



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
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SECRETARY OF LABOR
Complainant,

v.

ISLAND LATHING & PLASTERING, INC.
Respondent.

OSHRC DOCKET
NO. 92-1935

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 28, 1993. The decision of the Judge will become a final order of the Commission on August 27, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 17, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: July 28, 1993

DOCKET NO. 92-1935

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
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Office of the Solicitor, U.S. DOL
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Burton W. Stone, Esquire
Island Lathing & Plastering, Inc.
585 Stewart Avenue
Garden City, NY 11530

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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SECRETARY OF LABOR,

Complainant,

v.

ISLAND LATHING & PLASTERING
 INC.,

Respondent.

Docket No. 92-1935

Appearances:

Luis A. Micheli, Esq.
 U.S. Dept. of Labor
 New York, New York

Burton W. Stone, Esq.
 585 Stewart Avenue
 Garden City, New York

For the Complainant

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Respondent is a corporation which was engaged in plastering work and related activities. On April 29, 1992, its worksite in a Garden City, New York shopping mall was inspected by an OSHA compliance officer. Subsequently, on June 5, 1992, the Respondent was issued two citations arising from the inspection. Respondent was cited for an alleged

serious violation of 29 C.F.R. 1926.556 (b)(2)(v) with a proposed penalty of \$2,275., and for an alleged other than serious violation of 29 C.F.R. 1926.1052(c)(1) with a proposed penalty of \$650. Respondent filed a timely notice of contest. A hearing was held on March 25, 1993, in New York, N.Y. Both parties were represented and filed post-hearing briefs. No jurisdictional issues are in dispute.

DISCUSSION

Alleged serious violation of 29 C.F.R. 1926.556(b)(2)(v)

The standard at 1926.556(b)(2)(v) states: Aerial lifts (b) Specific requirements (2) Extensible and articulating boom platforms. (v) A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift. The Secretary alleges that an employee working from an aerial lift was not attached to the boom or basket with a body belt and lanyard. The compliance officer, John Donahue testified that he had observed Respondent's employee in the bucket of an aerial lift doing fireproof spraying eighteen and a half feet above the ground with no safety belt and lanyard attached to the boom or basket to protect against possible falls. (T 6-10,14) He further testified that the Respondent's head foreman, scaffold foreman, spraying foreman and plaster foreman were all present in the immediate area of the violation. When pointed out to Mr. Juliano, the head foreman a search was instituted and a safety belt was found but not a lanyard, and instead a piece of rope was used. (T-16,32) The compliance officer's testimony was uncontroverted and clearly supported by photographic evidence. (Exh. C-1 and C-2)

On this record the Secretary has demonstrated that the cited standard applies, that an employee of the Respondent was working in an aerial lift without being tied off by a belt and lanyard, and was exposed to a fall of over eighteen feet. The Respondent knew of the violative condition, or with exercise if reasonable diligence could have known of the presence of the violative condition since its foremen were all present and either knew or could have known of the cited condition. The Secretary has shown by a preponderance of the evidence all of the necessary elements which establish a violation of the standard. Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 76-6247, 1981). The Respondent's

allegation that the crane lessor should be held liable for the violation is totally without merit. In the instant case the employer created and controlled the hazard to which its employee was exposed.

I find that the Respondent violated 29 C.F.R. 1926.556(b)(2)(v) and that the violation was serious. Having considered the statutory criteria, I further conclude the penalty proposed by the Secretary are appropriate.

Alleged other than serious violation of 29 C.F.R. 1926/1052(c)(1)

The standard at 1926.1052(c)(1) provides:

Stairways. (c) Stairrails and handrails. (1) Stairways having four or more risers or rising more than 30 inches (76 cm.), whichever is less, shall be equipped with: (i) At least one handrail; and (ii) One stairrail system along each unprotected edge.

The compliance officer observed Respondent's employees using a stairway which had six risers, measuring 48 inches high lacking in handrails. The employees were using the stairway to carry building materials and said employees were exposed to the hazard of slipping and falling therefrom. His testimony was uncontroverted and clearly supported by photographic evidence. (Exh. C-3). Respondent's contention that the absence of a handrail was due to the fact that the stairway was in an erection phase is not believable considering the unrebutted testimony of the compliance officer that from both the condition of the stairs and his conversation with Respondent's employees it was apparent the stairs had been erected at least two weeks prior to the inspection and used. (T 24-5)

The preponderance of the credible evidence demonstrates that Respondent's employees were exposed to the hazard of slipping and falling while using the stairs at the worksite. The violation was obvious and discernible by mere observation. The Respondent committed an other than serious violation of 1926.1052 (c)(1) as charged. In light of the record, and the statutory penalty criteria set forth in 17(j) of the Act, I conclude that a penalty of \$650 is reasonable and appropriate.

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 specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of law, and the entire record, it is hereby ORDERED:

1. Citation no. 1, item 1, alleging a serious violation of 29 C.F.R. 1926.556 (b)(2)(v) is AFFIRMED and a penalty of \$2, 275.00 is ASSESSED.
2. Citation no. 2, item 1, alleging an other than serious violation of 29 C.F.R. 1926.1052 (c)(1) is AFFIRMED and a penalty of \$650.00 is ASSESSED.



IRVING SOMMER
Judge

DATED: JUL 23 1993
Washington, D.C.