



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

PHONE:
COM (202) 606-6100
FTS (202) 606-6100

FAX:
COM (202) 606-6080
FTS (202) 606-6080

SECRETARY OF LABOR
Complainant,

v.

DANELLA CONSTRUCTION CORP. OF FL., IN
Respondent.

OSHRC DOCKET
NO. 93-0648

**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 March 3, 1994. The decision of the Judge will become a final order of the Commission on April 4, 1994 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 23, 1994 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: March 3, 1994

DOCKET NO. 93-0648

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.
Washington, D.C. 20210

Don McCoy, Esq.
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Building, Rm. 407B
299 East Broward Boulevard
Ft. Lauderdale, FL 33301

David E. Jones, Esquire
Ogletree, Deakins, Nash, Smoak &
Stewart
3800 One Atlantic Center
1201 West Peachtree Street, N. w.
Atlanta, GA 30309

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

00110062270:04



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-01
FTS (404) 347-011

SECRETARY OF LABOR,

Complainant,

v.

DANELLA CONSTRUCTION
CORPORATION OF FLORIDA, INC.,

Respondent.

OSHRC Docket No. 93-648

APPEARANCES:

Stephen Alan Clark, Esquire
Office of the Solicitor
U. S. Department of Labor
Fort Lauderdale, Florida
For Complainant

David E. Jones, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act (Act) to contest a citation issued by the Secretary of Labor (Secretary) pursuant to section 9(a) of the Act.

The underlying facts in this case are not in dispute. On November 23, 1992, respondent, Danella Construction Corporation of Florida, Inc. (Danella), was engaged to

install telephone communication lines at the corner of Congress and Sixth Avenues in Lake Worth, Florida. The work on that day involved the shoring of a trench using an 8-foot shield which was being lifted with a boom truck. An inspection of the worksite at that time resulted in the issuance of the citation.

Prior to commencement of the hearing on the merits, the Secretary moved to withdraw item 2 of the citation and amend item 3. Both motions were granted, and item 3 was amended to allege a willful violation with a proposed penalty of \$5,000.

Alleged Serious Violation of 29 C.F.R. § 1926.20(b)(2)

The standard, which pertains to accident prevention, requires the employer to “provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.”

The citation alleges that frequent and regular inspections of the work area were not made by a designated person in the following instances:

- (a) Employees were permitted to work under energized power wires.
- (b) Failing to contact power company to provide a safe work area.
- (d) Competent person failed to inspect the work site while shoring a trench.

In his posthearing brief, the Secretary concedes that competent persons had conducted an inspection of the worksite. The evidence shows that Messrs. Steven Pascale and Nolan Marks, competent persons, inspected the worksite on November 23, 1992, prior to commencement of the shoring operation. Also, Nolan Marks remained on the site throughout the day. The Secretary argues that the inspection of the worksite was deficient because it failed to disclose that use of the crane in an area with overhead wires presented a hazard to employees. It is pointed out that the inspection report (Exh. R-6) makes no mention of the overhead wires.

The evidence establishes that the standard’s requirements have been met. There is no dispute the site was inspected by competent persons prior to commencement of work on the first day. In addition, a competent person was present during the entire period work was being performed.

Although the Secretary argues the inspection was deficient in not revealing a hazard, the standard's language does not prescribe the manner in which an inspection should be conducted. However, if hazardous conditions are found, the "competent person," as defined in § 1926.32(f), shall have "authorization to take prompt corrective measures to eliminate them." The fact that work was being performed in the general area of overhead lines cannot be considered substantial evidence to prove a violation. The mere presence of an alleged hazard does not establish a violation of this standard. The evidence fails to show that the requirements of the standard have not been met.

The standard was not violated as alleged.

Alleged Violation of 29 C.F.R. § 1926.550(a)(15)

The standard provides that:

(15) Except where electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to powerlines only in accordance with the following:

(i) For lines rated 50 kV. or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet;

....

The alleged violation is described in the citation as follows:

Equipment was operated where part of the equipment was within 10 feet of electrical distribution or transmission lines rated 50 kV or below that had not been de-energized and visibly grounded, nor had insulating barriers not a part of, or an attachment to, the equipment been erected to prevent physical contact with the lines

Mr. Joseph DiMartino, safety and health compliance officer, conducted the inspection that gave rise to the issuance of the citation. He testified that, while driving his car along Congress Avenue at the intersection of Sixth Avenue, he observed a crane being operated with the tip of the boom close to overhead electrical lines. DiMartino stopped his car and took photographs from a distance of approximately 100 feet. He estimated the boom to be

within 2 feet of the wires when he first observed it but moved away to about 5 feet when the photographs were taken¹ (Tr. 24-25, 71).

Mr. Robert Risley, a field technician for Lake Worth Utilities and an expert on overhead electrical power lines, testified regarding the lines at the worksite. He explained that the utility poles supported four lines. Three lines were connected to insulators, which were in turn connected to a crossarm mounted about 3 to 5 inches from the top of each pole (Tr. 218). The fourth overhead line—a neutral line—hung some 6 or 6½ feet from the top of each pole (Tr. 221).

Mr. Pascale, Danella's safety inspector, indicated that during the morning of the inspection, he and foreman Marks discussed the overhead electrical lines on the worksite. They concluded their work would not be within the 10-foot danger zone of the lines (Tr. 143, 149). Soon after the crane began to place the shoring plate or shield in the trench, it became necessary to re-position the crane nearer to the truck. Mr. Marks observed the re-positioning and location of the boom and determined they were "nowhere near the power lines" (Tr. 255-256). At no time did he see the boom tip within 10 feet of the overhead lines (Tr. 265). He stated that in moving closer to the load, the length of the boom was shortened causing less possibility of reaching the lines (Tr. 262-263).

Mr. George Dunnaway, a laborer who was helping guide the shield into the trench, testified the boom did not come within 10 feet of the overhead lines. He also stated, "We was watching the wires at all times, that's why he couldn't get no higher on account of the wires. We seen the wires. We was staying away from the wires" (Tr. 286-289).

The central question is whether the minimum clearance of 10 feet between the boom and overhead lines was maintained. No actual measurements were taken, and the Secretary's evidence of the violation was based on the inspecting officer's estimate of a 2-foot clearance which he made at a distance of approximately 100 feet. It is noted that the visual approximations were made at ground level of the moving boom which was in an

¹ The photographs depicting the scene were received into evidence as Complainant's Exhibits 1 through 8. No actual measurements were taken at the scene.

elevated position. Danella refutes the inspector's observations with the testimony of two employees who were much closer in proximity to the boom and its operation.

While there was considerable discussion of the credibility of some witnesses, it is clear the Secretary has failed to establish the violation by a preponderance of credible evidence. The Secretary's only testimony regarding the distance consisted of a visual estimate. Danella adequately refuted the estimate with the testimony of two witnesses who were in a better position to make more accurate estimates.

The evidence does not establish the violation as alleged.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rules of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

The citation alleging violations of 29 C.F.R. § 1926.20(b)(2) and § 1926.550(a)(15) is hereby vacated.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: February 22, 1994