

Secretary of Labor,
Complainant,
v.
Southern Pan Services Company,
Respondent.

OSHRC Docket No. **97-404**

APPEARANCES

Leslie John Rodriguez, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Donald R. McCoy, Esq.
Ft. Lauderdale, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Southern Pan Service Company (SPS), a formwork contractor, was preparing vertical wall forms for removal from the 30th floor of a condominium project in Miami, Florida, on September 3, 1996, when a wall form fell, fatally injuring an employee. As a result of an investigation by the Occupational Safety and Health Administration (OSHA), SPS received a serious citation alleging violation of 29 C.F.R. § 1926.21(b)(2), for failing to train employees in the recognition of unsafe conditions, and 29 C.F.R. § 1926.703(a)(1), for failing to support formwork for all reasonably expected vertical and lateral loads. OSHA proposed a \$5,000 penalty for each alleged violation.

SPS timely contested the citation. The hearing was held August 8 and 11, 1997, in Miami, Florida. The parties stipulated jurisdiction and coverage (Tr. 4-5). The parties filed post-hearing briefs.

SPS asserts that the citation was not issued with reasonable promptness. Also, SPS denies the violations, claiming lack of employer knowledge, employee misconduct and that § 1926.703(a)(1) is not applicable. For the reasons stated, the violations are vacated.

Background

SPS contracted in August, 1995, to erect the concrete wall and floor formwork for a condominium project in Miami, Florida. The project, referred to as “Santa Maria Condominium,” was designed as expensive high-rise residential condominiums ranging in price from \$800,000 to \$4 million (Tr. 348). The proposed building was to be 55 stories with a parking deck. Each floor was 22,000 square feet (Tr. 305). SPS completed its work on the project in August, 1997 (Tr. 347). To erect the concrete floor, SPS used slab tables (Tr. 250). The tables were 80 feet long and 14 feet wide with metal decks (pans) in which concrete was poured to form the floor (Exh. R-14; Tr. 21-22, 164). To erect the walls and columns, SPS used a plate girder formwork system manufactured by the SYMONS Corporation (Tr. 12). The concrete for the wall was poured between the vertical steel panels. Until the concrete hardens, the vertical wall forms were held by braces and taper ties (Tr. 15-17). The braces, also called “pipe form aligners,” position the wall to “form straight and plumb walls” and “was not intended to resist lateral loads” (Exh. R-24A; Tr. 229). The brace primarily aligned the wall form (Exh. R-17 p. 10; Tr. 228). “The brace has no function as far as the concrete pressures” (Tr. 18, 230). SPS mounted the six-foot brace to the wall form and secured the brace to the floor (Tr. 183-184).

“Taper ties” are solid steel bolts which go through the wall form panels to hold the concrete pressure when the concrete is poured (Exh. R-24A; Tr. 18). Each taper tie is 1 ¼ inches in diameter, approximately 55 inches long, and has a load-bearing capacity of 50,000 pounds (Exh. R-16; Tr. 20, 227, 230-231). The purpose of the taper tie is to resist lateral loads. Depending on the size of the wall form, there are at least 15 taper ties (Tr. 20, 50, 310).

“Even with all supports removed, in most cases you have to drive a wedge between the concrete and the form to release the form from the concrete” (Tr. 16). The form sticks to the concrete. However, Brack Maggard, SPS representative, acknowledges that “without any support, the form could fall over” (Tr. 16, 300). The wall form which fell was 70 feet long, 9 feet tall, and weighed 13,000 to 15,000 pounds (Tr. 19, 29, 304).

In dismantling the wall form to move to another location, the form is attached to the crane and the remaining taper ties are removed. Alfredo Gonzales, foreman, testified that it was industry practice to support a wall form by retaining enough taper ties to hold it, and not to release the remaining taper ties until the wall form was hooked to the crane (Tr. 170). Brack

Maggard, SPS representative, testified that “it is a basic thing [in our business] that you never release a form from the concrete until you hook it to the [crane], without adequate support” (Tr. 20).

By September, 1996, the formwork at the condominium project had progressed to the 30th floor (Tr. 21). After the floor slab for the 30th floor hardened, the formwork for the walls and columns was set. On each floor, the walls were erected in three separate concrete pours (phases) -- the south section, center section and the north section. After each pour was completed and the concrete hardened, the vertical formwork was dismantled and moved to the next location (Exh. R-14; Tr. 305-307).

In the north section of floors 6 through 29, unlike in the other sections, the slab tables remained in place during the erection of the wall forms. SPS installed the braces through the table truss, set the wall forms, and poured the concrete (Tr. 309). When the crew dismantled the wall forms in the north section, all braces and taper ties were removed prior to securing it to the crane. The table, standing a couple inches from the wall form, was capable of supporting the form. Evli DeLaRosa, employee, testified that SPS “took all the ties and all the braces off because the table itself would be the one holding up the wall” (Tr. 48-49, 58). Maggard agreed (Tr. 310).

On August 31, 1996 (Friday), because of a possible hurricane, the slab tables for the north section remained on the 29th floor instead of brought to the 30th floor (Tr. 24, 48, 174, 308-309). Therefore, SPS erected the wall forms in the north section and set the braces and taper ties without the tables next to the forms. By 3:30 p.m., the concrete for the walls was poured and the job was shut down because of the possible hurricane (Tr. 48, 171, 174, 309).

On September 3, 1996 (Tuesday), the work site was reopened (Tr. 41, 182). SPS continued its activities on the 30th floor, which included a crew dismantling the wall forms in the north section to move them to another location (Tr. 42, 185-186, 309-310). The crew began removing the taper ties from the wall form. Because the slab tables were still on the 29th floor, the tables were not next to the wall forms in the north section (Exh. R-14; Tr. 49, 81, 170, 309-310).

By the morning break, Alfredo Gonzales, foreman, and his crew of Orlando Rodriguez, Evli DeLaRosa, and Jerry Levy had removed all the taper ties except three taper ties and the five

braces from the wall form in the north section (Tr. 49, 184, 186). During the break, Gonzales was directed to remove the braces from the wall form because SPS needed a clear pathway to fly in the slab tables (Tr. 43, 163). After instructing the crew, Gonzales went to the other side of the building (Tr. 166). The crew removed the three remaining taper ties and then began removing the braces (Tr. 58). At the time of the accident, DeLaRosa was on one side of the wall form when Rodriguez undid a brace on the other end. When Rodriguez went to undo the brace at the top of the form, DeLaRosa felt the form move (Tr. 64-65). He told Rodriguez twice to get off the form (Tr. 65). Rodriguez told him “No, I’ve got to get this brace off” (Tr. 66). As DeLaRosa walked to a corner of the form, the form fell with Rodriguez on it. Rodriguez was fatally injured.

Discussion

Reasonable Promptness

OSHA inspected the September 3rd accident on September 9 and 10, 1996. The citation was issued on February 20, 1997. SPS asserts that because of the delay in issuing the citation, it was prejudiced in its ability to prepare defenses (SPS Brief, p. 42).

Section 9(c) of the Occupational Safety and Health Act recognizes that the instance of noncompliance and employee access to the unsafe condition providing the basis for the alleged violation must occur within six months of the issuance of the citation. *Central of Georgia*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977). The purpose of the six-month limitation is “to ensure that claims are prosecuted while the events are still fresh, and the witnesses and evidence can be obtained.” *Safeway Store No. 914*, 16 BNA OSHC 1504, 1506 (No. 91-373, 1993).

SPS does not dispute that the citation was issued within six months of the alleged violations. Also, although claimed, SPS fails to show prejudice. SPS was aware of the OSHA inspection and participated in the walkaround. It was initially informed of OSHA’s findings during the inspection.

SPS’s work on the condominium project was completed in August, 1997, with the completion of the parking deck. SPS completed its work in the tower in January or February, 1997 (Tr. 347). During this period, SPS was free to gather any evidence needed to explain its

position or prepare a defense. During the two-day hearing SPS offered the testimony of 5 witnesses and introduced 25 exhibits. There is no evidence that SPS was hindered in presenting its case or cross-examining the Secretary's witnesses because of a delay in issuing the citation. Although a video tape of the dismantling process could have been helpful, the testimony of witnesses clearly described the dismantling process. SPS's motion to dismiss is denied.

Alleged Violations

The Secretary has the burden of proving a violation.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

There is no dispute that employees were exposed to an unsafe condition in removing taper ties and braces from an unsupported wall form. Also, the parties agree that all the taper ties and braces were removed at the time the wall form fell on Rodriguez.

Item 1 - § 1926.21(b)(2)

The citation alleges that SPS failed to train each employee in the unsafe conditions caused by removing all the taper ties and braces from wall formwork without it being secured to the crane or supported by the slab tables. Section 1926.21(b)(2) provides that:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

“An employer complies with §1926.21(b)(2) when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards.” *L&M*

Lignos Enterprises, 17 BNA OSHC 1066, 1067 (No. 92-1746, 1995). A safety instruction is required to address any known duties and hazards that a reasonably prudent employer similarly situated would reasonably expect in the workplace. *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011 (No. 90-2668, 1992). Industry practice is relevant in determining whether an employer has notice of the known duties and hazards. *J.A. Jones Constr Co.*, 15 BNA OSHC 2201, 2205-2206 (No. 87-2059, 1993); *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793 (No. 90-998, 1992) (industry practice is not dispositive if it is shown to be inadequate).

SPS's principal business is erecting and dismantling concrete formwork. As a formwork contractor, it is reasonable to expect SPS to instruct each employee engaged in dismantling formwork in the safe removal of wall forms. SPS does not dispute that the standard requires it to train employees in the safe dismantling of formwork. Also, the parties agree that the wall form could be supported prior to securing it to the crane by leaving two or three taper ties or by having the slab table next to the form.

The Secretary asserts that employees were not instructed in dismantling the wall forms "due to the fact that they removed the ties, the braces and the bolts before the form would have been secured to the lifting mechanism" (Tr. 88). The Secretary, however, fails to identify specific deficiency in SPS's safety instruction or training. The fact that the employees removed all the ties and braces does not necessarily show that they were not properly instructed by SPS. The occurrence of an accident does not establish a violation of § 1926.21(b)(2). *Intercontinental Terminals Co.*, 8 BNA OSHC 1554 (No. 78-5523, 1980).

The standard requires that instructions be given, not that they must be enforced in every instance. *Dravo Engineers and Constructors*, 11 BNA OSHC 2010 (No. 81-748, 1984). In *El Paso Crane and Rigging Co., Inc.*, 16 BNA OSHC 1419 (No. 90-1106, 1993), the Commission stated that "[t]he issue as to this particular citation item . . . is whether the employer's program of safety instruction provided adequate guidance to the employees, not whether the accident could have been averted."

Compliance officer Diaz agreed that SPS trained its workers to work with vertical wall forms, whether or not they had tables next to them (Tr. 133). Gonzales told him that he had instructed the crew to leave certain ties in the form (Tr. 108-109).

Compliance officer Mike Heath testified that SPS employees were instructed not to remove all of the taper ties (Tr. 137). DeLaRosa told him that they were told to leave some ties in the wall form (Tr. 155). Heath agreed that the industry practice is to remove certain supporting members, leaving “a couple of taper ties in place” prior to connecting the wall form to the crane (Tr. 141). Heath stated that the wall form was adequately supported with three taper ties. He did not dispute that one taper tie was capable of holding up the entire wall form (Tr. 149-150). Heath felt the problem was that “no one specifically told them [crew] which taper ties or what supporting braces to leave in place” (Tr. 137-138).

SPS’s safety program states that on-the-job training is a key element of its instruction, as are weekly safety meetings and daily tool box meetings each morning (Exh. R-1; Tr. 313). SPS has no specific written safety rules addressing the procedure for removing wall forms. The Secretary agrees that the standard does not require written safety instructions (Tr. 100).

SPS’s job safety manual requires orientation for new employees. The orientation includes an explanation of work procedures for the particular jobsite (Exh. R-1). In addition to an introduction to SPS’s safety program, new employees’ orientation also discusses “Understanding and using proper procedures established for erecting, wrecking or dismantling various forming systems.” The record shows that Rodriguez completed the new employees’ orientation in 1995 (Exh. R-2). The Secretary does not argue that the orientation training was inadequate or not provided.

It is also uncontradicted that the dismantling crew of DeLaRosa, Rodriguez and Levy received additional training on the dismantling of wall forms (Exhs. R-6, R-7, R-8). SPS considered the crew as “experts in their field” (Tr. 34). DeLaRosa had worked for SPS for approximately three years and started on the condominium project in December, 1995 (Tr. 41). Alfredo Gonzales, foreman, had worked for SPS for two years. He had a total of 16 years in the formwork construction industry (Tr. 157). The employees were experienced and had repeatedly dismantled wall forms throughout the 29 lower floors (Tr. 34, 308). The standard, however, requires instructing each employee whether or not the employee is from the union hall and no matter how experienced. Prior to the accident, there is no showing that on the lower floors the employees removed all the taper ties without adequate support for the wall forms.

Mack Blanton, Business Manager for the South Florida Carpenters Regional Council, testified that SPS has “great” safety practices and procedures (Tr. 288). He stated that SPS “preached safety.” (Tr. 291). Blanton participated in SPS weekly safety meetings (Tr. 290-291). He agreed that removing the braces and many of the ties prior to securing the form to the crane is standard practice in the industry. Blanton testified that the proper assembly and disassembly of concrete formwork are generally learned in the field. He stated that Levy, Rodriguez and DeLaRosa should have known the proper practice for removing wall forms where tables were not in place (Tr. 292, 295).

The record is uncontradicted that the employees were instructed in dismantling formwork through SPS’s on-the-job training and weekly safety tool box meetings (Exhs. R-4, R-6, R-7, R-8; Tr. 32, 34, 63, 313-314). Within a week after being hired, the employees attended a safety meeting, which discussed taper ties and removing the wall forms by crane (Tr. 45). Also, Alfredo Gonzales, foreman, and Evli DeLaRosa, worker, testified that SPS required each member of the formwork crew to attend a 30-hour OSHA safety course given by the union. Rodriguez, DeLaRosa, Levy and Gonzales completed the course before starting work on the condominium project (Exh. R-5).

DeLaRosa was the only crew member who testified. He testified that as part of his training he viewed videos showing the proper way to use SYMONS forms. He also stated that “we knew at that time which taper ties were to be removed and which ones were to remain.” “The idea is to keep it [the form] standing until the crane comes in to remove it when they’re taking it to another work site” (Tr. 45). He testified that he also received training in dismantling at safety meetings which were held every week (Tr. 45-46). He estimated that the procedure for removing taper ties was discussed at three to five safety meetings while on the condominium project. He did not explain why at the time of the accident the crew had removed all the taper ties and braces. DeLaRosa’s testimony was not contradicted.

Foreman Gonzales was a member of the Carpenters’ union for two years and received the same training as DeLaRosa, including the initial orientation by SPS and weekly safety meetings (Tr. 158). As foreman, he stated that he also trained DeLaRosa, Levy and Rodriguez (Tr. 159). His training included designating with paint the ties to be left in place before the crane is hooked

to the form. He stated that “where it’s painted, you make sure a person never takes those ties off. And while they are training, I make sure they leave three ties on that wall so that there is no way that they can take it out of there, not even with the crane” (Tr. 160). He stated that the crew was trained in how to dismantle and remove a wall form whether or not tables were next to the form (Tr. 177, 191). Gonzales’ testimony was not contradicted.

A violation of § 1926.21(b)(2) is vacated.

Item 2 - § 1926.703(a)(1)

The citation alleges that SPS failed to maintain wall forms in a capacity to support reasonably expected lateral and vertical loads during preparation for removal to another location.

Section 1926.703(a) provides that:

Formwork shall be designed, fabricated, erected, supported, braced and maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork. Formwork which is designed, fabricated, erected, supported, braced and maintained in conformance with the Appendix to this section will be deemed to meet the requirements of this paragraph.

SPS argues that the standard cited is not applicable to the dismantling process. It is preempted by §1926.703(e) which deals with the removal of formwork. Also, SPS argues that if applicable, § 1926.703(a)(1) was not violated in that it was not aware that the employees would remove all the taper ties. SPS asserts an employee misconduct defense.

Application of § 1926.703(a)(1).

Section 1926.703(a)(1), a general standard, requires formwork to be erected and maintained so that it is capable of supporting all reasonably anticipated loads. As noted by the Commission:

[U]nder this standard, the Secretary has the burden to show that, more likely than not, the erected formwork was not strong enough

to support the reasonably anticipated load. The cited employer can rebut by showing that, more likely than not, the erected formwork was strong enough to support such load.

Worcester Steel Erectors, Inc., 16 BNA OSHC 1409, 1419 (No. 89-1206, 1993).

Section 1926.703(e), which SPS argues is applicable, provides in part that:

Forms and shores (except those used for slabs on grade and slip forms) shall not be removed until the employer determines that the concrete has gained sufficient strength to support its weight and superimposed loads.

Section 1910.5(c) governs the applicability of standards. If a specific standard is applicable to a condition, it prevails over a general standard which might otherwise be applicable. On the other hand, a general standard applies according to its terms to any employment, even though specific standards are also prescribed for the industry and none of the specific standards apply. A general standard is not preempted by a specific standard unless both address the same hazard. If the same hazard is addressed, the specific standard preempts the application of the general standard. *McNally Construction & Tunneling Co.*, 16 BNA OSHC 1879, 1880 (No. 90-2337, 1994).

Section 1926.703(a) is a performance standard stating that formwork must be “maintained so that it will be capable of supporting without failure all vertical and lateral loads that may reasonably be anticipated to be applied to the formwork.” The standard provides “the general requirements for formwork,” which includes adequate support for the formwork during the dismantling process (Tr. 148). The formwork needs to be supported, braced and “maintained” without failure through all stages, from erection to dismantling. During dismantling, the standard requires that the formwork is maintained in a condition capable of supporting anticipated loads (Tr. 27-28, 141). The removal of braces and taper ties from a wall form is in preparation of the form’s removal to another location. Section 1926.703(a)(1), in a “generic” sense, applies to the proper procedures for preparing wall forms for removal (Tr. 249). As a general standard, § 1926.703(a)(1) is not preempted unless a specific standard addresses the same hazard.

Section 1926.703(e), entitled “Removal of Formwork,” applies “while the concrete in the wall is still wet and has not cured sufficiently to support itself” (Tr. 143-144). By its terms, it

does not cover formwork where the concrete is “sufficiently cured to be self-supporting” (Tr. 143). The Secretary agrees that SPS complied with § 1926.703(e) since it did not remove the wall forms while the concrete was wet (Tr. 144-145, 147-148). Section 1926.703(e) does not apply or preempt § 1926.703(a)(1).

SPS also argues that under a predecessor standard to § 1926.703(a)(1) requiring lateral bracing for concrete forms, the standard ceased to apply when dismantling of the forms began, as it had in this matter. *Daniel Construction Co.*, 5 BNA OSHC 1955 (No. 12754, 1976). In *Daniel*, a concrete form collapsed while employees were removing cross-bracing, killing a worker. The court held that “once dismantling began, the shoring system ceased to exist as a complete shoring set up subject to the cited standard.”

The *Daniel* case is not applicable to this case. It is an unreviewed judge’s opinion and involved a predecessor standard which incorporated by reference the safety requirements for concrete construction of ANSI A10.9-1970. The section of ANSI referenced in the *Daniel* case required a completed shoring setup to be braced. Unlike the requirements in the *Daniel* case, § 1926.703(a)(1) is a general standard requiring the formwork to be braced and maintained so that it will support all reasonably anticipated loads.

Therefore, § 1926.703(a)(1), as cited by the Secretary, applies to SPS’s preparation of the wall forms for removal to another location.

SPS’s Compliance With § 1926.703(a)(1)

There is no dispute that employees dismantling the wall form were exposed to an unsafe condition. Brack Maggard testified that when wall forms are erected and dismantled, employees must physically climb the sides of the forms to remove the braces and taper ties with wrenches, and use tools to pry the form off the concrete (Tr. 26-27). There is also no dispute that the wall form fell because it was not braced, bolted, or secured to a crane (Tr. 51-52, 73, 271). As a result, an employee was fatally injured.

The parties agree that it is industry custom to leave a few taper ties in place during the dismantling process (Tr. 20, 141, 149, 248, 293). Compliance officer Heath agreed that three taper ties were capable of supporting the 70-foot wall form. He stated that, “as long as the lateral

taper ties and the diagonal operations were in place,” the wall form was maintained in a manner in which “it would support any reasonably anticipated load” (Tr. 149). Heath concluded that “had some of the supporting members still been in place, then . . . the section of the formwork that collapsed . . . would have still remained and been sufficiently strong enough for the employee to climb the form” (Tr. 145). One taper tie has a 50,000 pound capacity and could support a wall form weighing 15,000 pounds.

According to a representative of SYMONS, it is customary to remove everything from the form prior to the crane being attached, including the majority of the ties (Tr. 233). He stated that after the concrete is cured, as long as one or two ties are left in near the top, the form is not weakened. It will not fall over of its own weight, even coupled with the wind load and the weight of a worker climbing on it (Tr. 235-236). The practice of removing all ties if a table was next to the form or leaving three tapers ties in without a table next to the form was a regular practice in the industry.

Also, the American Concrete Institute states: “When stripping large wall form sections, it is advisable to leave a few ties connected until the crane has a secure hold, thus preventing it from breaking loose accidentally” (Exh. R-20, p.10-17). Therefore, when the employees removed all of the taper ties and braces, the wall form was not maintained so that it was capable of supporting all reasonably anticipated loads.

The terms of § 1926.703(a)(1) were violated.

SPS Was Not Aware of the Violation

After establishing application of the standard, employees’ exposure, and a violation of the terms of the standard, the Secretary must also show that the employer knew or should have known of the violative condition. In order to prove employer knowledge, the Secretary must show that the employer knew, or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986). Reasonable diligence includes adequate supervision of employees and the implementation of training programs designed to ensure that employees perform their work safely. *Mosser Construction Co.*, 15 BNA OSHC 1408 (No. 89-1027, 1991).

SPS directed the employees to prepare the wall form for removal. Foreman Gonzales supervised the activities of the employees in removing the braces and taper ties. He knew that in the north section, the slab table was not in place (Tr. 97). Gonzales worked with the employees prior to the morning break. After the break, Gonzales remained on the floor, but at another location. As a supervisor, Gonzales' knowledge is imputed to SPS. When a supervisory employee has actual or constructive knowledge of the violation conditions, knowledge is imputed to the employer and the Secretary satisfies his burden of proving knowledge. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The record, however, fails to show that Gonzales knew or should have known that the crew would remove all the taper ties and braces from the wall form prior to securing it to the crane. Gonzales testified that he then told the crew "we should take off the braces and the turnbuckles¹. . . so they could bring in a table" (Tr. 43). He instructed the crew "as a whole to take the braces off and to leave the taper ties on, as was usual" (Tr. 44). Gonzales's testimony was consistent with his affidavit dated September 6, 1996 (Exh. R-12).

DeLaRosa stated that "we knew at that time which taper ties were to be removed and which ones were to remain" (Tr. 45). However, DeLaRosa stated that the crew decided that "since the wall would remain standing there with nothing and since the table was not there, they decided to tie it up with the rope" (Tr. 51-52). DeLaRosa stated in an affidavit that he removed the taper ties because "there isn't enough room to remove ties when the tables are in place" (Exh. R-12).

Maggard explained that the section of wall form which fell was used four times per floor. In the other three sections of each floor, the wall form was dismantled before the table was moved to the location (Tr. 306-307). The same crew set and dismantled the same wall form properly four times per floor, or 120 times before the accident (Tr. 307-308). There is no showing that in previous dismantling, all the taper ties were removed without the wall form secured by the crane or supported by the table.

¹Turnbuckles are different than taper ties (Tr. 43).

The Act is intended to require employers to “reduce “ workplace hazards and to ensure “so far as possible” safe and healthy working conditions. 29 U.S.C. §601(b). The procedure for removing vertical wall forms was referred to by Gonzales as the “cardinal rule” (Tr. 170). Maggard called it “basic” to the industry. Vertical wall forms must be kept adequately supported until attached to the crane. SPS repeatedly communicated this safety rule to its employees in their initial training and at weekly safety meetings. DeLaRosa stated that “since it was something we were doing all the time, we always knew that we would have to leave two of the taper ties in the middle....The idea is to keep it standing until the crane comes to remove it when they’re taking it to another work site.” He stated that at safety meetings “we talk about what are the kinds of ties that we have to leave on; what are the things we have to do for moving the crane” (Tr. 45-47). DeLaRosa estimated that from December, 1995, to September, 1996, at safety meetings, the proper dismantling of wall forms was discussed three to five times.

Compliance officer Diaz agreed that employees disregarded the instructions and removed the taper ties after being told not to (Tr. 117). Diaz testified that he was unable to determine who removed the taper ties from the form. A signed statement from DeLaRosa states that “I removed the ties” (Exh. R-12). Maggard and Gonzales gave statements that the crew was told to leave three ties in place (Exh. R-12; Tr. 116). The crew should have known better than to remove the last ties even if their supervisor had not instructed them to leave them in (Tr. 259-260). It was common sense.

The record also shows that SPS took reasonable steps to discover unsafe conduct. Blanton testified that SPS has full time safety monitors on its jobs. The safety inspectors walked the site to eliminate potential accidents. SPS also allowed the union officials to participate in safety meetings and a union carpenter was a full time safety person to enforce safety practices (Tr. 288). SPS’s Job Safety Manual contains provisions for inspections and progressive discipline for safety infractions, written warnings, time off without pay, and termination (Exh. R-1, p. 11). The Secretary failed to show any similar instances going unpunished. Gonzales testified that in his 16 years in formwork he had not seen an accident of this type occur (Tr. 171). Further, the record reflects that Foreman Gonzales left the crew for less than 10 minutes when the accident occurred

The record fails to establish SPS's knowledge of the crew's removal of all taper ties. A violation of § 1926.703(a)(1) is vacated.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, violation of § 1926.21(b)(2), is vacated.
2. Item 2, violation of § 1926.703(a)(1), is vacated.

KEN S. WELSCH
Judge

Date: November 3, 1998