



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR  
Complainant,

v.

KUNZ CONSTRUCTION CO., INC.  
Respondent.

OSHRC DOCKET  
NO. 92-2803

**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 February 13, 1995. The decision of the Judge will become a final order of the Commission on March 15, 1995 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 March 6, 1995 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

Date: February 13, 1995

Ray H. Darling, Jr.  
Executive Secretary

DOCKET NO. 92-2803

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.  
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Office of the Solicitor, U.S. DOL  
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Harold H. Kunz, Jr., President  
Kunz Construction Co., Inc.  
211 West Turbo Drive  
P.O. Box 790140  
San Antonio, TX 78279 0140

Louis G. LaVecchia  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
Federal Building, Room 7B11  
1100 Commerce Street  
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UNITED STATES OF AMERICA  
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SECRETARY OF LABOR, :  
 :  
 Complainant, :  
 :  
 v. :  
 :  
 KUNZ CONSTRUCTION :  
 COMPANY, INC., :  
 :  
 Respondent. :

OSHRC DOCKET NO. 92-2803

**APPEARANCES:**

Ernest A. Burford, Esquire  
 Dallas, Texas  
 For the Complainant.

H. H. Kunz, Jr.  
 San Antonio, Texas  
 For the Respondent, *pro se*.

Before: Administrative Law Judge Louis G. LaVecchia

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The hearing in the matter was held on July 19, 1994, at San Antonio, Texas. The respondent objected to the proceeding on the grounds that the inspection was illegal. The objection is hereby overruled since the inspection was made as a result of a routine referral to the compliance officers.

**The Underlying Facts**

An inspection of a work site in San Antonio, Texas by compliance officers of the Occupational Safety and Health Administration ("OSHA") on July 7, 1992 resulted in the issuance of a "serious" citation against the respondent for alleged violations of

several safety standards promulgated under the Occupational Safety and Health Act of 1970. These are shown and discussed below:

29 CFR 1926.100(a)

Mr. Solter, the lead compliance officer, spoke with Mr. Hargett, the respondent's job foreman, in the opening conference normally held before an inspection and noted that Mr. Hargett was wearing a baseball cap, instead of a hard hat in an area designated as a hard hat area. He was, therefore, exposed to the hazard of being struck in the head by falling objects, or receiving an electrical shock or burn. The danger was magnified by the fact that the work being performed involved deep excavations and trenches, which are subject to cave-ins and heavy rocks, etc., rolling down from above. (Exhibits C-1 through C-3).

29 CFR 1926.651(c)(2)

Employees were entering and exiting a 20' x 20' excavation using a ladder which was not adequate for that purpose, since it did not, as required, extend up over the working surface at least 3 feet. The excavation was 9 or 10 feet deep, exposing an employee to a substantial fall and serious injury or death. (Exhibit C-2).

29 CFR 1926.651(l)(1)

A 2 x 12 inch plank without guardrails was observed extending from the east to the west side of an excavation to a concrete valve box on the north side. The compliance officer was told by one of the workmen that the plank was being used by the men for the crossover. A fall of up to 10 feet could be experienced by the employees, exposing them to serious injuries or death. (Exhibits C-1 and C-2).

29 CFR 652(a)(1)

The compliance officer observed employees working in a 20 x 20 foot excavation on the north side of the Alamo Dome that had not been shored or properly sloped, exposing them to the hazard of being struck by moving earth. (Exhibits C-2 and C-3).

Discussion

The respondent offered no specific defenses to the cited violations but expressed the opinion that the inspection was improper because the compliance officer

“did not go through” the general contractor in conducting the inspection. There is no merit in this stance, of course, and it must be rejected. In the absence of valid defenses to the charges, and in view of the credible testimony of the compliance officer, supported by the photographic evidence, I can only conclude that the complainant has proved his complaint. The citation items will be affirmed as serious violations of the Act.

The proposed penalties have been considered and found to be fair and proper under appropriate sections of the Act. Therefore, a total penalty of \$5,000.00 as proposed by the complainant, will be assessed for the violations here found.

#### CONCLUSIONS

1. The Review Commission has jurisdiction of this proceeding.
2. The respondent is engaged in a business affecting commerce and has employees within the meaning of the Act.
3. The respondent violated the safety standards shown above and the violations are properly characterized as “serious” within the meaning of the Act.

#### Order

The respondent is assessed a total civil penalty of \$5,000.00 for the violations found.

So ORDERED.

  
Louis G. LaVecchia  
Administrative Law Judge

Date: FEB - 7 1995