



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

BIELMEIER BUILDERS, INC.,

Respondent.

Docket No. 91-1714

ORDER

This matter is before the Commission on a direction for review entered by Commissioner Velma Montoya on April 19, 1993. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Stuart E. Weisberg
 Stuart E. Weisberg
 Chairman

Edwin G. Foulke, Jr.
 Edwin G. Foulke, Jr.
 Commissioner

Dated March 25, 1994

Velma Montoya
 Velma Montoya
 Commissioner

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on March 25, 1994.

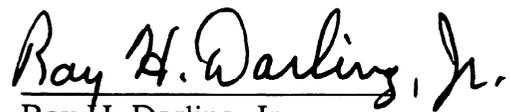
Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

FOR THE COMMISSION


Ray H. Darling, Jr.
Executive Secretary

reclassify the alleged violation of 29 C.F.R. §1926.500(d)(1) from a serious to an other-than-serious violation. The proposed penalty for this citation is amended to \$500.00.

3. Respondent hereby withdraws its notice of contest to the citations and penalties as amended above.

4. Respondent agrees to submit to the OSHA Area Office \$500.00 in full and complete payment of the penalty within 30 days of the date of this Agreement.

5. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on March 18, 1994, in accordance with Rules 7 and 100 of the Commission's Rules of Procedures, and will remain posted for a period of ten days.

6. There is no authorized employee representative to have elected party status in this case.

7. Each party agrees to bear its own costs.

8. None of the foregoing agreements, statements, stipulations, or actions taken by respondent shall be deemed an admission by respondent of the allegations contained in the citations or the complaint herein. The agreements, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and they shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and

Health Act of 1970.

Respectfully submitted,

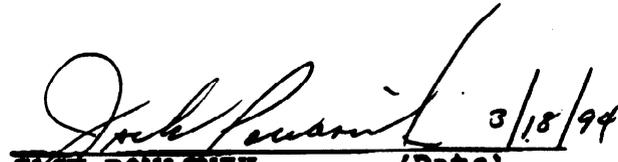
THOMAS S. WILLIAMSON, Jr.
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation


ROBERT G. WALSH (Date) 3/14/94
Attorney for the
Respondent


JACK POWASNIK (Date) 3/18/94
Attorney for the
Secretary of Labor



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
BIELMEIR BUILDERS, INC.
Respondent.

OSHRC DOCKET
NO. 91-1714

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 18, 1993. The decision of the Judge will become a final order of the Commission on April 19, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before April 7, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: March 18, 1993

DOCKET NO. 91-1714

NOTICE IS GIVEN TO THE FOLLOWING:

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story residential house in Clarence, New York. On April 17, 1991, Fredrick A. Giovino, an Occupational Safety and Health Administration (OSHA) compliance officer, conducted an inspection of the worksite.

Alleged Violation of 29 C.F.R. § 1926.404(b)(1)(i)

The standard requires, in pertinent part, as follows:

The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. . . .

It is alleged in the citation that Bielmeier did not use either ground fault circuit interrupters (GFCIs) or an assured equipment grounding conductor program as required. More specifically: "Garage Area - Royal 7 ¼ inch speed saw, used in damp location, connected to adjacent building using extension cords."

Giovino, accompanied by Robert J. Draper, superintendent for Bielmeier, inspected an extension cord coming into the garage area from another residence under construction on adjacent property. Using a receptacle tester, Giovino determined the cord was wired properly, but there was no GFCI in the circuit. He learned from Draper that the cord was used to energize a saw for cutting wood. He stated that Draper thought it was plugged into a GFCI (Tr. 12-13). The compliance officer also testified that the cord extended across damp soil outside the building, thus exposing employees to the hazard of electrical shock (Tr. 27.).

In order to establish a violation of the standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applied, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). Bielmeier does not directly refute the compliance officer's testimony, but maintains the Secretary has not established the necessary elements of proof.

It is argued that the standard does not apply because the saw was connected to an outlet which was part of the building's permanent wiring. This argument is based on the requirements of 29 C.F.R. § 1926.404(b)(1)(ii), which states in pertinent part:

[R]eceptacle 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.

The evidence shows that the electrical cord was not connected to an outlet that was part of the permanent wiring of the building under construction (Tr. 57). Under the circumstances, it must be held that the standard refers to buildings under construction at the particular site. Bielmeier has offered no evidence that the receptacle outlets were part of the "permanent wiring of the building or structure." Clearly, the standard applied in this case.

There was no evidence to refute the testimony that a GFCI was not being used. The compliance officer did testify that Bielmeier's Superintendent Draper stated he "thought" a GFCI was used, but its presence was not verified. Also, James Bielmeier, president and owner, testified he had no knowledge of whether or not the circuit was protected by a GFCI at the time of the inspection (Tr. 187-188).

John P. Coniglio, safety consultant, testified the saw was double-insulated and therefore protected against ground fault hazards. He did not believe failure to use a GFCI constituted a violation of the standard (Tr. 181-183). He admitted on cross-examination that no exception was allowed for double-insulated tools from coverage under the standard and that GFCIs did provide protection regardless of double insulation (Tr. 183-185). The Secretary established that the standard was violated.

The evidence shows that employees had access to the violative condition. The compliance officer found the saw connected to the extension cord and available for use. There also is no dispute that Draper told him the saw was in use on the morning of the inspection. The evidence does not establish that Bielmeier knew of the violation. However, it is clear that with the exercise of reasonable diligence the condition could have been known. There is no dispute that Draper "thought" the current was protected with a GFCI. Obviously, with the exercise of reasonable diligence, he could have verified the absence of a GFCI and thus known of the violation.

Alleged Violation of 29 C.F.R. § 1926.500(d)(1)

The standard requires, in pertinent part, as follows:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section.

The alleged violation is described in the citation as follows:

Open-sided floors or platforms 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

- (a) On or about 4/17/91, stairway near front door - No protection against a 107 inch fall from side of top landing, 41 inch long open-sided areas. . . .

Giovino testified that he conducted the inspection on April 17, 1991, pursuant to a complaint regarding an open-sided floor on the premises (Tr. 8). He observed a 41-inch wide landing at the head of the front stairway without a guardrail, exposing employees in the area to a fall of 107 inches to the floor below (Exh. C-1; Tr. 16-17). He also observed that the edge alongside the second floor level lacked a guardrail (Exh. C-2; Tr. 21, 24-25). Giovino stated that Draper told him he did not have time to erect guardrails, but later stated he was in the process of erecting them. Giovino did not see any evidence of this work, such as lumber or tools (Tr. 17).

Bielmeier admits that there was no guardrail on the second floor level. Draper testified that he was going to "reinstall" the guardrail when he was interrupted by Giovino's visit. He stated he had installed a post and was going to his truck for more nails when he met Giovino (Exh. C-2; Tr. 132). Bielmeier also points out that there was a piece of lumber approximately 9 to 10 feet in length at the bottom of the landing, and that there was a saw on the site (Exh. R-2; Tr. 43, 45).

The Secretary offered two witnesses who testified they never observed guardrails in the area. Thomas E. Cashman testified that he installed drywall in the house for six days until he suffered an accident on April 11, 1991 (Tr. 61-62). He stated that at no time during the period he worked did he observe any railing at the second floor level as depicted in

Exhibit C-2 (Tr. 63). Also, on several occasions, he observed Draper walking within a foot or a foot and a half of the open floor (Tr. 65-67). Bielmeier was seen in the same proximity to the edge on April 11, 1991 (Tr. 68).

Glen P. Cashman testified that he continued to work four or five days after his brother's accident on April 11, 1991 (Tr. 82). During the period he worked installing drywall, he never observed any guardrails along the edge of the landing shown in Exhibit C-2. Cashman also testified that he saw Draper within 1 to 1½ feet from the unguarded edge on two occasions, and on one occasion he saw James Bielmeier on the second floor level (Tr. 86-88).

Bielmeier called several witnesses to establish that guardrails were in place along the edge of the second floor level. Robert E. Daniel, a framing carpenter, testified that he installed the stairway, and guardrails were present during that time. Daniel was obviously referring to a time prior to the period in question. He stated his work was performed before any inside walls or drywall were erected in the house (Tr. 111-112). George M. Stepniwski, employer of the Cashman brothers, testified that upon his initial tour of the site, he observed guardrails in place. He could not recall whether he had seen guardrails on other occasions, but knew they were not present on April 11, 1991 (Tr. 123-124). Draper testified that guardrails were up during the time the stairs were installed. He did not know specifically of any other time except after the inspection, as they were not in place before the inspection (Tr. 147).

The evidence clearly establishes the violation as alleged. Although the record convincingly shows guardrails were in place at different times at the site, they were not present for an undetermined period prior to the inspection.

Since the violations have been proven, a determination must now be made whether they are of a serious nature and whether the proposed penalties are appropriate in accordance with § 17 of the Act. A violation is deemed serious if there is a substantial probability that death or serious physical harm could result from the violative condition. The record indicates that shock or electrocution could result from the violation of 29 C.F.R. 1926.404(b)(i). The violation of 29 C.F.R. § 1926.500(d)(1) could result in fractures, including head injuries. The violations are of a serious nature. The determination

of what constitutes an appropriate penalty is within the discretion of the Commission. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under § 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Company*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

The evidence indicates Bielmeier's concern for safety matters, and that both violations were immediately abated. In addition to consideration of the foregoing factors, it is noted that a GFCI was thought to have been in use. Also, another stairwell at the site was adequately protected, and guardrails had been utilized at the location in question. A penalty in the amount of \$500.00 is deemed appropriate for each violation.

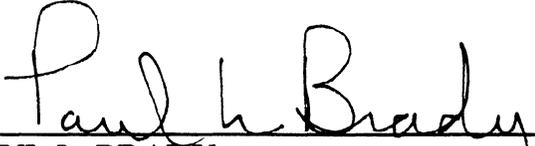
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is hereby ORDERED that:

- (1) Item 1 of the citation alleging violation of 29 C.F.R. § 1926.404(b)(1)(i) is affirmed and a penalty in the amount of \$500.00 is assessed; and
- (2) Item 2 of the citation alleging violation of 29 C.F.R. § 1926.500(d)(1) is affirmed and a penalty in the amount of \$500.00 is assessed.



PAUL L. BRADY
Judge

Date: March 10, 1993