UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ISLAND LATHING & PLASTERING, INC.
Respondent.

OSHRC DOCKET
NO. 93-2220

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 June 17, 1994. The decision of the Judge will become a final order of the Commission on July 18, 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 July 7, 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.

Date: June 17, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2220

NOTICE IS GIVEN TO THE FOLLOWING:

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Burton W. Stone, Esquire
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Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
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One Lafayette Centre
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ISLAND LATHING AND PLASTERING, Respondent.	Docket No. 93-2220

ERRATA REGARDING DECISION AND ORDER

In a Decision and Order mailed to the parties on May 25, 1994, the Respondent in this matter was mis-identified as Island ADC, Inc..

Accordingly, the caption of the case is amended to reflect the correct party Respondent.

SO ORDERED.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JUN 2 1994
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order was mailed to the parties listed below by first class mail on June 2, 1994.

93-2220

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Garden City, New York 11530

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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 93-2220
ISLAND ADC, INC.,	
Respondent.	

Appearances:

Luis A. Micheli, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Burton W. Stone, Esq.
Garden City, New York
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration on or about May 29 and 30, 1993[1], Island Lathing and

[1] Request for Admissions, ¶ 1. Inasmuch as Respondent never responded to the Secretary's Request for Admissions each and every request is deemed to have been

Plastering, Inc., ("Respondent") was, on or about June 25, 1993, issued one citation alleging two serious violations of the Act and one citation alleging one repeat violation. Penalties of $900 each for the alleged serious violations and $1800 for the repeated violation were proposed by the Secretary. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on May 10, 1994, in New York, New York. No affected employees sought to assert party status.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction related activities. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce (Complaint, ¶ ¶ II, III; Answer; Request for Admissions, ¶ ¶ 2 & 3).[2] I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[3] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Respondent in this matter is under the same operation and control as the Respondent in a companion case, Docket No. 93-1203. As in that case, Respondent conceded the alleged violations and contested only the appropriateness of the penalties proposed (Tr. 4).

The violative conditions which existed and the penalties proposed by the Secretary for each violation are as follows:

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admitted. Rule 54(b), 29 C.F.R. § 2200.54(b) (1993).

[2] Inasmuch as Respondent never responded at all to the Secretary's Request for Admissions, each and every request made therein is deemed to have been admitted. Rule 54(b), 29 C.F.R. § 2200.54(b) (1993).

[3] Title 29 U.S.C. § 652(5).

Serious Item 1 - An employee was spraying fireproofing material without using personal eye protection. (29 C.F.R. § 1926.102(a)(1).) Penalty proposed: $900.

Serious Item 2 - Temporary lights were suspended by electric cords not designed for such use. Penalty proposed: $900.

Repeat Item 1 - Lack of a provision in the company safety program requiring a frequent and regular inspection of the jobsite by a competent person designated by the employer. Penalty proposed: $ 1800. (Prior violation of this standard cited on July 12, 1990 and not contested.)

Under § 17(j) of the Act, 29 U.S.C. § 666(j), the Commission has the

> authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

Where the record contains little relevant information concerning the factors set out above, the Commission has "given [the respondent] the benefit of the doubt on each of these three factors in determining an appropriate penalty." *Moser Construction Co.*, 15 BNA OSHC 1408, 1416 (No. 89-1027, 1991).

The Compliance Officer testified as to how he calculated the proposed penalty as to each of the four items. As to each instance, he started with a "gravity based" amount and, following the formula in the Field Operations Manual, gave Respondent "adjustments (reductions)" for its small size. He allowed no "adjustments" of the penalties proposed for the serious violations for good faith or history because he found that a copy of the safety program was not "immediately available" at the site, respondent's employees at the site "knew little about it" and because Respondent had a history of 15 separate citations during the period 1988 to 1992 (Tr. 9; Exhibit C-1). As to the repeat violation, no "good faith" adjustment was allowed because Respondent did not have a complete safety program and no adjustment was allowed for "history" because of the repeat nature of the violation cited.

Respondent repeated its arguments that as a sub-contractor on multi-employer work sites its employees often face conditions which were created by other contractors over which it has no control and that the requirement that it "hire" from the local union hiring hall

results in its having employees who may be with Respondent for only a day or two and cannot be trained economically. As discussed in Docket No. 93-1203, these "defenses" do not warrant any reduction in the proposed penalties.

In this case, even though Respondent withdrew its challenge to the alleged repeat violation, its counsel questioned the Compliance Officer as to whether the violative conditions cited in the "prior" citation, which formed the basis of the repeat allegation, were the "same type" as those cited in these proceedings (Tr. 12 - 13). Respondent presented no evidence contradicting the Compliance Officer's assumption that since the same standard was cited in both instances, the type of work was the same (Tr. 12). The Compliance Officer's assumption is in accord with the primary factor used in categorizing violations as "repeat" under § 17(j) of the Act. Violations are "repeat" when a subsequent violation is substantially similar, that is - the two violations resulted in substantially similar hazards. *Austin Road Co.,* 8 BNA OSHC 1916, 1918 (No. 77-2752, 1980). Accordingly, the violation alleged to be classified as "repeat" is found to be such.

In some cases one of the "factors" of penalty consideration outweighs and is more important than the others. See, *Hern Iron Works, Inc.*, 16 BNA OSHC 1207, 1216 (No. 89-433, 1993); citing, *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972). In this case, Respondent's extensive history of prior violations warrants increasing the penalties beyond the amounts proposed by the Secretary. Such a history indicates a lack of a good faith effort on Respondent's part in complying with OSHA standards. Multiple citations over a period of years, even where, as here, there is little duplication in the exact standards violated, is clearly indicative of a less that concerted effort at compliance with the Act. The effectiveness of the Act, designed to prevent the first accident, is greatly undermined by Respondents who, despite numerous citations, appear to put forth no greater effort at compliance. Accordingly, I find that Respondent's history is the most important penalty factor in this case and deserves special emphasis in penalty calculations. I thus conclude that a penalty of $1,000 is appropriate for each of the serious violations and a penalty of $2,000 is appropriate for the repeat violation.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in serious violation of the Act as alleged in the citation issued to it on or about June 25, 1993.

4. Respondent was in repeat violation of the Act as alleged in the citation issued to it on or about June 25, 1993.

5. Under § 17(j) of the Act, a penalty of $1,000 for each of the serious violations is appropriate.

6. Under § 17(j) of the Act, a penalty of $2,000 for the repeat violation is appropriate.

ORDER

1. The citations issued to Respondent on or about June 25, 1993 are AFFIRMED.

2. Respondent shall pay to the Secretary of Labor - OSHA an aggregate civil penalty totalling $ 4,000.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JUN 15 1994
Washington, D.C.