docketing of the Judge's report. The earlier a cross-petition is filed, the more consideration it can be given.

(d) *Contents of the petition.* No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) *When filing effective.* A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) *Failure to file.* The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. *See Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976).

(g) *Statements in opposition to petition.* Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Judge's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

(h) *Number of copies.* An original and eight copies of a petition or of a statement in opposition to a petition shall be filed.