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| SECRETARY OF LABOR, | : | |
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| Complainant, | : | |
| | : | |
| v. | : | Docket No. 98-2014 |
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| ORION CONSTRUCTION, INC., | : | |
| | : | |
| Respondent. | : | |

***DECISION***

Before: ROGERS, Chairman; VISSCHER, Commissioner.

BY THE COMMISSION

The only issue on review is whether Administrative Law Judge James H. Barkley erred in assessing a penalty of $100 each for two serious violations of fall protection standards, for which the Secretary had proposed penalties of $1125 and $675. For the reasons stated below, we find that the penalties assessed by the judge were appropriate.

Section 17(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 666(j), requires that in assessing penalties the Commission must give "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." These penalty factors need not be accorded equal weight; gravity is generally the primary element. *E.g., Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624, 1993-95 CCH OSHD ¶ 30,363, p. 41,882 (No. 88-1962, 1994). The Commission has wide discretion in penalty assessment. *Id*. at 1622-23, 1993-95 CCH OSHD at pp. 41,881-82.

The Secretary argues in her petition for discretionary review[1] that the judge erred in his consideration of gravity, history of violations, and size with regard to each of the two

[1]We have determined that no briefs on review are necessary to decide this issue.

violations. The Secretary does not challenge the judge's reduction of the penalty based on evidence of good faith.[2]

**The Violations**

The judge affirmed Citation 1, Item 1, which (as amended) alleged a serious violation of 29 C.F.R. § 1926.502(b)(2) because Orion Construction, Inc. ("Orion") failed to provide a midrail as part of its guardrail system to protect employees installing metal studs at the edge of the second level of a boat house under construction in Harbor, Oregon. Because employees were exposed to an 11-foot fall, the judge found that the violation was "serious," that is, there was a "substantial probability that death or serious physical harm could result" from the condition. See section 17(k) of the Act, 29 U.S.C. § 666(k). The Secretary, through the Occupational Safety and Health Administration ("OSHA"), had proposed a penalty of $1125. The judge assessed $100 after discussing evidence relating to the four statutory factors.

The judge affirmed Citation 1, Item 2, which alleged a violation of 29 C.F.R. § 1926.502(b)(12) because a stairwell opening used to pass building materials through was not completely covered or protected by a guardrail system when it was not in use. The hole was partially covered by plywood, and yellow caution tape was put around the perimeter of the hole. Because the violation presented the hazard of an 11-foot fall to employees, the judge found that the violation was serious. OSHA had proposed a penalty of $675; the judge assessed a penalty of $100 after discussing the penalty factors.

[2]The judge noted that, as the compliance officer testified, Orion had a good written safety and health program, compared to the other employers the compliance officer had inspected.

**History of Violations**

The judge stated in his decision that "[t]hough Orion had a history of prior OSHA violations, none of those violations were for the cited standards," therefore suggesting a reduction based on that fact. We agree with the Secretary that this penalty factor encompasses *all* of an employer's prior violations, not just those of the same standard.

The compliance officer testified that OSHA did not give Orion any credit for this factor because it had four previous serious violations. According to him, more information on these violations "should be in the file." However, we have not found in the record of this case any further information from the Secretary on Orion's previous violations. While the history of violations is a factor to consider, we accord it little weight in this particular case. We do so consistent with the lack of specific information in the record from the Secretary.

**Employer's Size**

The judge's only mention of size was when he noted that the compliance officer "testified that Orion qualified for a 40% reduction in the penalty based on [its] size." The compliance officer did not testify as to the number of Orion's employees. Later in the hearing, Orion's president stated that the company (which has its principal office in Pasadena, Texas) had 480 employees. The Secretary asserts that until that statement from Orion's president, it thought Orion had between 26 and 100 employees, thus qualifying for the 40 percent reduction specified in OSHA's Field Inspection Reference Manual ("FIRM"). The Secretary contends that Orion's larger size, which it argues it could have learned of through discovery had this not been an E-Z Trial proceeding, thus disqualified Orion from a reduced penalty under the FIRM.

We note that, following the statement of Orion's president that the company had 480 employees, no one testifying or representing the Secretary informed the judge that OSHA had based its calculations on a different number. We also note that the cited employer's size can be established at the pre-hearing conference, if not earlier, in E-Z Trial cases. Those matters aside, we find that size is not the primary factor in penalty assessment in this case.

Even when an employer was "relatively large" with approximately 600 employees, the Commission assessed a penalty of $100 for a serious violation of a fall protection standard where the overriding factor was the low gravity. *See Flintco, Inc.*, 16 BNA OSHC 1404, 1406, 1993-95 CCH OSHD ¶ 30,227, pp. 41,611-12 (No. 92-1396, 1993).

**Gravity of Midrail Violation**

Because the gravity of the offense is the only one of the four penalty factors addressing the particulars of a violation under consideration in a case, it is usually the factor of greatest significance in penalty assessment. *Flintco, Inc.*, 16 BNA OSHC at 1406, 1993-95 CCH OSHD at p. 41,611; *Natkin & Co.*, 1 BNA OSHC 1204, 1205 n.3, 1971-73 CCH OSHD ¶ 15,679, p. 20,968 n.3 (No. 401, 1973). The judge identified the gravity of the violation as the most significant factor in assessing the penalty.

The judge concluded that the gravity of the midrail violation was low. He found that "[t]he only employees working in the area without a midrail were protected from falling by the metal studs they worked behind. Employees accessing their work areas were partially protected by the guard railing's most important rail, the top rail, which was adequately installed."

We agree with the judge that gravity is the most important factor here. The gravity of a violation involves such considerations as the number of employees exposed, the duration of exposure, the degree of probability of an accident, and any precautions taken against it. *E.g., Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1991-93 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993). As the judge noted, the compliance officer testified that he observed one exposed employee. The evidence is not specific as to the exact number of exposed employees and the duration of their exposure. However, we find that the probability of injury was extremely low in light of the facts (noted by the judge) that the

employees installing the studs were protected by them and the employees going by the area to reach their work were protected by the top rail.[3]

**Gravity of Inadequately Guarded Hole Violation**

In his discussion of the gravity of this violation, the judge considered the elements noted above and found that at least two employees were exposed to the hazard as they passed by the hole. He stated that the gravity was lowered by the presence of warning tape around the opening as a "reminder barrier."

The Secretary argues that the hole was in close proximity to where several employees were working. However, the testimony at the transcript page she cites does not establish that fact. On later pages, the testimony establishes that, as the judge found, two employees came within two or three feet of the area as they passed by on their way to work on the other side of the room. The Secretary also contends that the judge erred in not considering the tripping hazard in his gravity evaluation. We note that in his discussion of the facts, the judge mentioned the compliance officer's testimony that construction materials and extension

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[3]The Secretary asserts that, based on the FIRM, the violation was of "moderate" gravity because, although there was a lesser probability of a fall, the severity of any injury that would result would be high. This assertion suggests that a serious violation cannot have low gravity for penalty purposes, but that is not the case. *See, e.g., Flintco*, 16 BNA OSHC at 1406, 1993-95 CCH OSHD pp. 41,611-212 (serious violation for not protecting employees from falling onto unprotected rebar, but gravity was low because probability of accident was not great). We note that the penalty formulas in OSHA's FIRM are not binding on the Commission. *See, e.g., Roberts Pipeline Constr., Inc.*, 16 BNA OSHC 2029, 2030, 1993-95 CCH OSHD ¶ 30,576, pp. 42,331-32 (No. 91-2051, 1994), *aff'd without published opinion*, 85 F.3d 632 (7th Cir. 1996); *Hern*, 16 BNA OSHC at 1622, 1993-95 CCH OSHD at p. 41,882; *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, pp. 20,043-44 (No. 4, 1972). It is well-settled that the Commission has the exclusive authority to assess penalties for items that have been contested, and the Secretary's proposed penalties are no more than proposals. *E.g., Secretary v. Arcadian Corp.*, 110 F.3d 1192, 1199 & n.8 (5th Cir. 1997); *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975); *Hern*, 16 BNA OSHC at 1621-23, 1993-95 CCH OSHD at pp. 41,881-83.

cords presented a tripping hazard in the area. We agree with the Secretary that this should be considered in evaluating the probability of an accident in the gravity determination.

We conclude that the gravity is low based on: the small number of exposed employees; the fact that employees were primarily working on the other side of the room and so were exposed when passing by on their way to work elsewhere; although there were some materials that could present tripping hazards near the hole, the exposed employees got no closer than two to three feet from the hole; plywood covered part of the hole; and the caution tape went around the perimeter, attached to the top of stanchions at the corners of the hole at a height easily visible to an employee walking within two or three feet, as shown on the photographic Exhibit S-1. As with the item above, we find that gravity is the most significant penalty factor here.

**Penalties**

Based on the gravity, history, and size discussions above, and on Orion's good faith demonstrated by its good written safety program, we determine that the judge's assessment of a penalty of $100 each for these two low-gravity violations is appropriate.

**Order**

In light of the above, we assess a penalty of $100 for the violation of section 1926.502(b)(2), and a penalty of $100 for the violation of section 1926.502(b)(12).

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Date: August 12, 1999

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>ORION CONSTRUCTION, INC., and its successors,<br>Respondent. | OSHRC DOCKET NO. 98-2014 |

APPEARANCES:

For the Complainant:
Stephen E. Irving, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Russell B. Inserra, Orion Construction, Inc., Pasadena, Texas

Before: Administrative Law Judge: James H. Barkley

## DECISION AND ORDER

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

Respondent, Orion Construction, Inc., and its successors (Orion), at all times relevant to this action maintained a place of business at 16133 Lower Harbor Road, Harbor, Oregon, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On October 20-21, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Orion's Harbor, Oregon work site. As a result of that inspection, Orion was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest, Orion brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 27, 1999, an E-Z hearing was held in Houston, Texas. No briefs are required under E-Z proceedings, and this matter is ready for disposition.

**Alleged Violation of §1926.502(b)(1)**

Serious citation 1, item 1 alleges:

29 CFR 1926.502(b)(1): Each employee on a walking/working surface with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

> (A) Employees were installing metal studs to the edge of the second level of the boathouse and were exposed to a fall of 11 feet to concrete below. The midrail of the guardrail system was removed to accommodate the work, and there was no safety net system nor personal fall arrest system used.

*Facts*

The OSHA Compliance Officer, Alex Bedard, testified that he conducted the inspection of a Coast Guard boat house being constructed by Orion in Harbor, Oregon (Tr. 8-9). Bedard testified that he observed employees working, installing metal studs, at the edge of the second level of the boat house (Tr. 9, 11). Bedard testified that the edge was inadequately guarded; though there was a top rail of 1/4 inch cable in place, there was no midrail (Tr. 10; Exh. S-5, S-7). Bedard stated that he observed one employee exposed (Tr. 9; Exh. S-4). Bedard also stated that employees accessed the second floor by means of a job ladder in the inadequately guarded area (Tr. 12-13; Exh. S-6).

Elliott Kennedy, Respondent's agent, testified that there was a second cable attached to the stanchions in the midrail position; however, the tension on the cable had been released for easier installation of the metal studs (Tr. 14; Exh. S-8). The cable was hanging below the second floor level at the time of the inspection (Tr. 14; Exh. S-8). Kennedy testified that with the midrail in place, the installer could not reach through the metal studs, which were spaced 14 ½ inches apart, to install the outside screw into the metal plate at the base of the stud (Tr. 16). Orion's, president, Russell Inserra, stated that when installing the outside screws, the installers were protected by the studs themselves (Tr. 21).

CO Bedard stated that his concern was for the employees accessing the area by means of the job ladder, walking along the inadequately guarded edge, where no studs had yet been installed (Tr. 16; Exh. S-4, S-6).

*Discussion*

The cited standard provides:

*Guardrail systems.* Guardrail systems and their use shall comply with the following provisions:

> (1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1m) plus or minus 3 inches (8 cm) above the walking/working level. . ..

At the hearing, Complainant moved to amend the citation to conform to the evidence (Tr. 35), and to allege a violation of paragraph (b)(2), which states:

> (2) Midrails, screens, mesh, intermediate vertical members, or equivalent intermediate structural members shall be installed between the top edge of the guardrail system and the walking/working surface when there is no wall or parapet wall at least 21 inches (53 cm) high.
>
> (i) Midrails, when used, shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, made applicable to Commission proceedings by 29 CFR §2200.2(b), post-trial amendment of the pleadings is proper "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties." *Peavey Co.*,16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). Consent may be implied from the parties' introduction of evidence relevant only to the unpleaded issue. *McWilliams Forge Company, Inc.*, 11 BNA OSHC 2128, 1984 CCH OSHD ¶26,979 (No. 80-5868, 1984).

It is clear that the parties were both aware that the midrail, rather than the toprail, was at issue at the hearing. The parties introduced evidence pertaining solely to the condition of the midrail. The citation is, therefore, amended to allege violation of §1926.502(b)(2).

The violation is established, in that the midrail, though used, was not installed at a height midway between the top rail and the walking/working level.[4]

*Penalty*

The cited violation was "serious", in that an 11 foot fall could result in serious bodily injury. The gravity of the violation, which CO Bedard figured as high (Tr. 36), was overstated. The only employees working in the inadequately guarded area were protected from falling by the metal studs they worked behind. Employees accessing their work areas were partially protected by the guard railing's most important rail, the top rail, which was adequately installed. Though Orion had a history of prior OSHA violations, none of those violations were for the cited standards (Tr. 37). Orion had a good written safety

[4] As noted at the hearing, Orion's contention that no protection was required where its stud work was ongoing is without merit (Tr. 22). Orion claims that its construction of a stud wall comprised an exempt "leading edge." A "leading edge," however, is defined at §1926.500(b) as "the edge of a floor, roof or formwork for a floor or other walking/working surface (such as the deck) which changes location as additional floor, roof, decking, or formwork sections are placed, formed, or constructed.. . ." Only walking/working surfaces are encompassed in the definition. A wall is never a leading edge.

and health program, compared to other employers Bedard had inspected (Tr. 37-38). Bedard testified that Orion qualified for a 40% reduction in the penalty based on their size (Tr. 38).

Taking into account the relevant factors, especially the low gravity of the violation, which is the principle factor to be considered, *see, Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972), I find that the proposed penalty is excessive. A penalty of $100.00 will be assessed.

**Alleged Violation of §1926.502(b)(12)**

Serious citation 1, item 2 alleges:

29 CFR 1926.502(b)(12): When guardrail systems are used around holes to pass materials, the hole shall have not more than two sides provided with removable guardrail sections to allow the passage of materials. When the hole is not in use, it shall be closed over with a cover, or a guardrail system shall be provided along all unprotected sides or edges.

> (A) The stairwell opening on the second level of the boat house, which was used in the morning of October 20, 1998 as a passage way for building materials, was only partially covered by plywood and had a guardrail system that did not meet the requirements of 29 CFR 1926.502(b)(3)[5] to protect employees against fall hazards when the opening was not in use.

*Facts*

CO Bedard testified that during his inspection of the site, he observed, and photographed an open floor hole that was used for passing materials to the second floor (Tr. 22; Exh. S-1). Bedard stated that the floor hole did not have a standard guardrail, and was guarded solely by yellow caution tape around the perimeter of the hole (Tr. 23; Exh. S-1). Bedard testified that two employees, Mark Dickey and Robin Rowl, told him that they had been walking within two or three feet of the stairwell opening (Tr. 25). Bedard stated that likelihood of an accident occurring was increased by the presence of construction materials and extension cords that presented a tripping hazard in the area (Tr. 25-26).

Mr. Kennedy testified that Orion employees had been using the hole, which was a future stairway, to pass materials to the second floor for use in the stud work (Tr. 24). Kennedy admitted that, though plywood had been installed over a portion of the stairwell, a fall hazard remained in the area of the caution tape (Tr. 24). Kennedy further admitted that it was possible that employees had passed by the stairwell to access their work areas, though the actual work areas were across the room from the opening (Tr. 25).

Mr. Inserra testified that the hole had been covered prior to its use as a pass through, and that it would have been covered at the completion of the day's work (Tr. 27).

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[5] Section 1926.502(b)(3) requires that guardrails be capable of withstanding a force of at least 200 pounds in any outward or downward direction.

*Discussion*

The cited standard provides:

> When guardrail systems are used around holes used for the passage of materials, the hole shall have not more than two sides provided with removable guardrail sections to allow the passage of materials. When the hole is not in use, it shall be closed over with a cover, or a guardrail system shall be provided along all unprotected sides or edges.

The evidence establishes that Orion violated the cited section, in that 1) the stairwell opening had been, but was not at the time of the inspection being used for the passage of materials, and 2) the hole had not been closed over, or provided with standard guardrails. Employees were exposed to the fall hazard thus created as they accessed their work areas.

*Penalty*

As noted above, an 11 foot fall to the floor below could result in serious injury; the violation is properly classified as "serious." At least two employees were exposed to the cited hazard as they passed by the area. The gravity of the violation was overstated, however, inasmuch as Respondent had placed warning tape around the opening as a reminder barrier. Taking into account the gravity of the violation, as well as the other factors discussed under item 1 above, I find that a penalty of $100.00 is appropriate, and will be assessed.

**Alleged Violation of §1926.25(a)**

Other than serious citation 2, item 1 was vacated at the hearing for Complainant's failure to make the photographs available to Respondent as required under E-Z trial procedures (Tr. 33).

## ORDER

1. Serious citation 1, item 1, alleging violation of §1926.502(b)(2) is AFFIRMED, and a penalty of $100.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.502(b)(12) is AFFIRMED, and a penalty of $100.00 is ASSESSED.

3. Other than serious citation 2, item 1, alleging violation of §1926.25(a) is VACATED.

James H. Barkley
Judge, OSHRC

Dated: