



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

SOLTEK PACIFIC,

Respondent.

OSHRC DOCKET NO. 04-0764

APPEARANCES:

For the Complainant:

Jay A. Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:

Arnold Doppler, Soltek Pacific, San Diego, California

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Soltek Pacific (Soltek), at all times relevant to this action maintained a place of business at the Puget Sound Naval Shipyard in Bremerton, Washington, where it was engaged in construction. Soltek admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On March 30, 2004, the Occupational Safety and Health Administration (OSHA) conducted a comprehensive inspection of Soltek's Bremerton work site. As a result of that inspection, Soltek was issued a citation alleging violation of 29 CFR §1926.501(b)(4)(iii) of the Act. By filing a timely notice of contest Soltek brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On October 13, 2004, a hearing was held in Seattle, Washington. The parties submitted the matter for decision after oral arguments were made at the conclusion of the hearing.

FACTS

OSHA Compliance Officer (CO) David Baker testified that Soltek was the general contractor in charge of construction of the multi-story steel and concrete barracks at the naval base in Bremerton (Tr. 22-23). Baker testified that, during his March 30, 2004 inspection, he noted two uncovered openings in an alcove on the south end of the ground floor of the building under construction (Tr. 25, 27, 31; Exh. C-1). The alcove was approximately two inches off the main hallway (Tr. 28, 35). The floor openings were approximately seven inches in diameter, and were surrounded by a metal lip approximately two inches high (Tr. 28-31, 34-35; Exh. C-1). Beneath the floor hole, employees of Soltek's electrical sub-contractor were working on the floor below, wiring the main distribution panel for the building (Tr. 27, 38, 44; Exh. C-1). Baker testified that three or four employees were working on the ground floor, in the area where the floor hole was located (Tr. 26). Further, Baker stated, a cart with fittings and boxes of material was located two to three feet from the floor holes (Tr. 36-37). Baker believed that tools or construction materials, including but not limited to those on the cart, could fall through the floor hole and strike employees working below (Tr. 39-40). Baker testified that cuts, scrapes and bruises requiring first aid in excess of a Band-aid were the probable injuries that employees might sustain (Tr. 41, 51). Baker admitted that the employees working at the site wore hard hats and eye protection, lessening the likelihood of a serious injury occurring (Tr. 54).

Soltek was aware of the floor hole, which had been uncovered for several days (Tr. 43). Mechanical systems were to be run through the floor hole; however, Baker did not observe any staged materials indicating that work was imminent (Tr. 44-45). The holes located on the other floors of the building had been covered with plywood (Tr. 44, 69-70). After he noted the cited hazard, Soltek immediately installed toe-boards around the hole and restricted access to the hallway (Tr. 46). According to Baker, Soltek had no prior history of OSHA violations in the past three years, a comprehensive safety program, and the overall condition of the worksite was excellent (Tr. 50, 60; Exh. R-1).

Arnold Doppler, Soltek's safety officer, testified that although he recognized some level of hazard associated with the floor holes, that the danger to employees was lower than Baker estimated (Tr. 61). According to Doppler, there was virtually no traffic in the dead-end hallway where the alcove was located (Tr. 63). The metal lip prevented material from being kicked into the floor hole (Tr. 64). Steven Parshall, Soltek's superintendent, testified that the floor holes were drilled after the walls were in place, so that no work was ever done above the openings (Tr. 68). Parshall testified that he evaluated the floor holes as a tripping hazard, but did not consider the possibility of materials falling through the hole (Tr. 68-69). After the hazard was brought to his attention, he admitted that he could see the potential for injury (Tr. 71).

Alleged Violation of §1926.501(b)(4)(iii)

Citation 1, item 1 alleges:

29 CFR 1926.501(b)(4)(iii): Each employee on a walking/working surface was not protected from objects falling through holes (including skylights) by covers.

(a) First floor, mechanical alcove, Seven inch diameters holes that opened into the basement below, on or about 30 March 2004.

The cited standard states:

Each employee on a walking/working surface shall be protected from objects falling through holes (including skylights) by covers.

Discussion

The existence of the violative condition is undisputed in this case. Soltek objects only to the classification of the violation as “serious.” According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm, unless the employer did not and could not, with the exercise of reasonable diligence, know the presence of the violation. The substantial probability of death or serious physical harm required by the Act does not refer to the probability that an accident will, in fact, result, but only that if the accident were to occur, there would be a substantial probability that death or serious physical harm would result. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 1987-90 CCH OSHD ¶28,501 (No. 87-1238, 1989).

The two holes cited in this case are extremely small, limiting the size of any object dropped through them. On this record I cannot find it probable that either death or serious physical harm would result from materials capable of falling through the seven-inch openings onto workers wearing hard hats and eye protection on the floor below. The cited violation, therefore, is re-classified as “other than serious.”

Moreover, because no work was being performed on the ground floor, and because the holes were located in an alcove, I find the occurrence of an accident highly unlikely. Because of the low gravity of the violation, Soltek’s demonstration of good faith, and the absence of previous OSHA violations, the assessment of any penalty would be inappropriate. See, *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1926.501(b)(4)(iii) is AFFIRMED as an “other than serious” violation of the Act, without penalty.

/s/ _____
Benjamin R. Loye
Judge, OSHRC

Dated: November 22, 2004