UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-1613
CAPFORM, INC.,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue in this case is whether Capform, Inc., a subcontractor constructing concrete formwork and shoring for concrete placement at a construction site in Tampa, Florida, failed to comply with four construction safety standards promulgated by the Occupational Safety and Health Administration ("OSHA"). Administrative Law Judge Edwin G. Salyers affirmed the four citation items, and we affirm them for the following reasons.[1]

I. *Unguarded Rebar*

In citation no. 1, item 4, OSHA alleged a serious violation of 29 C.F.R. § 1926.701(b)[2] because Capform employees were exposed to the hazard of tripping and falling on unguarded rebar, steel reinforcing rods which protruded vertically from concrete

[1]Another citation item was directed for review, but it was later withdrawn by the Secretary. This was acknowledged by the Commission in its December 23, 1993, order setting aside that part of the judge's decision.

[2]Section 1926.701(b) provides that "[a]ll protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement."

slabs. Mark Houck, Capform's superintendent, acknowledged that only some of the unguarded rebar that was "all around the site" had been covered with wood blocks or "barricaded" with brightly-colored caution tape. He also noted that some of the tape had been removed. The hazard could have been eliminated by placing pieces of wood over all the exposed rebar. Capform argues that the judge erred in (1) finding that the Secretary proved that its employees had access to the hazardous condition, and (2) rejecting its multi-employer worksite defense.

A. *Employee Access*

To establish a violation, the Secretary must prove that employees had access to the cited hazard.[3] He may prove access by showing that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976), quoted in *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶ 30,303, p. 41,757 (No. 90-2866, 1993).

We find that the Secretary has proved employee access to the hazard of tripping on the unguarded rebar. The compliance officer's testimony established that Capform's employees had to traverse the ground level in the entrance area to get to their work locations and to take breaks. Although Capform's superintendent Houck testified that the entrance area was to the side of the photograph in evidence upon which the Secretary relies, Capform did not actually rebut the compliance officer's testimony on access. Rather, Houck admitted that although he "pretty much directed them not to . . . [t]hroughout the day, there might be some people [who] walk into this area." Houck also acknowledged that after he had "encountered" the unprotected rebar at the entrance area in the early morning

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[3]In order to make a prima facie showing that a cited standard was violated, the Secretary must prove that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). Access is the only element of the Secretary's proof challenged for this item.

darkness, he instructed the employees to stay away from the unguarded rebar and go only where it had been "barricaded."

We therefore conclude that the Secretary proved a violation of section 1926.701(b).[4]

B. *Multi-Employer Worksite Defense*

To prove the multi-employer worksite defense, an employer must prove by a preponderance of the evidence that it (1) did not create the hazardous condition, (2) did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard, and (3) took reasonable alternative steps to protect its employees or did not have (and could not have had with the exercise of reasonable diligence) notice that the violative condition was hazardous. *E.g., Capform, Inc.*, 13 BNA OSHC 2219, 2222, 1987-90 CCH OSHD ¶ 28,503, p. 37,776 (No. 84-556, 1989), *aff'd without published opinion*, 901 F.2d 1112 (5th Cir. 1990); *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198, 1975-76 CCH OSHD ¶ 20,690, pp. 24,783-84 (No. 3694, 1976) (consolidated). It is undisputed that Capform did not create the hazardous condition, because another subcontractor, Owens Steel, installed the rebar. It is also undisputed that the general contractor was responsible for covering the rebar. The record establishes that Capform had notice of the hazard.

We conclude, however, that Capform failed to establish the defense because it did not prove that it took reasonable alternative steps to protect its employees. We recognize that reasonable measures may fall short of full compliance because "[w]hat is realistic depends upon a balance of the hazard involved with considerations of efficiency, economy, and equity." *Hayden Electric Servs.*, 4 BNA OSHC 1494, 1495, 1976-77 CCH OSHD ¶ 20,939, p. 25,149 (No. 4034, 1976) (consolidated). We also recognize that "it is normally not difficult to assert that the subcontractor could conceivably have done something more to protect [its] exposed employees." *Electric Smith, Inc. v. Secretary of Labor*, 666 F.2d 1267, 1273-74 (9th Cir. 1982). We must view, therefore, Capform's conduct in its totality and in terms of "whether a reasonable employer would have done more." *Id.* For instance, in

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[4]The compliance officer testified as to other areas of alleged employee access. We dispose of this item, however, solely on the evidence concerning the entrance area.

Electric Smith, the court upheld the defense because the subcontractor made *repeated* complaints to the general contractor, directed employees to stay away from the hazardous areas, and provided an alternative physical barrier in the form of a plywood board at the elevator opening.

In this case, despite the presence of extensive unguarded rebar at the entrance area, Capform, through its superintendent Houck, complained to the general contractor only once, and that was "a month or two" before the inspection. We conclude that a reasonable employer would have pursued the matter further with the general contractor once it realized that the rebar remained unguarded. Alternatively, it appears that Capform could have at least barricaded the rebar itself with the tape, as Houck testified that he had partially done. Houck's instructions to the employees to stay away from the unprotected rebar were by his own admission inadequate. This is shown by his testimony that although he had directed them not to, there might be some employees who walk through this unguarded area throughout the day. We conclude that Capform's efforts were minimal and did not constitute reasonable alternative protective measures. For these reasons, we conclude that Capform did not establish the multi-employer worksite defense.

C. *Characterization and Penalty*

The citation alleged that this violation was "serious." The Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, provides in section 17(k), 29 U.S.C. § 666(k), that a violation is serious "if there is a substantial probability that death or serious physical harm could result" from the violation. Capform does not take exception to the judge's characterization of the violation as serious. We characterize the violation as serious, noting the compliance officer's unrebutted testimony that any injury from tripping on rebar could result in impalement or other serious bodily harm.

The Secretary proposed a penalty of $700, and the judge assessed that amount. Capform does not take issue with this penalty on review. In accordance with section 17(j) of the Act, 29 U.S.C. § 666(j), in assessing the penalty we give due consideration to the gravity of the violation, the size of the employer, the employer's good faith, and its history of violations. The gravity in this case is high, because Capform's employees passed through this area regularly and could suffer considerable injury such as impalement if they tripped

on the rebar. The record shows that Capform has 700 employees and is therefore a large employer. Capform has a considerable history of violations, including repeat and serious violations within the three years before the hearing in this case. Based on Capform's history, we extend no credit for good faith. In light of the factors above, we assess a penalty of $700.

II. *Proximity to Post-Tensioning Operation*

In citation no. 1, item 5, OSHA alleged a serious violation of 29 C.F.R. § 1926.701(c)(1)[5] because Capform employees on the seventh floor who were not part of the post-tensioning operation being performed by Owens Steel were positioned directly behind, and in close proximity to the operation. The Owens Steel employees were using a post-tensioning jack to pull on the rebar inside the concrete. The two Capform employees were preparing a form for vertical rebar; one was 2 feet from the jack, while the other was 6 feet from it. Because of the tension on the jack, it could slip or the operation fail and injure the two Capform employees. Capform defends on the grounds that it did not know of the condition because it was the result of unpreventable employee misconduct.

A. *Unpreventable Employee Misconduct Defense*

In order to prove the unpreventable employee misconduct defense, the employer must establish that it had a work rule that effectively implemented the requirements of the standard, and the work rule was adequately communicated and effectively enforced. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991). The party claiming an affirmative defense has the burden of proving it. *E.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1077, 1993 CCH OSHD ¶ 30,034, p. 41,172 (No. 88-1720, 1993), *aff'd without published opinion*, No. 93-3615 (6th Cir. July 1, 1994).

The only evidence that Capform had such a rule directed at post-tensioning operations is found in the testimony of Houck. He stated that prior to the inspection he instructed the two employees at issue concerning the dangers of operating behind a jack.

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[5]Section 1926.701(c)(1) provides that "[n]o employee (except those essential to the post-tensioning operations) shall be permitted to be behind the jack during tensioning operations."

He also testified that he "directed people on other occasions to stay away from the areas and the whole banded line." Houck gave hearsay testimony that "after [the employee] was cited, he came to me and he admitted that he knew he was in the wrong area at the wrong time." According to Houck, Capform had a "progressive" discipline system for violations of instructions, which consisted of a verbal discipline after the first offense, then (depending on the severity) a day off, or termination for further offenses. Houck testified that he had "chewed out" one of the two employees after the incident.

Capform has seventeen written safety rules, none of which could be viewed as addressing the hazard of proximity to a post-tensioning jack. The judge characterized as "self-serving" Houck's testimony that he had orally instructed the two employees at issue of the danger of working behind jacks. The judge also found that Houck's testimony was "unconvincing" with respect to the item. Capform has not provided us with a sufficient reason to overturn those findings by the judge, and our review of the record indicates that there is no basis for doing so. *See United States Steel Corp.*, 9 BNA OSHC 1641, 1644, 1981 CCH OSHD ¶ 25,282, pp. 31,251-52 (No. 76-5007, 1981). We therefore defer to those credibility determinations. *See, e.g., C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978) (deference due to judge "who has lived with the case, heard the witnesses, and observed their demeanor"). We thus agree with the judge and dismiss as not credible Houck's testimony regarding his oral instructions to the employees involved in the citation, as well as his other directions to employees to stay away from such areas. We likewise dismiss Houck's testimony that an employee afterwards admitted to him that he was in the wrong place at the wrong time. We also note that Capform had no written work rule dealing with the hazard of working near a post-tensioning jack.

Even if it were found that there was a work rule that was sufficiently communicated, Capform did not show that it was effectively enforced. Houck testified that he "chewed out" one employee, but said nothing about the other. There is no written evidence of the so-called progressive disciplinary system, which was only vaguely described by Houck beyond the initial verbal reprimand.

For the reasons above, we conclude that Capform did not prove that it had a work rule addressing the cited condition that was adequately communicated and effectively enforced. We therefore reject Capform's claim that the violation was the result of unpreventable employee misconduct. Capform could have known of the violation with the exercise of reasonable diligence. Houck testified that he was aware that post-tensioning operations were being done on every floor that day and that Capform employees were working on various floors.

B. *Characterization and Penalty*

According to the compliance officer, the jack could come loose and flip out as a result of the tension, and the employees behind the jack could be struck by it. Capform does not dispute that any accident could cause serious bodily harm. Houck even admitted that he had seen accidents happen with post-tensioning. Therefore, we conclude that the violation is serious under section 17(k) of the Act.

The judge assessed a penalty of $500, which is what the Secretary proposed. Capform does not take issue with that penalty. Accordingly, we assess a penalty of $500.

III. *Lumber Not Cleared from Work Areas*

In citation no. 2, item 1, OSHA alleged a repeat violation of 29 C.F.R. § 1926.25(a)[6] because 4 by 4's, 2 by 10's, and other wooden materials lying about on the seventh floor were not kept clear from work areas and passageways. Capform argues that section 1926.25(a) does not apply to these materials and that its employees did not have access to the condition.

A. *Applicability of Standard*

We find that the standard applies. Capform would limit the standard's applicability to material that is not intended for reuse, and it takes issue with the Commission's decision in *Gallo Mechanical Contrac., Inc.*, 9 BNA OSHC 1178, 1180, 1981 CCH OSHD ¶ 25,008, p. 30,899 (No. 76-4371, 1980). In that section 1926.25(a) case, the Commission determined

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[6]Section 1926.25(a) provides that "[d]uring 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."

that the phrase "all other debris" in the standard "is not limited to ruined or fragmented matter, that is, matter not destined for future use." *Id.* The Commission noted that the phrase is linked by "and" to "form and scrap lumber with protruding nails," which "there is no real question . . . can be used again." *Id.* It concluded that "[w]hether the material has been used in the past or can or will be used in the future is irrelevant." *Id.*

Capform characterizes *Gallo* as "clearly overbroad" and "misguided" because it is based on the unfounded presumption that "form and scrap material" includes material that may be used in the future. It contends that "scrap" ordinarily means trash, or material to be discarded, and "debris" would mean the same thing. It argues that either of these two definitions is more natural and ordinary than the definition in *Gallo*, and without clear indication from the drafter of the standard, the Commission should apply the usual and ordinary meaning of the terms. It notes that "debris" is defined in Webster's Ninth New Collegiate Dictionary (1991) as "the remains of something broken down or destroyed; ruins," which is not what the materials at issue here were.

We find no basis for disturbing our decision in *Gallo*. There we considered the meaning of "debris" in light of the purpose of the standard (to prevent tripping accidents) and in relation to the only items specifically listed in the standard (form and scrap lumber with protruding nails). Capform's proposed meaning does not take into account this purpose, and Capform does not cite any precedent in support of its view. As for Capform's argument that to apply *Gallo*'s definition of "debris" would cripple construction contractors, the definition has been Commission precedent since 1980, and Capform presents no evidence that it has had that effect. Regarding Capform's argument that the wood was not debris because it was in piles for use as forming material and not scattered about, we note that the photographic evidence and the compliance officer's testimony both indicate that the wood was not in piles. Finding that the reusable lumber that was lying about on the seventh floor was "debris" within the meaning of the standard, we conclude that the standard applies and its terms were not met.[7]

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[7]We also note that, even if we were to accept Capform's interpretation of "debris," it (continued...)

B. *Employee Access*

We also find that the evidence establishes that Capform's employees had access to the violative condition. According to the compliance officer, Capform's employees were exposed to the hazard of tripping on these materials because Capform employees working on a mobile scaffold in the center "would have to walk around this material" or "walk over, walk through" this lumber and debris to get to their work station. When asked by the judge at the hearing whether this area at issue was a Capform work area, Houck responded "yes" there "would be a danger zone more or less." Moreover, Houck agreed with the compliance officer that during the walkaround inspection they had to "carefully step over" some of these materials. We therefore conclude that the Secretary proved a violation of section 1926.25(a).

C. *Characterization and Penalty*

The evidence establishes that the violation was repeated within the meaning of section 17(a) of the Act, 29 U.S.C. § 666(a), as alleged by the Secretary. Under Commission precedent, a violation is repeated if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary makes a prima facie showing that the violations are substantially similar by introducing evidence that both violations are of the same standard. The employer then has the burden of rebutting the evidence of similarity. *E.g., Stone Container Corp.*, 14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p. 38,819 (No. 88-310, 1990). In this case, the Secretary introduced into evidence a copy of a 1989 citation issued to Capform for violating the same standard as cited here, section 1926.25(a). That citation became a final

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[7](...continued)
appears that Capform did not comply with the terms of the standard. The compliance officer testified, and Houck did not deny, that Houck told him that some of the 2 by 10's were "scrap" and some of the 4 by 4's "were going to be cut because they were bad." Houck testified that some of the 4 by 4's "will be cut if we have damaged material which wouldn't serve as a good shoring member."

order of the Commission. Capform did not rebut the evidence of similarity. Therefore, we characterize the violation as repeated.

Capform claims that the prior violation was not substantially similar to the instant one because Houck was not the supervisor on that jobsite and was not aware of the citation issued for that earlier site. We find no merit in that argument because in *Potlatch* the Commission majority specifically rejected the view that the same supervisor must control the two violative conditions for one to be repeated.

The Secretary proposed a penalty of $1,200 for this violation, and the judge assessed that amount. Capform does not specifically take issue with that amount, which is supported by the record. Accordingly, we assess a penalty of $1,200.

IV. *Shoring Materials Stored at or Near Edge of Floor*

In citation no. 2, item 2, OSHA alleged a repeat violation of 29 C.F.R. § 1926.250(b)(1)[8] because Capform permitted the storage of its own wood shoring materials within ten feet of the outside edge on two areas on the seventh floor and in one location on the second floor. The cited areas lacked walls or toeboards to prevent the materials from being pushed or rolled off the floor's edge and hitting employees working below. Capform claims that the Secretary failed to prove a violation because he did not establish (1) employee access to the violative condition, and (2) employer knowledge of the condition. *See supra* note 3.

A. *Employee Access*

The compliance officer testified that, for the two cited areas on the seventh floor, as shown in the photographic exhibits in evidence, "[m]aterial was stored above the protection [guardrails] and at the floor edge" and "[t]his is directly above the entrance that employees used to gain access to the building." This testimony was not rebutted. Therefore, we find that, because all employees had to pass through the entrance area to get to their job

[8]Section 1926.250(b)(1) provides that "[m]aterial stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored."

assignments, they had access to the hazard of materials falling onto them from these two seventh floor locations.

B. *Employer Knowledge*

Although Capform's superintendent Houck testified that he had no knowledge of the conditions on the seventh floor, the record shows that Capform's employees were working on these floors throughout the inspection, and, as the photographic exhibits in evidence show, the existence of these materials near the edge of the floor would have been readily apparent to a Capform supervisor. *E.g., Hamilton Fixture*, 16 BNA OSHC at 1087, 1993 CCH OSHD at p. 41,190. We therefore conclude that the Secretary proved employer knowledge, and he established a violation of section 1926.250(b)(1). [9]

C. *Characterization and Penalty*

As noted above, under Commission precedent, a violation is repeated if, at the time of the alleged violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC at 1063, 1979 CCH OSHD at p. 28,171. To make a prima facie showing that a violation is substantially similar to the earlier one, the Secretary must introduce evidence that both violations are of the same standard, and the employer then has the burden of rebutting the evidence of similarity. *E.g., Stone Container Corp.*, 14 BNA OSHC at 1762, 1987-90 CCH OSHD at p. 38,819. The Secretary introduced into evidence a citation issued to Capform in 1988 for violating section 1926.250(b)(1), the same standard cited here. That citation became a final order of the Commission. Capform's only argument is that in order to prove substantial similarity the Secretary must prove that the same supervisor was in charge for both. As discussed above, we rejected that argument in *Potlatch*, and we do so again here. Accordingly, we characterize the violation as repeated under section 17(a) of the Act.

The judge assessed a penalty of $1,600, which is what the Secretary proposed. Capform does not specifically take exception to this penalty amount. Noting that the wood shoring materials stored on the edge of the seventh floor were directly above the building entrance, a heavily traveled area, we do not reduce the $1,600 penalty.

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[9] Because we find a violation of the cited standard as to the seventh floor, we consider it unnecessary to address the merits of the second floor allegation.

V. *Order*

For the reasons above, we affirm citation no. 1, item 4, alleging a serious violation of section 1926.701(b), and assess a penalty of $700. We affirm citation no. 1, item 5, charging a serious violation of section 1926.701(c), and assess a penalty of $500. We affirm citation no. 2, item 1, alleging a repeat violation of section 1926.25(a), and assess a penalty of $1,200. We affirm citation no. 2, item 2, insofar as it charged a repeat violation of section 1926.250(b)(1) at the two seventh floor locations, and assess a penalty of $1,600.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

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

Velma Montoya
Velma Montoya
Commissioner

Dated: September 29, 1994

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-1613
CAPFORM, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 29, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

September 29, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 94-1613

NOTICE IS GIVEN TO THE FOLLOWING:

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

Jaylynn K. Fortney, Regional Solicitor
U. S. Department of Labor
Office of the Solicitor
1371 Peachtree Street, N. E.
Atlanta, GA 30367

Steven R. McCown, Esquire
Littler, Mendelson, Fastiff & Tichy
300 Crescent Court, Suite 600
Dallas, TX 75201

Administrative Law Judge Office
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX:
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,
v.
CAPFORM, INC.
Respondent.

OSHRC DOCKET
NO. 91-1613

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 November 24, 1992. The decision of the Judge will become a final order of the Commission on December 24, 1992 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 December 14, 1992 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.

Date: November 24, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1613

NOTICE IS GIVEN TO THE FOLLOWING:

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

Ms. Bobbye D. Spears
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Steven McCown, Esquire
Jenkens & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas,, TX 75202 2711

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-1613
CAPFORM, INC.,	:	
Respondent.	:	

APPEARANCES:

John Black, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Steven McCown, Esquire
Jenkens and Gilchrist
Dallas, Texas
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

This case results from an inspection of a multi-employer worksite located in Tampa, Florida, conducted by Compliance Officer Warren B. Knopf under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*). The respondent, Capform, Inc., was a subcontractor performing the formwork and shoring for the placement of concrete at this project where an addition to a retirement community (University Village) was being constructed.

Following the inspection, the Secretary of Labor issued respondent a serious citation consisting of five items and proposing penalties of $2,800; a "repeat" citation consisting of two items and proposing penalties of $2,800; and an "other" citation with no proposed penalty. Respondent filed a notice of contest and a hearing was conducted in Tampa, Florida. The parties have filed posthearing briefs setting forth their respective positions concerning each item of the citations, and the matter is now ready for decision.

Serious Citation No. 1, Item 1

This item charges respondent with a violation of 29 C.F.R. § 1926.21(b)(2)[1] for its alleged failure to instruct employees in the recognition and avoidance of unsafe conditions. The charge is based upon Knopf's observation of an employee engaged in a plumb line operation at ground level in a seven-story stairwell shaft. The employee in question was wearing a hard hat and was measuring a plumb line suspended from the top of a shaft for the purpose of determining proper wall alignment. He was located beneath two other employees standing on a platform at the top of the shaft giving signals to a crane operator (Tr. 55, 161-163). Knopf noted that the two employees at the top of the shaft were standing on planks which were not tightly secured and that there was an opening between the planks through which tools or debris could fall. He testified he observed concrete chips falling through this opening as the employees worked on the planks (Tr. 118-119) and believed this circumstance created a potential for serious injury to the employee working at the bottom of the shaft. He also surmised there was a potential for the planks to fall into the shaft since they were not tightly secured and that this eventually could also cause serious injury to the employee working below.

In its posthearing brief, respondent argues that the conditions described by Knopf did not create a hazard. This position is based upon the testimony of Mark Alan Houck, respondent's superintendent, that there was "no work going on" while the employee was at

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[1] Section 1926.21(b)(2) states:

> (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

the bottom of the shaft (Tr. 165-166) and, therefore, no potential for objects to fall through or from the platform during the few minutes the employee spent in that location. According to Houck, the employees on the platform did nothing while the employee was measuring the plumb line at the bottom of the shaft except to signal the crane operator. All work on the platform, as well as any movement of the crane, was deferred, according to Houck, until the employee at the bottom of the shaft completed the measurement and was safely out of the shaft (Tr. 162).

Houck's testimony[2] is in direct conflict with that of Knopf who adamantly maintained he observed the employees on the platform moving around and performing work in such a manner that objects could and did fall from the platform while the employee was still in the shaft below (Tr. 114-115). In view of this conflict in testimony, it is necessary to make a credibility determination. Upon full consideration of the testimony, including the demeanor of the witnesses, this court concludes Knopf's account is more credible and finds that the employee working at the bottom of the shaft was exposed to the potential hazard of being struck by falling objects. This does not, however, end the inquiry.

The Secretary charges respondent under § 1926.21(b)(2), which requires an employer to "instruct each employee in the recognition and avoidance of unsafe conditions." To establish a violation under this standard, the Secretary has the burden of showing by a preponderance of the evidence that the cited employer did not "instruct" its employees in such practices. Apparently, Knopf made no attempt to determine whether or to what extent respondent instructed its employees in the recognition and avoidance of hazardous conditions. Under examination by the court on the point, Knopf appeared to avoid giving a direct answer:

> JUDGE SALYERS: All right, this citation charges failure to instruct. What led you to cite under that particular standard?
>
> THE WITNESS: The operation that was going on at the time was a plumb line operation. The employee was directly underneath other workers who were standing on planks which, as you can see, with Picture C-4 were not tightened planks.

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[2] It is significant to note that Houck was not present when Knopf observed this condition.

Those employees were carrying tools in their belts. They were belted off with a lanyard and safety belt. The debris at the bottom had fallen from above, and there was concern that the employee did not have sufficient protection from materials which were above him.

JUDGE SALYERS: Well, did you ascertain whether or not that particular employee or any other employees of Capform had been instructed not to work under a platform where debris was falling?

THE WITNESS: I had interviewed this employee, and he informed me that he was there. He knew the material was up there, and they were doing plumb line operations.

JUDGE SALYERS: Well, that's not an answer to my question.

You're charging here under "failure to instruct on standards." Now, I want to know how you got to that conclusion. You've described a situation that appears to be hazardous, but you haven't told me how you determined that these employees had never been instructed to avoid such hazards.

THE WITNESS: The employee himself was asked by myself if at any time had anybody trained him in the recognition of the hazards that he was exposed to, and his answer to me was that he knew the material was above.

JUDGE SALYERS: Well, that still doesn't answer my question.

Did he know he shouldn't be underneath the platform where there is debris falling.

THE WITNESS: He indicated he was going to be under that platform to me.

JUDGE SALYERS: All right.

THE WITNESS: He did not indicate that he hadn't received any training not to be under it. (Tr. 55-57)

In contrast to the testimony of Knopf, respondent's superintendent, Houck, rendered clear testimony on the point. He testified that respondent conducts weekly safety meetings which are attended by all employees (Tr. 14-18, 191). Exhibit R-3 contains the reports of safety meetings held from November 26, 1990, through May 6, 1991, including the topics

which were discussed at each meeting. One of the topics discussed at a meeting conducted on January 14, 1991 (one month before the inspection) related to "awareness." Houck testified that hazard awareness is a subject that is brought up not only in safety meetings but also on a day-to-day basis as he makes his walk-arounds at the worksite and that employees are routinely instructed to be aware of such things as working in areas where they might be hit by falling debris or other items (Tr. 166-167). All employees, according to Houck, are regularly reminded to wear hard hats and exercise caution when working below other employees "where there is a possibility of something coming down on you" (Tr. 198). Houck's testimony was not refuted by Knopf, the Secretary's only witness, and is, therefore, accorded full weight.

In order to comply with § 1926.21(b)(2), an employer must instruct employees about the hazards they may encounter on the job and the regulations applicable to those hazards. The standard does not, however, dictate to an employer concerning the manner in which it may impart the necessary training. A safety program that includes appropriate instructions to employees satisfies the standard. *Archer-Western Contracting, Ltd.*, 15 BNA OSHC 1013, 1991 CCH OSHD ¶ 29,317 (No. 87-1067, 1991). The standard is satisfied when the employer instructs its employees about the hazards they may encounter on the job. *Dravo Engineering & Constructors*, 11 BNA OSHC 2010, 1984-85 CCH OSHD ¶ 26,930 (No. 81-748, 1984). The evidence in this case does not support the Secretary's contention that respondent failed to instruct its employees concerning jobsite hazards.

Serious Citation No. 1, item 1, will be vacated since the Secretary failed to carry her burden of proof with respect to a crucial element of the charge.

Serious Citation No. 1, Item 2

During the course of his inspection, Knopf observed a Capform employee using a portable electric saw[3] that was plugged into a Capform receptacle box. This box was

[3] Knopf determined that this saw was "grounded;" *i.e.*, it had a three-wire system but also concluded this circumstance would not prevent electrical shock to its user in the event of a short (Tr. 58, 63-64). Section 1926.404(b)(1) requires the use of GFCIs to protect employees on construction sites and mandates their use "in addition to any other requirements for equipment grounding conductors.

attached to an extension cord that was plugged into a temporary electrical power outlet belonging to the general contractor and located at ground level seven floors below the location where the saw was in use (Tr. 58). Both the temporary power outlet and Capform's receptacle box were equipped with ground fault circuit interrupters (GFCIs). Knopf tested both GFCIs using a circuit testing device. He first plugged the tester into the Capform box and created a fault with the tester, but neither the GFCI on the Capform box nor the GFCI on the temporary power at ground level tripped. He then pressed the manual test button on the Capform GFCI and it failed to interrupt the current. He then plugged the tester directly into the temporary power, created a fault with the tester, and the GFCI on the temporary power tripped (Tr. 58-62, 148-150). Based upon these circumstances, Knopf concluded that Capform's GFCI was defective and, as a result, exposed its employee to the potential for electrical shock. He, therefore, proposed that respondent be cited for an infraction of 29 C.F.R. § 1926.404(b)(1)(ii).[4]

While respondent does not seriously question Knopf's determination that the GFCIs on Capform's receptacle box malfunctioned during the test performed by Knopf, respondent takes issue with the proposition that this circumstance exposed the employee to electrical shock. Respondent contends the GFCI in service at the source of the temporary power would serve to trip the system in the event of a short in the saw even if Capform's GFCI was inoperative. This theory was specifically addressed by Knopf and rejected during the course of his testimony. Although respondent maintains the point was conceded by Knopf during cross-examination and cites the testimony contained at transcript pages 125 to 127, the court disagrees and finds as a fact that Knopf correctly determined that Capform's GFCI was inoperative and, therefore, negated any protection from electrical shock.

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[4] Section 1926.404(b)(1)(ii) states:

> (ii) *Ground-fault circuit interrupters.* 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. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator rated not more than 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground-fault circuit interrupters.

Respondent makes an additional argument that this item should be vacated because respondent had no "knowledge" of the cited condition. This approach is based upon respondent's assertion that the inoperative GFCI was not readily apparent upon visual inspection, and the fact that it was inoperable could only be ascertained through the use of a testing device.

In *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981), the Commission held that the Secretary has the burden to prove employer knowledge of a cited condition but that this requirement can be satisfied upon a showing that the employer could have ascertained the condition through the exercise of reasonable diligence. The Commission explained that the "exercise of reasonable diligence requires (the employer) to inspect and perform tests in order to discover safety-related defects in materials and equipment." *Id.* at 1869.

In the case at bar, respondent failed to show what, if any, steps were taken to insure that the GFCIs utilized in its operations were functioning properly. As demonstrated in the testimony of Knopf, the inoperable condition of the GFCI in question was readily ascertainable by simply pressing the manual test button on the GFCI. It is, therefore, concluded that respondent failed to exercise reasonable diligence in this regard, and the cited standard was breached.

Serious Citation No. 1, Item 3

As Knopf began his inspection, he observed Houck standing on a mobile tubular steel scaffold which was missing a diagonal brace (Exh. C-1; Tr. 65). When this circumstance was called to Houck's attention, he explained to Knopf that he was still engaged in constructing the scaffold and had not yet attached the diagonal brace but planned to do so before the scaffold was lifted to the building roof where it would then be used by respondent's employees (Tr. 169-170). In Knopf's presence, Houck immediately located the brace and attached it to the scaffold (Tr. 70, 170-171). It is undisputed that the scaffold was properly cross-braced and was "otherwise okay" (Tr. 128) and that Knopf made no attempt to determine whether the scaffold was unstable prior to the attachment of the diagonal brace or thereafter (Tr. 71). It is also undisputed that Houck had previously constructed a similar

scaffold (Exh. C-11) that had the diagonal brace in place before it was put into use (Tr. 171).

In its posthearing brief, respondent points out that § 1926.451(d)(3)[5] requires "scaffolds shall be properly braced by cross-bracing *or* diagonal bracing *or* both." Respondent argues that the standard is written in the disjunctive and, since the scaffold was connected by adequate cross-bracing, the Secretary has failed to establish a *per se* breach of the standard. Under the rules of general construction, this approach has merit. The court would also note that the purpose of the bracing, as recited in the standard, is to secure "vertical members together laterally, and the cross braces shall be of such length as will automatically square and aline vertical members so that the erected scaffold is always plumb, square and rigid." Read as a whole, it would appear this standard permits discretion in the use of cross and/or diagonal bracing which may be used singularly or in combination so long as the caveat is met, *i.e.*, the scaffold is "plumb, square and rigid."

A proper interpretation of the standard requires the Secretary to show not only that a scaffold has missing braces but to further show that, as a result, the erect scaffold is not plumb, square or rigid. *Swain & Sons*, 15 BNA OSHC 1062, 1991 CCH OSHD ¶ 29,348 (No. 90-355, 1991); *Dan Berich, Inc.*, 11 BNA OSHC 1598, 1983 CCH OSHD ¶ 26,589 (No. 80-5573, 1983). In view of the fact the Secretary made no showing that the scaffold in question was unstable, this item will be vacated.

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[5] Section 1926.451(d)(3) states:

> (3) Scaffolds shall be properly braced by cross bracing or diagonal braces, or both, for securing vertical members together laterally, and the cross braces shall be of such length as will automatically square and aline vertical members so that the erected scaffold is always plumb, square, and rigid. All brace connections shall be made secure.

Serious Citation No. 1, Item 4

This item charges respondent with a violation of 29 C.F.R. § 1926.701(b)[6] for its alleged exposure of employees to unguarded rebar (vertical reinforcing steel rods protruding from concrete slabs and columns). There is no dispute that uncapped rebar existed throughout the worksite (Exhs. C-6, C-7; Tr. 24-25, 173). It is also undisputed that the general contractor at the worksite had the responsibility for capping the rebar (Tr. 129).

Respondent argues in its posthearing brief that the Secretary's evidence fails to establish respondent's employees were actually exposed to the hazard of impalement by falling upon or tripping into uncapped rebar. This argument is based upon Houck's non-specific testimony that respondent's employees did not work in areas around or above exposed rebar since respondent's work was completed before the rebar was installed (Tr. 23-25). Houck testified that he became concerned about the uncapped rebar "a month or two" before the inspection, discussed this situation with the general contractor, and some action was taken by the general contractor to barricade[7] and cap rebar in certain areas (Tr. 174). He also alleges that he explained to respondent's employees that they should "stay away" from the rebar areas as much as possible and "to enter the building in a certain area where it was barricaded" (Tr. 175-176). On cross-examination, he conceded that "not all" areas containing rebar had been barricaded (Tr. 208).

In contrast to Houck's generalized testimony, Knopf gave specific instances concerning his observations of the exposure of respondent's employees to uncapped rebar. During the course of his inspection, he observed respondent's employees "climbing and dressing" a form on the north side of the building with exposed rebar directly underneath (Tr. 72-74). He observed employees working directly above the areas depicted in Exhibits C-6 and C-7 (which show uncapped rebar) who were subject to impalement in the event of

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[6] Section 1926.701(b) states:

> (b) *Reinforcing steel.* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

[7] This term means only that the area was cordoned off with "bright colored tape" (Tr. 208).

a fall (Tr. 77-79). The likelihood of falls from these areas was enhanced since the open-sided floors were not fully protected by standard guardrails (Tr. 78). He also observed numerous instances of respondent's employees walking above and around uncapped rebar throughout the worksite and that respondent was fully aware of this condition.

As a defense to this charge, respondent relies upon the multi-employer worksite theory. To establish this defense, an employer must show by a preponderance of the evidence that it neither created nor controlled the hazardous condition and that it took reasonable alternative steps to protect its employees. *Anning-Johnson Co.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,690 (No. 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976).

The crucial question is whether respondent established that it took reasonable alternative measures to protect its employees from the hazard of impalement. As previously noted, Houck testified that he expressed his concern regarding this condition on one occasion to the general contractor "a month or two" before the inspection, and some steps were taken to cap and barricade the rebar in the area where respondent's employees entered the building (Tr. 174-175). Even though this condition was widespread, respondent offered no evidence to indicate that any measures were taken to cap or barricade rebar in the other areas where respondent's employees were exposed to rebar or that Houck ever requested the general contractor to correct this situation in these areas. Houck's testimony concerning his instructions to employees is also inconclusive. While he testified that the matter of exposed rebar was discussed at one safety meeting conducted about three months before the inspection, it appears this discussion related only to the area where employees entered the building and not to all other areas where employees were exposed to uncapped rebar (Tr. 174-176). In short, it appears Houck's attention and concern focused only on the one area where employees entered the building and did not encompass the widespread problem which existed throughout the worksite. Accordingly, it is concluded respondent did not establish it took effective measures to protect its employees, and this item will be affirmed.

Serious Citation No. 1, Item 5

On February 25, 1991, Knopf observed two employees of Owens Steel using a post-tensioning jack in a horizontal position to strengthen the concrete on the seventh floor of the building. Two of respondent's employees were working directly behind this operation and in close proximity to the jack (Tr. 82-83). Since there was tension on the jack, there was a potential that the jack could slip and injure anyone in the immediate area (Tr. 84). It is undisputed that Houck was aware that this circumstance created a potential for serious injury to employees and had actually witnessed "accidents happen with post-tensioning" devices in the past (Tr. 176-178). Respondent does not dispute that this circumstance constituted a violation of 29 C.F.R. § 1926.701(c).[8]

To combat this charge, respondent relies upon the defense of unpreventable employee misconduct. To establish this affirmative defense, an employer must show that it had work rules that effectively implemented the requirements of the cited standard and that these work rules were adequately communicated and effectively enforced. *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991).

Respondent offered no competent evidence that it had any written work rule which covered the cited condition. Respondent's safety program (Exhibit R-2), which consists of seventeen rules pertaining to general safety, its policy on the use of drugs and alcohol, and its written hazard communication program, contains no reference to post-tensioning jacks or to any rule which respondent had adopted with respect to their use or avoidance. It is also significant to note that no specific reference is made to the cited hazard in respondent's record of safety meetings (Exh. R-3).

Respondent's case is based entirely upon Houck's self-serving testimony that the dangers of working near the jack was explained to employees "in the past prior to (the investigation)" (Tr. 177) and also to the two employees who were working near the jack at

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[8] Section 1926.701(c) states:

> (c) *Post-tensioning operations.* (1) No employee (except those essential to the post-tensioning operations) shall be permitted to be behind the jack during tensioning operations.

some unspecified time prior to the incident (Tr. 179). Houck also testified, over the objection of the Secretary's counsel, that one of respondent's employees who was working near the jack came to Houck after the incident and "admitted that he knew he was in the wrong area at the wrong time" (Tr. 177), which respondent suggests indicates his awareness of the fact that he had violated company policy. Houck further testified respondent has a progressive system of discipline for employees who violated safety rules which consisted of a verbal reprimand for a first offense and "a day off or termination" for a repeated infraction, and that he had verbally reprimanded the employees involved in working near the jack upon learning of this incident (Tr. 179). However, no documentation to support the existence of a disciplinary program was presented at the hearing.

An employer seeking to establish an affirmative defense has the burden of proof on this issue and must establish each element of the defense through the presentation of clear and convincing evidence. *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1991 CCH OSHD ¶ 29,344 (No. 86-1087, 1991). In this case, respondent seeks to prevail solely on the uncorroborated testimony of Houck, which this court finds unconvincing. At the very least, respondent should have presented the testimony of one or more employees to verify Houck's testimony concerning the existence of a specific work rule directed to the hazard of working near a post-tensioning jack and how it was communicated and enforced. Respondent has failed to establish the defense of unpreventable employee misconduct by a preponderance of the evidence, and this item will be affirmed.

Repeat Citation No. 2, Item 1

This item charges respondent with a violation of 29 C.F.R. § 1926.25(a)[9] for failure to keep work areas and passageways clear of debris.

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[9] 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.

During his inspection, Knopf observed boards and lumber scattered on the seventh floor (Exhs. C-11, C-12; Tr. 89-90). This situation was observed on both February 22 and 25 (Tr. 92). It was his testimony that respondent's employees had to walk around and through this lumber and debris to get to their work areas on a mobile scaffold in the center of the floor (Tr. 90, 92-93, 210). Knopf observed employees on the scaffold working directly over the lumber and debris (Tr. 90). Knopf was advised by Houck that the lumber would be reused as supports for additional formwork but that other portions, such as the 2" x 10" lumber and some 4" x 4" lumber, would be scrapped (Tr. 94, 143).

The photographic evidence, together with the Knopf's testimony, clearly establish that respondent permitted a large amount of reusable and scrap lumber to accumulate on the seventh floor in areas through which employees had to pass. This situation created a tripping hazard which could result in serious injury to employees.

Respondent argues that the lumber observed by Knopf was not "debris" since this lumber was intended for reuse. This argument was laid to rest by the Review Commission in *Gallo Mechanical Contractors, Inc.*, 9 BNA OSHC 1178, 1980 CCH OSHD ¶ 25,008 (No. 76-4371, 1980), as follows:

> Section 1926.25(a) is concerned with housekeeping on construction worksites. It directs employers to keep lumber and debris cleared "from work areas, passageways, and stairs, in and around buildings and other structures." Hazards of tripping and falling, possibly resulting in sprains, fractures, and even concussions, can occur if matter is scattered about working or walking areas . . . . Accordingly, "debris" within the meaning of section 1926.25(a) includes material that is scattered about working or walking areas. *Whether the material has been used in the past or can or will be used in the future is irrelevant. Id.* at p. 30,899 (Emphasis added)

Accordingly, Capform's argument that most of the lumber pictured in Exhibits C-11 and C-12 was not debris must be rejected, and this item will be affirmed.

Repeat Citation No. 2, Item 2

This item charges respondent with a violation of 29 C.F.R. § 1926.250(b)(1)[10] for storing material within 10 feet of an exterior wall which did not extend above the top of the material being stored.

This charge is based upon Knopf's observation of lumber and other debris positioned near the floor edge on the second and seventh floors. This situation was photographed by Knopf (Exhs. C-12, C-13, C-14), and the photographs clearly reveal a breach of the standard's provisions. Knopf testified that the floor edge had no wall or toeboards and that directly below this location was the ground level entrance used by all employees to gain access to the building (Tr. 98-100). This situation was observed on two different days during the course of Knopf's inspection (Tr. 92).

Respondent argues that the material in question had been moved onto the floors by other contractors and that its presence was unknown to respondent. The evidence, however, reveals that respondent's employees were working on these floors throughout the period of the Secretary's inspection and that the existence of this material and its location near the edge of the floors could have been ascertained through the exercise of reasonable diligence. Indeed, Houck accompanied Knopf during the inspection and should have observed this condition which was in plain view. This item will be affirmed.

The Repeat Characterization

The Secretary characterizes the two foregoing items as "repeated" within the meaning of section 17(a) of the Act. Under Commission precedent, a violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). Under this doctrine, the Secretary establishes

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[10] Section 1926.250(b)(1) states:

> (b) *Material storage.* (1) Material stored inside buildings under construction shall not be placed within 6 feet of any hoistway or inside floor openings, nor within 10 feet of an exterior wall which does not extend above the top of the material stored.

a prima facie case of similarity by showing that both violations are of the same standard. The employer then has the burden of rebutting the evidence of similarity. *Secretary of Labor v. Stone Container Corp.*, 14 BNA OSHC 1757 at 1762, 1990 CCH OSHD ¶ 29,064 (No. 88-310, 1990).

In this case, the Secretary introduced previous citations which embrace the same standards as those cited in this case (Exhs. C-9, C-10). These previous citations became final orders of the Review Commission (Tr. 88-89). The violations affirmed in the previous citations involved identical violative conditions.

Respondent argues in its posthearing brief that Houck was not the superintendent on either of the prior jobsites, was unaware of the citations and that respondent should not, therefore, be charged with a repeat violation in this case. Respondent cites in support *George Hyman Construction Co.*, 5 BNA OSHC 1318, 1977 CCH OSHD ¶ 21,774 (No. 13559, 1977), in which Chairman Barnako expressed his personal view that a repeated violation should only issue "when the same first line supervisor is responsible for the prior violation." *Id.* at 1322. However, the case has no precedential value since the three commissioners were unable to agree on the disposition to be made and allowed the administrative law judge's decision, which affirmed the repeated violation, to stand. The violations itemized in Citation No. 2 were properly characterized as repeated.

"Other" Citation No. 3

This citation charges respondent with a violation of 29 C.F.R. § 1926.20(b)(1)[11] for its alleged failure to initiate and maintain an adequate accident prevention program, including the performance of frequent and regular inspections to insure that respondent's safety program is followed. This charge is based upon Knopf's conclusion that the instances of noncompliance disclosed in his inspection preclude the existence of an adequate safety program.

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[11] Section 1926.20(b)(1) states:

> (b) *Accident prevention responsibilities.* (1) It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

As previously noted respondent did, in fact, have a written safety program and conducted weekly safety meetings. Knopf conceded this circumstance during his testimony (Tr. 103-104). Houck's testimony that he performed periodic inspections of the worksite to discover and remedy safety hazards (Tr. 194-198) went unchallenged by the Secretary.

The cited standard requires an employer to *initiate* and *maintain* such programs as may be necessary to comply with Part 1926. Even if an employer initiates and maintains an adequate program, it does not logically follow that no violations will occur. In similar fashion, the fact that a violation occurs does not establish a *per se* violation of the cited standard. The Secretary has the burden of proof on this issue, and it was incumbent upon the Secretary to demonstrate by a preponderance of the evidence that the respondent did not initiate and maintain an adequate program. This she has failed to do, and the citation will be vacated.

The Penalties

The penalties in this case were computed by the Secretary in accordance with the agency's regular operating procedures which include consideration of the factors specified in section 17(j) of the Act (Tr. 106-107). In light of the evidence presented, the penalties proposed by the Secretary are appropriate and will be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing will constitute the court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing, it is hereby ORDERED:

(1) Serious Citation No. 1, item 1, is vacated.

(2) Serious Citation No. 1, item 2, is affirmed and a penalty of $700 is assessed.

(3) Serious Citation No. 1, item 3, is vacated.

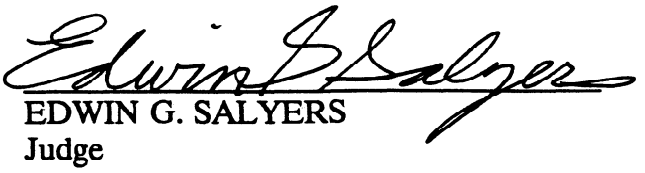
(4) Serious Citation No. 1, item 4, is affirmed and a penalty of $700 is assessed.

(5) Serious Citation No. 1, item 5, is affirmed and a penalty of $500 is assessed.

(6) Repeat Citation No. 2, item 1, is affirmed and a penalty of $1,200 is assessed.

(7) Repeat Citation No. 2, item 2, is affirmed and a penalty of $1,600 is assessed.

(8) "Other" Citation No. 3 is vacated.



EDWIN G. SALYERS
Judge

Date: November 19, 1992