SECRETARY OF LABOR, Complainant, v. CODY-ZEIGLER, INC., Respondent.	OSHRC Docket Nos. 99-912, 99-913, 99-914; 00-40, 00-222

DECISION

Before: ROGERS, Chairman, and EISENBREY, Commissioner.

BY THE COMMISSION:

Cody-Zeigler, Inc., is a family-owned construction contractor that performs work primarily for public entities in Central Ohio. The company's president, Francis Zeigler, testified that it has annual sales of ten to twelve million dollars, "which in today's market is a very small contractor." Cody-Zeigler consented to the inspections by the Secretary of Labor's Occupational Safety and Health Administration ("OSHA") in each of these five cases. It now argues, however, that the inspections were too frequent to have been based on probable cause, and thus the Commission should vacate the OSHA citations for alleged violations in each case. For the reasons that follow, we affirm the decisions by the administrative law judges in these cases, which rejected Cody-Zeigler's arguments.[1]

[1]We hereby consolidate these five cases, because they involve the same parties and the same questions of law. Commission Rule 9, 29 C.F.R. 2200.9. Cody-Zeigler has moved for oral argument in these cases, and the Secretary opposes that motion. Oral argument is unnecessary to the disposition of these cases. The motion, therefore, is denied. *See, e.g.*, *Propellex Corp.*, 18 BNA OSHC 1677, 1678 n.2, 1999 CCH OSHD ¶ 31,792, p. 46,585 n.2 (No. 96-265, 1999).

From 1998 through January 2000, OSHA conducted inspections of approximately eleven Ohio worksites on which Cody-Zeigler served as a general trades contractor. The five programmed inspections that led to the citations in these cases included three that began in April 1999: Evans Park Aquatic Center in Grove City, Ohio; Stillman Hall Addition on the Ohio State University Campus in Columbus, Ohio; and Marysville Hospital in Marysville, Ohio. The other two inspections were in December 1999: a Science Department building for Ohio State University in Columbus, Ohio (inspected on December 21), and a new high school for the Lakewood Board of Education in Hebron, Ohio (inspected on December 30). It is undisputed that Cody's worksite representatives consented to each of those five inspections when OSHA's compliance officers arrived to inspect.[2]

After contesting the citations arising from each inspection, Cody-Zeigler sought discovery in order to determine whether there was a violation of section 8(a) of the Act based on lack of administrative probable cause for the inspections. Review Commission Administrative Law Judges Ann Z. Cook, who decided the first three cases, and Ken S. Welsch, who decided the other two, denied the motions. Judge Cook stated: "Respondent has

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[2]According to the affidavit of the Secretary's counsel in the first three cases, "[e]ach of the three work sites was inspected based upon a listing in a report generated and provided by the University of Tennessee's Construction Resources Analysis Department." The University provides computer-generated inspection lists to OSHA's area offices, on which they are to base their programmed inspections. Those inspection lists are based on information provided to the University monthly by the F. W. Dodge Co. OSHA Instruction CPL 2.25I, *Scheduling System for Programmed Inspections* (Jan. 4, 1995) (superseding OSHA Instruction CPL 2.45B, *Field Operations Manual* ("*FOM*"), CH-3, Chap.II.F.2.b.(2)). *See* OSHA Instruction CPL 2.103, *Field Inspection Reference Manual* ("*FIRM*"), Section 5, Chapter I.D.1. ("Programmed inspections shall be scheduled in accordance with Chapter II, F.2. of OSHA Instruction CPL 2.45B or a superseding directive.")

An OSHA compliance officer receives a Dodge Report for a particular construction project when first assigned to inspect that project. The Secretary's counsel provided Cody-Zeigler a copy of the Dodge Report for each of the three work sites inspected in April 1999.

not articulated a defense or otherwise put forth a colorable claim which could entitle it to discovery" of the material it sought.

DISCUSSION

Fourth Amendment

In holding that an employer has a constitutional right under the Fourth Amendment[3] to refuse entry to an OSHA inspector and insist on a warrant, the Supreme Court explained that one of the ways in which OSHA may obtain a warrant is to demonstrate administrative probable cause for the inspection. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978). That is, OSHA may base an inspection on a "general administrative plan for the enforcement of the Act derived from neutral sources." *Id.* If the Secretary inspects pursuant to a warrant and issues a citation based on that inspection, the Commission has authority to "undertake a *de novo* inquiry to ascertain whether the Secretary's inspection conformed with the fourth amendment standards of probable cause and reasonableness." *Sarasota Concrete Co.*, 9 BNA OSHC 1608, 1611, 1981 CCH OSHD ¶ 25,360, p. 31,530 (No. 78-5264, 1981), *aff'd*, 693 F.2d 1061 (11th Cir. 1982).

If the employer consents to an OSHA inspection, however, the decisions are uniform that the employer may not later challenge the inspection on Fourth Amendment grounds, if it is within the scope of that consent. *E.g.*, *L. R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2061, 1995-97 CCH OSHD ¶ 31,262, p. 43,888 (employer waives "any protection

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[3]The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967)). *Barlow's* held that OSHA cases are not among the exceptions.

under the Fourth Amendment" when it "has consented to a compliance officer's entry"), *rev'd in part on other grounds*, 134 F.3d 1235, 1240 (4th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998); *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 n.8, 1993-95 CCH OSHD ¶ 30,034, p. 41,173 n.8 (No. 88-1720, 1993) *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994); *Concrete Construction Co.*, 15 BNA OSHC 1614, 1617, 1991-93 CCH OSHD ¶ 29,681, p. 40,240 (No. 89-2019, 1992) ("waiver of Fourth Amendment rights occurs when an employer 'freely and voluntarily' consents to an inspection") (citing *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 582 (D.C. Cir. 1985) (lack of objection to inspection after consulting with counsel indicates consent); *Lake Butler Apparel v. Secretary*, 519 F.2d 84, 88 (5th Cir. 1975). Thus, under Commission and court precedent, Cody-Zeigler is precluded from a probable cause challenge under the Fourth Amendment regarding an OSHA inspection to which it has consented.[4]

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[4]Cody-Zeigler argues that a recent Recommended Order by a Labor Department administrative law judge in *U. S. Dep't of Labor v. Bank of America, N.A.*, 1997-OFC-16 (August 25, 2000) (ALJ) requires a different result. That Recommended Order, however, deals with a different issue: the effect of the bank's *contractual consent* to Government inspections of its books and records, as a federal contractor. Courts have permitted post-inspection probable cause challenges under the Fourth Amendment regarding inspections that are based on advance contractual consent. *See, e.g., U.S. v. Harris Methodist of Fort Worth*, 970 F.2d 94 (5th Cir. 1992); *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982).

By contrast where, as here, an inspection is based on consent given freely and voluntarily *at the time and place* of the inspection, the courts do not permit post-inspection probable cause challenges. In those situations, "[i]f a valid consent is obtained, then clearly there is no additional requirement of probable cause for the search. Indeed there is no requirement of reasonable suspicion as a prerequisite to seeking consent." 3 Wayne R. LaFave, *Search and Seizure* § 8.1 n.8 (3d ed. 1996) (collecting cases). *See, e.g., Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) ("we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so") (citation omitted); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (it is "well-settled that one of the specifically established exceptions to the requirements of *both a warrant and probable cause* is a search that is conducted pursuant to consent") (emphasis added); *United*

(continued...)

Cody-Zeigler does not allege that any of the inspections here exceeded the scope of its consent. *Cf., e.g., Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (subject of search "may of course delimit as he chooses the scope of the search to which he consents"). Because Cody-Zeigler consented to each of the inspections here based on OSHA's request at the time and place of those inspections, it has no Fourth Amendment right to challenge them now.

Section 8(a) of the Act

Section 8(a) of the Act, 29 U.S.C. § 657(a), authorizes the Secretary of Labor to enter and inspect any "area, workplace or environment where work is performed."[5] Unlike the Fourth Amendment, section 8(a) is principally a grant of authority, though it does constrain the Secretary to conduct inspections at "reasonable times, and within reasonable limits and in a reasonable manner . . . ." Cody-Zeigler argues that a challenge to OSHA's selection of a particular worksite for inspection is cognizable under section 8(a), but its consent to the inspections in each of these cases makes it unnecessary to address that issue here. For as the

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[4](...continued)
States v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996) ("[a]n officer with consent needs neither a warrant nor probable cause to conduct a constitutional search"), *cert. denied*, 520 U.S. 1170 (1997).

[5]Section 8(a) provides:

> In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --
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> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Commission held in *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,403 (No. 77-3804, 1987), "section 8(a) of the Act does not require the Secretary to obtain evidence of any particular sort to support his decision to seek a consensual inspection." Cody-Zeigler's consent extinguishes any challenge it might otherwise have been able to make here.

It follows that the judges' denials of Cody-Zeigler's motions to engage in discovery were proper. Because Cody-Zeigler has failed to raise a challenge to the inspections upon which relief could be granted, discovery would serve no purpose. Cody-Zeigler does not allege vindictive prosecution or challenge the inspection on Fifth Amendment grounds.[6]

[6]Cody-Zeigler originally asserted that it was the subject of vindictive prosecution, but it subsequently made clear to the judges and to us that it has abandoned any such claim.

The judges affirmed some of the citation items and vacated others. Those rulings on the merits are not in dispute. Therefore, we affirm the judges' decisions in these cases.[7]

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: May 9, 2001

[7]Due to a clerical error, Judge Cook's decision initially stated that a penalty of $150 would be assessed for the violation she found of 29 C.F.R. § 1926.404(b)(1)(i). Her conclusions of law and order make clear, however, that the amount she assessed for that item is $100.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CODY-ZEIGLER, INC., Respondent.	OSHRC DOCKET NOS. 99-0912, 99-0913, and 99-0914

APPEARANCES:

For the Complainant:
Elizabeth R. Ashley, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio

For the Respondent:
Roger L. Sabo, Esquire, Isaac, Schottenstein, Zox & Dunn, Columbus, Ohio

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Cody-Zeigler, Inc. ("Cody"), was the general contractor on three construction projects: Evans Park Aquatic Center in Grove City, Ohio; Stillman Hall Addition on the Ohio State University Campus; and Marysville Hospital in Marysville, Ohio. The Occupational Safety and Health Administration ("OSHA") inspected these work sites in April and May 1999, which resulted in the citations here at issue. Cody filed timely notices of contest, the cases were consolidated, and a hearing was held in Columbus, Ohio on February 22, 2000.

The Secretary alleges and Cody does not deny that it is an employer engaged in construction work and related activities. It is undisputed that at the time of these inspections, Cody was engaged in construction activities. Cody also does not deny that it uses tools, equipment and supplies which

have moved in interstate commerce. I conclude that Cody is engaged in a business affecting interstate commerce. I further conclude that Cody is an employer within the meaning of section 3(5) of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

PROCEDURAL BACKGROUND

Cody's principal argument on brief is that it was denied a fair hearing by the arbitrary exclusion of evidence relevant to its section 8(a) affirmative defense. (R. Brief, pp. 1, 15-16). Consideration of this argument requires a review of the procedural history.

Initially, the three dockets were assigned for E-Z Trial proceedings. On July 6, 1999, Cody moved to consolidate the proceedings and to discontinue E-Z Trial so that it could conduct discovery to establish its affirmative defenses. Cody argued that the close time proximity of the three inspections necessitated an inquiry into "the inspection procedures of OSHA and whether Cody was targeted for inspection and harassment by OSHA, rather than randomly selected." (R. Motion, p. 3). On July 16, 1999, the judge assigned to the case consolidated the proceedings, denied the motion to discontinue E-Z-Trial, and allowed Cody "to file discovery with regard to its affirmative defense of vindictive prosecution." Following a conference call with the parties, the judge noticed an October 18, 1999 hearing and ordered that discovery on the affirmative defense of vindictive prosecution be completed by September 20, 1999. *See* Notice of Hearing dated July 27, 1999.

On August 31, 1999, the Secretary moved for a protective order denying discovery regarding vindictive prosecution until Cody presented some evidence tending to show the existence of the essential elements of a vindictive prosecution defense. Cody responded that it needed the discovery to prove the defense and that such discovery was expressly allowed by the judge's orders. On September 22, 1999, the judge granted the protective order after finding that case law required Cody to offer some evidence tending to show the existence of the essential elements of a claim of vindictive prosecution before it was entitled to discovery on the issue. She determined that Cody had not established one of the required showings, *i.e.*, that it was being punished for exercising a constitutional right. The judge then removed the case from E-Z Trial to facilitate discovery. The trial was continued first to February 1, and then to February 22, 2000, and discovery was extended to December 14, 1999. On January 11, 2000, the undersigned judge was assigned to these cases.

On January 10, 2000, Cody moved to compel answers to certain interrogatories and requests for production. Specifically, Cody requested OSHA construction inspection schedules, logs and reports from February to May 1999 which, Cody maintained, were relevant to its sixth, seventh and eighth affirmative defenses and would show how it came to be inspected so frequently. Cody's Answer lumps together discussion of the three affirmative defenses and leaves much about them in question. The relevant section of the Answer describes how OSHA, using the Dodge Reports provided by the University of Tennessee, schedules construction projects for inspections. The Answer also describes how Cody was inspected three times in one month, when the Dodge Reports on average show 2600 construction projects monthly in the Central Ohio region, and concludes that:

> 20. The use of such Dodge Reports in the manner utilized by the agency is violative of law and in disregard of the rights of Cody Zeigler in activities that include the following:
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> a. Violation of the requirements of the OSH Act for a neutral and unbiased inspection process.
> b. An unlawful delegation of the Act's requirements to private agency.
> c. An improper and unlawful selection process form the list as generated thereby allowing arbitrary and capricious selection processes by each area office.
> d. An arbitrary and capricious selection of Cody Zeigler for the inspection.
> e. An unlawful, improper, and vindictive prosecution of Cody Zeigler.

(R. Answer, pp. 3-5).

Cody cited a single authority, *Marshall v. Barlow's*, 436 U.S. 307 (1978), to support its right to discovery based on these affirmative defenses. That case held that the Fourth Amendment applied to places of business and, absent employer consent, required OSHA to obtain a warrant before conducting an inspection. To obtain a warrant, OSHA did not need to show probable cause in the criminal law sense, but needed only to establish administrative probable cause, that is, that the site was selected for inspection on the basis of an administrative plan for the enforcement of the Act derived from neutral sources. *Id*. at 320-21. The case discusses neither discovery nor affirmative defenses, and Cody did not explain how it understood the ruling to apply to its discovery request. Cody consented to the three inspections, and, thus, no warrants were obtained. In her response, the Secretary addressed only Cody's failure to make the threshold showing for vindictive prosecution. The Secretary had earlier provided Cody with the Dodge Reports for each of the sites inspected and

an affidavit of counsel stating that they were inspected based upon their being listed in a report generated by the University of Tennessee for OSHA's use in scheduling inspections. *See* Complainant's Motion For Protective Order, Attachment A. By order issued January 31, 2000, Cody's motion was denied because it was untimely and because Cody had failed to provide some evidence to show vindictive prosecution or another affirmative defense entitling it to the discovery.[8]

On February 11, 2000, Cody moved for reconsideration and for postponement of the February 22 hearing. It argued that discovery was sought not only for vindicative prosecution, but for its other defenses; simply put, its defense was "that it [had] been improperly selected for inspection on these and on numerous occasions." (R. Motion, pp. 3-4). It added no further explanation of its other affirmative defenses and no additional legal authority or argument. On February 16, 2000, the motion was denied for failure to raise any argument or legal authority not previously considered.

Cody next served subpoenas for the documents it had sought unsuccessfully in discovery and for the testimony of the area director and the custodian of records of the OSHA office that had issued the citations. The Secretary moved to quash, arguing that Cody should not be given through subpoena what had been properly denied in discovery. Cody responded that the subpoenas were not aimed at establishing vindictive prosecution and discussed the criteria in *Barlow's* for OSHA warrants without relating them to the circumstances at hand. The motion to quash was granted, and this matter went to hearing on February 22, 2000. At the hearing, Cody did not move to suppress the evidence obtained during the inspection and did not object to its acceptance into evidence.

CODY'S SECTION 8(a) DEFENSE

The affirmative defense Cody presented at hearing and on brief is that the inspections were unreasonable under section 8(a) of the Act, requiring suppression of the evidence obtained during those inspections. (Tr. 121-22; R. Brief, pp. 14-16). Cody asserts that it raised this defense in its sixth, seventh and eighth affirmative defenses, although these defenses do not specifically reference section 8(a). It has abandoned the vindictive prosecution defense which occasioned removal of the case from E-ZTrial procedures. (Tr. 100).

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[8] The Secretary's response to the discovery requests was served on December 10, 2000.

Cody asserts the inspection was unreasonable because its selection for inspection was not based on neutral criteria as required by the *Barlow's* case. As noted above, *Barlow's* held that the Fourth Amendment applied to OSHA inspections and required OSHA to obtain a warrant before conducting a nonconsensual inspection. It further held that OSHA may establish administrative probable cause for a warrant by showing it selected the employer for inspection based on a general administrative plan for the enforcement of the Act derived from neutral sources. *Barlow's* at 321-22. In challenging a warrant, the employer is limited to contesting whether the material presented to the magistrate in the warrant application was sufficient to establish probable cause, unless there is an indication that false evidence was either intentionally or recklessly presented to the magistrate. *Franks v. Delaware*, 438 U.S. 154 (1978)*; Donovan v. Trinity Indus., Inc.*, 524 F.2d 634 (8th Cir. 1987); *Donovan v. Hackney, Inc.*, 769 F.2d 650, 652-53 (10th Cir. 1985)*; Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1917-20 (Nos. 89-2611 & 89-2705, 1992).

An employer may still contest the reasonableness of the inspection under section 8(a) even though it consented to the inspection, as Cody did, thereby waiving its Fourth Amendment rights. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059 (No. 94-1546, 1997); *GEM Indus., Inc.*, 17 BNA OSHC 1184 (No. 93-1122, 1995); *Hamilton Fixture*, 16 BNA OSHC 1073 (Docket No. 88-1720, 1993). By its language, section 8(a) applies to the manner in which physical inspections are carried out on the work site. Section 8(a) provides as follows:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --
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> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee or an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 8(a) and the Fourth Amendment obviously are not coextensive. Section 8(a) is narrower in the sense that it applies only to the actual on-site inspection. In considering the section 8(a) defense, the Commission has restricted it to matters arising on site during the inspection. Thus,

it has held that extended off-site observation and videotaping, which could violate the Fourth Amendment, could not violate section 8(a). *L.R. Willson* at 2061. Cody's defense of improper selection for inspection is not about the reasonableness of the manner in which the inspection was conducted. Accordingly, Cody's defense is not cognizable under section 8(a).

Cody objects that it was prevented from developing a record to support its section 8(a) defense. Its objections are not specific, but appear to relate primarily to denial of its pretrial motions. I decline to reconsider those rulings, particularly in light of Cody's unwillingness or inability to define its affirmative defense, cite its legal basis, and present evidence to make a threshold showing of its defense. Courts have imposed a rigorous standard for discovery in aid of claims, such as selective prosecution, which intrude into executive decision making, and consequently require at least some evidence tending to show the existence of the essential elements of the defense. *U.S. v. Armstrong*, 517 U.S. 456, 468 (1996). There is also no point in hypothesizing about what trial rulings Cody might find objectionable. The burden is on Cody to identify any such rulings and to explain why they were erroneous. Cody has not done so, and, based on the record and the case law set out above, its section 8(a) defense is rejected.[9]

THE SECRETARY'S BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (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).

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[9] I have noted that the evidence presented at trial established a relatively frequent rate of inspection, given Cody's size and construction activity. I have also noted that, having waived its Fourth Amendment rights by consenting to the inspections, it is not clear how in these proceedings Cody could have protested its selection for inspection. Regardless, I am constrained by the circumstances of this case and by the foregoing case law to reject the section 8(a) defense.

DOCKET NO. 99-0912

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.404(b)(1)(i)

On April 8, 1999, Compliance Officer ("CO") Charles Sampsel inspected the Evans Park Aquatic Center, where Cody was the general contractor on the construction of a pool and several buildings. The CO observed a Cody employee using a circular power saw to cut lumber. The saw was plugged into an extension cord which was plugged into a permanent power source, and all three were grounded. The saw was double insulated, and both cord and saw were in good condition. Upon testing the equipment, the CO found no ground fault circuit interrupter ("GFCI"). Cody's job superintendent told the CO a portable GFCI was usually on site and used. Had the saw been plugged into the permanent power source directly, the CO testified, no GFCI would be required, but, because it was plugged into an extension cord, a GFCI was required. (Tr. 14-19, 77-85; CX-1, RX-15).

To protect employees on construction sites, section 1926.404(b)(1)(i) requires the employer to use either GFCIs as specified in paragraph (b)(1)(ii) or an assured grounding conductor program ("AGCP") as specified in paragraph (b)(1)(iii). There is no evidence that Cody fulfilled the requirements of an AGCP. In regard to GFCIs, paragraph (b)(1)(ii) provides, in relevant part, that:

> All 120-volt, single-phase 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

Although Cody contends that the standard is inapplicable because the extension cord was part of the permanent power source, the Commission ruled directly to the contrary in *Otis Elevator Co.*, 17 BNA OSHC 1167 (No. 90-2046, 1995). I therefore find that the standard applies.[10] I also find that the Secretary has established the other necessary elements to prove a violation.The supervisor's statement that a portable GFCI was usually used indicates that the lack of a GFCI could have been discovered through reasonable diligence. In addition, the employee operating the saw was exposed to an electrical shock hazard. However, I conclude that the hazard was slight. The weather was dry,

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[10] The Secretary did not present direct evidence that the receptable outlet was a 120-volt, single-phase 15 or 20 ampere outlet. However, Cody has not objected in this regard, and it is general industry knowledge that hand-held electric power tools operate on 120 volts at 15 or 20 amperes.

the saw was double insulated, and the cord and saw were grounded and in good condition. Moreover, the CO himself conceded that the likelihood and severity of any injury were low. This citation item is accordingly affirmed as an other-than-serious violation.[11]

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.501(b)(11)

CO Sampsel testified that before entering the work site, he observed and photographed two Cody employees without fall protection laying moisture barrier on the roof of a building. He took two additional photos showing the roof's configuration and the moisture barrier on the lower part of the roof. Cody's superintendent told the CO that the pitch of the roof was 5 to 12 and that the lower part of the roof was 11 feet above the ground and the dormer was 18 feet above the ground. He also told the CO that the employees had begun laying the barrier that morning and that there was no fall protection because it was not required in residential construction. (Tr. 21-30, 87-89; CX-2-4).

Section 1926.501(b)(11) requires that employees on a steep roof with unprotected sides and edges 6 feet or more above lower levels be protected by guardrails, safety nets or personal fall arrest systems. A steep roof is one having a slope greater than 4 inches vertical to 12 inches horizontal. *See* 1926.500(b). The CO's unrefuted testimony and photographs establish the standard's applicability, the exposure of two employees, and the supervisor's knowledge, which is attributable to Cody. In addition, the concrete block building was to house the pool and was not residential construction. I find that the cited standard applies and that it was violated. Because a fall from 11 feet can cause serious injuries, the violation was serious. This item is therefore affirmed as a serious violation.

DOCKET NO. 99-0913

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.501(b)(1)[12]

On April 21, 1999, CO Sampsel inspected the construction of an addition to Stillman Hall on the Ohio State University campus where Cody was the general contractor. The CO testified that in

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[11] The penalties for the affirmed items in this case are set out *infra*.

[12] The Secretary initially alleged a violation of 29 C.F.R. 1926.500(d)(1). At the end of the hearing it became clear that the standard had been renumbered, and the Secretary has moved to amend the citation to allege a violation of 1926.501(b)(1). Because the standard's language was unchanged and the parties tried the item as if correctly cited, the motion is granted.

front of the south wall of the third floor, there was a gap 13 inches wide and 60 inches long between the outer wall and the floor. The side of the floor was unguarded and the drop to the floor below was 12 feet. A Cody employee had plugged an extension cord into an electrical outlet on the wall above the gap, requiring him to reach over the gap, and the CO's opinion was that the employee was exposed to a trip-fall hazard. (Tr. 31-37, 89-92; CX-5).

The cited standard provides as follows:

> Each employee on a walking/working surface ... with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

As I read it, the purpose of the standard is to guard against the hazard of falling over an unprotected edge, not falling on a walking/working surface. Because the gap in this case was only 13 inches deep and directly against the wall, it would not have been possible for an employee to fall over the unguarded edge. The only relevant evidence of a fall hazard offered by the Secretary was the CO's opinion that the lack of guarding presented a trip-fall hazard that could have caused contusions, bruises or sprains. (Tr. 36-37). By contrast, a fall of 6 or more feet could cause more serious injuries, such as broken bones. I find that the Secretary has not established that the standard applies to the circumstances in this case. This citation item is accordingly vacated.

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.502(i)(3)

During his inspection, CO Sampsel also noticed that a steam vent maintenance hole was only partially covered by a piece of plywood. The hole, which measured 26 by 37 inches, was 12 feet in front of the main entrance to the construction site. A photograph taken by the CO shows deteriorating concrete and steel rods in the part of the hole not covered by the plywood. The CO concluded that the condition violated the cited standard and that the violation was serious because it presented a trip-fall hazard that could result in sprains, strains and contusions. (Tr. 39-45, CX 6-8).

Section 1926.502(i)(3), which pertains to covers over holes in floors, roofs, and other walking/working surfaces, requires that "all covers be secured when installed so as to prevent accidental displacement by the wind, equipment, or employees." The plywood cover did not fully cover the hole and could easily be displaced. Employees walked over or by the hole when they

entered and exited the work site, and the cover and hole were in plain view and easily observable by the Cody supervisor. I find that the Secretary has established a violation of the cited standard.[13]

Although the Secretary has characterized this item as a serious violation, I conclude she has not demonstrated a substantial probability that the condition could have led to death or serious injury. *See* section 17(k) of the Act. Rather, the Secretary's evidence shows that the violation could have resulted in sprains, strains and contusions. This item is affirmed as an other-than-serious violation.

DOCKET NO. 99-0914

ALLEGED SERIOUS VIOLATION OF 29 C.F.R. 1926.403(i)(2)(i)

On April 9, 1999, CO Richard Burns inspected a construction and renovation project at Marysville Hospital, where Cody was the general contractor. On a wall just left of a staircase on the second floor, Burns observed two electrical panels without face covers. The panels had been installed by the electrical contractor, not Cody. The exposed panels were live and operating at 120 volts. Burns interviewed two Cody employees, who acknowledged that they walked by the panels several times a day to access the work area on the second floor and that in doing so they came within 2 feet of the panels. The CO testified that the unguarded panels posed an electrocution hazard because an employee passing by could stumble and fall against them. (Tr. 139, 142-47, 154-59; CX-9).

Section 1926.403(i)(2)(i) requires that live parts of electrical equipment operating at 50 volts or more be guarded against accidental contact by cabinets or other protective means. The Secretary has shown that to get to and from their work area, two Cody employees were exposed to two unguarded and otherwise unprotected 120-volt panels. While Cody did not create or control the hazard, its employees were exposed to the violative conditions. Because the exposed panels were in plain view where Cody's job supervisor could easily have discovered them, Cody is charged with knowledge of the hazard. The Secretary has established the alleged violation, which was serious as it could have led to serious injury or death. This item is affirmed as a serious violation.

PENALTIES

[13] Cody's argument that the cited standard does not apply to cast iron manhole covers or steel grates used on streets or roadways is irrelevant as there is no evidence that the hole was in a roadway.

In accordance with section 17(j) of the Act, the Commission is to give due consideration to the gravity of the violation and the employer's size, history and good faith when determining penalties. The gravity of the violation, generally the most significant factor, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

In Docket No. 99-0912, Citation 1, Item 1, the Secretary proposed a penalty of $675.00 for the failure to use a GFCI. This violation has been found to be other-than-serious rather than serious as alleged. The CO rated both the severity and probability as lesser and gave credit for size and good faith, but not for history because Cody had been cited within the last three years. (Tr. 19). In view of one employee having been exposed for an undetermined period of time to a very slight hazard, I find that a penalty of $100.00 is appropriate for this item. For Item 2 of Citation 1, the fall protection violation, the CO recommended a penalty of $1,125.00, rating the severity as higher and the probability as lesser because of the dry conditions. (Tr. 29-30). Although the duration of the two employees' exposure was at most a few hours, I conclude that the hazard of falling 11 or more feet from the roof to the ground renders appropriate the proposed penalty of $1,125.00.

In Docket No. 99-0913, a penalty of $675.00 was proposed for Citation 1, Item 2. This item, involving the unsecured cover, has been found to be an other-than-serious violation. The CO rated both the severity and probability as lesser and gave credit for size and good faith, but not for history. I conclude that an injury was unlikely and that the severity of any injury would have been slight. I also note that Cody initiated abatement immediately. (Tr. 45-46). However, in view of the number of employees exposed to the hazard, I find that a penalty of $300.00 is appropriate.

In Docket No. 99-0914, Citation 1, Item 1, the CO proposed a penalty of $1,000.00 for the two unguarded electrical panels. The CO determined the severity to be higher and the probability to be lesser, and no credit was given for either history or good faith. The CO testified that Cody's superintendent was uncooperative, but he offered no specifics in this regard. (Tr. 147-50). Cody, on the other hand, offered evidence that both its safety program and toolbox talks at the site had covered electrical hazards. (RX-1-2). Only two employees were exposed briefly as they entered and exited the second floor. In addition, while Cody was the general contractor, it had no direct authority over,

and no contractual relationship with, the electrical contractor that created and controlled the hazard. However, there is no evidence that Cody made any attempt to have the electrical contractor cover the panels or took any steps to protect its employees. Based upon all of these factors, I conclude that a penalty of $400.00 is appropriate.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.

2. Cody was not in violation of 29 C.F.R. § 1926.501(b)(1).

3. Cody was in other-than-serious violation of 29 C.F.R. §§ 1926.404(b)(1)(i) and 1926.502(i)(3), and penalties of $100.00 and $300.00, respectively, are appropriate.

4. Cody was in serious violation of 29 C.F.R. §§ 1926.403(i)(2)(i) and 1926.501(b)(11), and penalties of $400.00 and $1,125.00, respectively, are appropriate.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. In Docket No. 99-0912, Item 1 of Citation 1 is affirmed as an other-than-serious violation, and Item 2 of Citation 1 is affirmed as a serious violation. Penalties totaling $1,225 are imposed.

2. In Docket No. 99-0913, Item 1 of Citation 1 is vacated and Item 2 of Citation 1 is affirmed as a serious violation. A penalty of $300.00 is assessed for Item 2.

3. In Docket No. 99-0914, Item 1 of Citation 1 is affirmed as a serious violation, and a penalty of $400.00 is assessed.

/s/

Ann Z. Cook
Judge, OSHRC

Dated: 22 MAY 2000
Washington, D.C.

Secretary of Labor, Complainant, v.	OSHRC Docket Nos. **00-0040** & **00-0222** (Consolidated)

APPEARANCES

Heather A. Joys, Esq.
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U. S. Department of Labor
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For Complainant

Roger L. Sabo, Esq.
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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Cody Zeigler, Inc. (Cody) is a general trades construction contractor in central and southeastern Ohio. Cody employs approximately 80 employees, usually has 10 to 15 projects a year, and makes 12 to 15 million dollars per year (Tr. 8, 115). In December, 1999, Cody was the general contractor for two construction projects: (1) construction of a new office building for Ohio State University Science Department in Columbus, Ohio, and (2) construction of a new high school for the Lakewood Board of Education in Hebron, Ohio.

On December 21,1999, the Occupational Safety and Health Administration (OSHA) inspected Cody's Ohio State University project in Columbus, Ohio, under its planned inspection program. Cody permitted the inspection without a warrant (Tr. 74, 75). As a result of the inspection, OSHA issued a serious citation (Docket No. 00-0040). The citation alleges that Cody did not comply with 29 C. F. R. § 1926.405(b)(2) by failing to have a faceplate on an electrical outlet box. The citation proposes a penalty of $675. Cody denies that the uncovered electrical outlet box was a shock hazard.

On December 30, 1999, OSHA inspected Cody's high school project in Hebron, Ohio, also under its planned inspection program. Cody again permitted the inspection without a warrant (Tr. 17). As a result of this inspection, OSHA issued a serious citation (Docket No. 00-0222). The

citation alleges that Cody did not comply with 29 C. F. R. § 1926.25(a) by failing to keep the ramp area of Building B clear of forming pins protruding from the ground. The citation proposes a penalty of $525. Cody denies that the forming pins were debris.

A hearing on the consolidated cases was held in Columbus, Ohio, on May 22, 2000. Jurisdiction and coverage are stipulated (Tr. 4-5). Cody contests both citations. Nonetheless, Cody's primary dispute is OSHA's repeated number of inspections of its worksites. Since February, 1998, Cody has been inspected eleven times by OSHA (Tr. 11). Cody claims § 8(a) of the Occupational Safety and Health Act (Act) as an affirmative defense.

For the reasons discussed, Cody's § 8(a) defense is rejected. The violation of § 1926.405(b)(2) (University project) is affirmed and the violation of § 1926.25(a) (high school project) is vacated.

PROCEDURAL BACKGROUND

Initially the consolidated cases were assigned for E-Z Trial proceedings. On February 28, 2000, Cody moved to remove the cases from E-Z Trial because of the complex nature of its § 8(a) defense and the need to conduct discovery to support its defense. Over the objections of the Secretary, the cases were removed from E-Z Trial by Order dated March 10, 2000. The hearing was scheduled for May 22, 2000.

On May 10, 2000, Cody moved to compel discovery as to certain of its interrogatories and requests for production of documents. On May 16, 2000, Cody sought a continuance of the hearing in order to take additional discovery on its affirmative defense. Cody requested documents and information used by the Columbus, Ohio OSHA Area Office in its inspection selection process, including the programmed inspection criteria. The Secretary objected as not relevant to any issue before the court. The court agreed and denied the motion to compel on May 17, 2000. Since no additional responses or documents were required, the motion for continuance of the hearing was also denied.

On May 18, 2000, the Secretary moved to quash a subpoena duces tecum issued to Deborah Zubaty, OSHA Area Director of the Columbus, Ohio, office. The subpoena duces tecum sought the same documents as rejected by the court in Cody's motion to compel. Also, Cody in its prehearing

exchange described Zubaty's expected testimony to involve "the manner by which companies are selected for planned or focused inspections in the construction industry and the criteria utilized by the Columbus Area Office for the assignment of planned inspections in the construction industry." The court by order dated May 19, 2000, granted the motion to quash.

During the hearing on May 22, 2000, Cody offered copies of computer printouts of inspections conducted by OSHA in central Ohio (Exhibit R-5) and Dodge Reports received by Cody during February, 2000 (Exhibit R-6). The court rejected both exhibits.

SECTION 8(a) DEFENSE

Cody argues that OSHA's planned inspections of its worksites were unrealistically numerous and therefore not reasonable under § 8(a) of the Act. Cody asserts that it could not establish its defense because it was precluded from obtaining information which may show OSHA's unreasonable conduct (Respondent's Brief, pp. 8-12).

Section 8(a) provides:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized –
>
> > (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> >
> > (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Warrant Inspection

The Supreme Court has held that the Fourth Amendment requires OSHA to obtain a warrant in order to conduct a nonconsensual inspection. *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978). A warrant showing that a specific business has been chosen for an OSHA search on the basis of a

general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights. *Id.* at 320-321. A finding of administrative probable cause by a magistrate for a programmed inspection is based on a determination that the Secretary's administrative inspection plan is neutral and that the selection of an employer for inspection is pursuant to an application of the plan's neutral criteria. *In re Trinity*, 876 F.2d 1485, 1490 (11th Cir. 1989). In challenging a warrant, the employer is limited to contesting whether the material in the warrant application presented to the magistrate was sufficient to establish probable cause unless there is a substantial preliminary showing that false evidence was either knowingly and intentionally or recklessly presented to the magistrate. *Franks v. Delaware*, 438 U. S. 154, 171-172 (1978); *Tri-State Steel Construction, Inc.*, 15 BNA OSHC 1903, 1917 (Nos. 89-2611 and 89-2705, 1992). Courts have denied employers access to the underlying documents upon which an OSHA inspection plan is based unless the employer can prove that the agency did not follow the plan or that fraud was involved. *Donovan v. Trinity Industries, Inc.*, 824 F.2d 634, 637 (8th Cir. 1987) and *Donovan v. Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), *cert. denied* 475 U. S. 1081 (1986).

The OSHA inspections in this case were conducted according to a scheduled programmed inspection plan. Cody claims that OSHA's scheduled inspection plan is unreasonable. The appropriate procedure for challenging the criteria used in selecting an employer for a scheduled programmed inspection is in the context of challenging the warrant application. Cody did not assert its rights at the proper time – the time of the inspection. *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1024 (5th Cir. 1978). Cody consented to both inspections; therefore, no warrants were obtained. By consenting to both inspections, Cody waived its Fourth Amendment right to review the probable cause basis for inspection.

Consensual Inspection

Even though Cody waived its Fourth Amendment rights by not requesting a warrant for inspection in both cases, it is not precluded from claiming that the inspections were unreasonable under § 8(a) of the Act. *Hamilton Fixtures*, 16 BNA OSHC 1073, 1078 (No. 88-1720, 1993), *aff'd.* 28 F.3d 1213 (6th Cir. 1995). Cody does assert its claim under § 8(a).

To establish the § 8(a) affirmative defense of unreasonable inspection, the employer must prove unreasonable conduct by OSHA. *Hamilton* at 1078. Additionally, the employer must show that OSHA substantially failed to comply with the provisions of § 8(a) and such noncompliance substantially prejudiced the employer. *Gem Industrial, Inc.,* 17 BNA OSHC 1184, 1187 (No. 93-1122, 1995). However, the language of § 8(a) applies only to the actual on-site inspection by OSHA. *L. R. Willson and Sons, Inc.,* 17 BNA OSHC 2059, 2061 (No. 94-1546, 1997).

In this case Cody did not allege and did not seek to prove any misconduct on the part of either of the OSHA compliance officers or misconduct in the manner of their on-site inspections. Cody has not established a violation of § 8(a) of the Act. Therefore, its unreasonable inspection defense fails.

Cody's § 8(a) defense in this case is similar to the consolidated cases involving Cody, decided May 12, 2000, by Administrative Law Judge Cook. Cody's argument in that case was that it was denied a fair hearing by the exclusion of evidence relevant to its § 8(a) affirmative defense. In rejecting Cody's § 8(a) defense, Judge Cook noted that Cody had consistently been unwilling or unable to define its affirmative defense, cite any legal basis, and present evidence to make a threshold showing of its defense. The burden is on Cody to identify the basis of its defense, not merely speculate and seek discovery. *Secretary of Labor v. Cody-Zeigler, Inc.,* OSHRC Docket Nos. 99-0912, 99-0913, and 99-0914 (Decision of ALJ Cook, May 12, 2000), directed for review by Review Commission (June 20, 2000).

ALLEGED VIOLATIONS

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a standard.

> 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).

DOCKET NO. 00-0040
ALLEGED § 1926.405(b)(2) VIOLATION

OSHA Compliance Officer (CO) John Sahayda was assigned to inspect Cody's building construction site at Ohio State University in Columbus, Ohio. On December 21, 1999, CO Sahayda held an opening conference with the Cody job superintendent, Mark Shaner, at the site (Tr. 74). Shaner accompanied CO Sahayda on the walk-around inspection. Three Cody employees were on site. The worksite was in the initial stage of construction. CO Sahayda observed digging and grading for foundation work (Tr. 75).

After the inspection CO Sahayda held a closing conference with Shaner in the Cody job trailer (Tr. 76). He pointed out to Shaner an electrical outlet box in the trailer that did not have a faceplate or cover. The outlet was 110 volts. A heater was plugged into the outlet and was running. The electrical outlet box was about five feet above the floor on a partition in the trailer. Shaner said that he was aware of it and had mentioned it to the electricians but they had not returned to install a faceplate (Exh. R-4; Tr. 77, 96, 102).

A citation was issued for violation of § 1926.405(b)(2) alleging that the electrical outlet box in the job trailer did not have a faceplate or cover. Section 1926.405(b)(2) provides in pertinent part:

> Covers and canopies. All pull boxes, junction boxes, and fittings shall be provided with covers.

Discussion

The electrical outlet box did not have a faceplate as required by § 1926.405(b)(2). This condition exposed employees to an electric shock hazard. The lack of a faceplate was in plain view. The employees entered the job trailer to warm up, eat lunch, and meet at break time (Tr. 78). Also, Shaner, who was aware of the missing faceplate, regularly used the trailer as his office.

Accordingly, the violation of § 1926.405(b)(2) is affirmed as serious. The nature of the injury from electrical shock could be serious. Based on the size of the company, history of violations and gravity of the violation, a penalty of $100 is assessed.

DOCKET NO. 00-0222
ALLEGED § 1926.25(a) VIOLATION

OSHA Compliance Officer Charles Sampsel inspected Cody's construction site at Lakewood high school in Hebron, Ohio. On December 30, 1999, when CO Sampsel entered the job site, he met Cody's superintendent, Mark Robinson, and conducted an opening conference (Tr. 16). CO Sampsel was asked to wait to begin his inspection until Cody's consultant, John Ogle, could arrive (Tr. 16). CO Sampsel conducted the walk-around inspection with Mr. Robinson and Mr. Ogle. Approximately 15 employees were on site (Tr. 18). The project was approximately fifty percent complete (Tr. 17).

During the inspection CO Sampsel observed approximately 6 forming pins sticking out of the ground in the ramp area of Building B (Exh. C-1; Tr. 19, 20). Forming pins were approximately 18 – 19 inches long, one-half inch wide, weigh two pounds, and have holes through them (Tr. 44, 111-113). The pins were driven into the ground in order for formwork (wood) to be nailed in place through holes in the forming pin (Tr. 111). Concrete is then poured into the form (Tr. 45, 111). When the concrete is cured, the form and forming pins are removed. The forming pins are used over and over again (Tr. 112).

Robinson told CO Sampsel that the forming pins were sticking up in the ground because a vehicle had hit the forms and the lumber had to be discarded (Tr. 22, 64). The accident occurred the day before the inspection (Tr. 64). The forming pins had been left exposed for a day and were in place for other forms to be placed at those pins so that concrete could be poured to complete the ramp (Tr. 64).

A citation was issued for violation of § 1926.25(a) in that Cody did not keep the ramp area of Building B clear of forming pins protruding from the ground. Section 1926.25(a) states:

> (a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Discussion

A forming pin is a piece of construction equipment that will be used again and again. The compliance officer admitted it was equipment (Tr. 45). The forming pins were not laying around but were protruding from the ground because forms were going to be reinstalled and concrete poured. Equipment is not considered "debris" within § 1926.25(a). *Gallo Mechanical Contractors, Inc.*, 9

BNA OSHC 1178, 1180 (No. 76-4371, 1980). In this case, the forming pins were not debris under the standard. Therefore, § 1926.25(a) does not apply.

Also, the Secretary failed to show exposure. The testimony indicates that one employee was seen in the area and employees used the ramp to access the building (Tr. 23, 50). However, this evidence fails to establish that the employees were in a zone of danger sufficient to be exposed to a tripping hazard posed by the protruding forming pins, especially in light of the fact that the pins were up for purposes of a concrete pour.

The violation of § 1926.25(a) is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 preceding decision, it is hereby ORDERED that:

Docket No. 00-0040:

Item 1, alleged serious violation of § 1926.405(b)(2), is affirmed as serious and a penalty of $100.00 is assessed.

Docket No. 00-0222:

Item 1, alleged serious violation of § 1926.25(a), is vacated and no penalty is assessed.

/s/

KEN S. WELSCH
Judge

Date: October 30, 2000