SECRETARY OF LABOR, Complainant, v. HENSEL PHELPS CONSTRUCTION CO. and its successors, Respondent.	OSHRC DOCKET NO. 00-2016

APPEARANCES:

Kayden B. Howard, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

Robert R. Miller, Esq., Stettner, Miller & Cohn, P.C., Denver, Colorado

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to enforce a citation issued by the Occupational Safety and Health Administration to the Respondent for the alleged violations of safety regulations adopted under the Occupational Safety and Health Act of 1970. The controversy arose after compliance officers for the Agency inspected a worksite of the Respondent in Fort Collins, Colorado, concluded that the company was in violation of safety standards related to the construction industry, and recommended that the citation be issued. The Respondent denied the infractions and filed a notice of contest. After a complaint and answer were filed with this Commission a hearing was held in Denver, Colorado.

Item 1 of the citation charged that: (1) Respondent's employees were working on surfaces with edges six feet or more above the lower level unprotected by guardrail, safety net or personal arrest systems (29 C.F.R. §1926.502(b)(1); (2) Respondent did not provide and install fall protection systems before employees began work which required fall protection (29 C.F.R. §1926.502(a)(2);

(3) when a test load was applied in a downward direction, the top edge of the guardrail deflected to a height of less than 39 inches (29 C.F.R. §1926.502(b)(4); and (4) wire rope used for top rails was not flagged with high-visibility material (29 C.F.R. §1926.502(b)(9).

Item 2 of the citation alleged that employees working on surfaces were not protected from falling through holes more than six feet above the lower level, (29 C.F.R. §1926.501(b)(4).

At the hearing the compliance officer testified that he observed Respondent's employees working over 25 feet above the lower level without fall protection. As mentioned in item 1a of the citation, he considered this situation a violation of the regulation which provides that each employee on a walking/working surface with an unprotected side or edge which is six feet 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.

With respect to item 1b of the citation, the officer learned that employees installing rebar on the upper deck were directed to work on the deck before it had properly installed guardrails. In his opinion, this was a violation of the regulation which states that the employer shall determine if the walking/working surfaces on which its employees are to work have the strength and structural integrity to support employees safely.

Item 1c of the citation involved the regulation at 29 C.F.R. §1926.502(b)(4) which reads, in substance, that when a 200 pound test load specified in that section is applied in a downward direction, the top edge of the guardrail shall not deflect to a height of less than 39 inches above the walking/working level. The compliance officer was able to push down the guardrail to a height of 17 inches, a violation of the standard in his opinion.

The last item of citation 1 involved the regulation at 29 C.F.R. §1926.502(b)(9). The regulation requires that if wire rope is used for top rails, it shall be flagged at not more than six-foot intervals with high-visibility material. The compliance officer testified that there was no flagging material on the rope.

With respect to item 2 of the citation, the officer stated that he saw employees on walking/working surfaces unprotected from falling through holes more than six feet above lower levels in that there were personal fall arrest systems, covers or guardrail systems erected around such holes. He believed this to be a violation of the regulation at 29 C.F.R. §1926.501(b)(4) which

requires such safeguards. Upon more detailed examination the officer agreed that one of the two holes had lumber over it.

The Respondent called upon its District Director of Safety and Health and its Area Director to discuss the company safety program. They related that all employees are furnished a Safety and Health Handbook. The Respondent also has ongoing safety training, including written statements of safety policy procedures and objectives, tool box meetings, and special references to fall protection, guardrails and hole covers. There are weekly safety and health meeting reports as well as self and third party audit committee safety and health inspections. Each foreman is furnished a library which includes safety and health reference manuals and OSHA construction standards. To assure adequate investigations, Respondent audits accidents, incidents and near misses.

Respondent also has a specialized Safety Training Observation Program (STOP) which includes its employees as well as subcontractor workers. Under this project Respondent's safety people recorded many areas where workers performed their duties in an unsafe manner. As an example, safety people were not surprised that 25 workers were observed working without safety glasses. In one year the STOP program recorded 927 cases of unsafe working instances. Very few employees were disciplined for safety violations, although one foreman was removed for failure to enforce safety procedures. Nevertheless, under the STOP program medical costs were substantially reduced.

In addition, the foreman on the project testified that he worked in a no-fall hazard area and was not exposed to any danger. Another worker who had no fall protection was not close to any edge. He always used fall protection and was tied off when needed. There were two floor holes on the date of the inspection, but one had 2x4 lumber across it, eliminating any danger. Nevertheless, he was disciplined because of exposure to a fall of over six feet, resulting in some forfeiture of pay and retraining along safety lines. On more detailed examination he admitted that he worked at a floor edge without fall protection.

As pointed out in the post-hearing briefs submitted by the parties, in order to sustain a serious violation, the Secretary must bear the burden of proving four elements: (1) that the appropriate safety standard applies; (2) that the employer failed to comply with the standard; (3) that employees had access to the violative condition; and (4) that the employer had knowledge or constructive

knowledge of the condition. The knowledge may be satisfied by proof that either the employer actually knew, or with the exercise of reasonable diligence, could have known of the violative condition. Constructive knowledge may be predicated on the employer's failure to establish an adequate safety and health program to detect hazards.

The record in this case establishes that the Secretary met the four requirements. The Complainant proved that the safety standards applied to the workplace situation; that the standards were violated; that employees were exposed to the violative conditions; and that the employer at least should have known of the prospective violations based upon its own safety violation records.

As noted in the Respondent's posthearing brief ". . . the facts in this matter are largely undisputed." Nevertheless, at the hearing there was testimony from a compliance officer, two officials of the company and its foreman on duty at the worksite at the time of the inspection. Where there is an inconsistency between the compliance officer and the foreman, I am placing more reliance upon the former since he was also at the worksite, observed the infractions described in the citation, made notes of what he saw in preparation of the citation and took pictures to confirm the violations.

The Respondent also advances the defense of employee misconduct. The Commission has ruled that to establish this defense the employer must prove that it established work rules to prevent the reckless behavior or unsafe condition from happening; that it adequately communicated the rule to its employees; that it took steps to discover incidents of noncompliance; and that it effectively enforced the rule whenever employees transgressed it. Further, the employee conduct or exposure must have resulted from "idiosyncratic," "demented," or "suicidal behavior."

In the instant matter, based upon the Respondent's STOP safety program records, there appears to be a pattern of employee disregard of various workplace safety rules. In this respect Respondent's safety program was sometimes inadequately communicated and not always effective. This case does not present a matter of a single employee acting in violation of safety rules. Where a number of workers are operating in violation of the Administration's safety regulations, the Respondent has failed to establish the defense of employee misconduct.

Respondent's posthearing brief cites a number of cases in support of its position that the case should be dismissed because of employee unforeseen and unanticipated misconduct. Four cases

were decided by the United States Circuit Court of Appeals, namely, *Austin Building Company*, 647 F.2d 1063; *Capital Electric Line Builders of Kansas, Inc.* 678 F.2d 128; *Mountain States Telephone & Telegraph Company*, 623 F.2d 155; and *Pennsylvania Power & Light Company*, 737 F.2d 350.

These decisions do not help Respondent's cause. Thus, in *Austin*, the court held for the Secretary and affirmed the citation because it believed the evidence was sufficient to permit the Administrative Law Judge to find that the employer's knowledge met the required standard, i.e., that the company knew or could have known, with the exercise of reasonable diligence, that the hazardous practice existed. The court also remarked that the regulation makes no exception for hazardous conditions of short duration.

The citation was vacated in the *Capital Electric Line Builders* case. However, the facts in that case are far different than the ones at bar. There the employee involved was a highly trained and experienced journeyman lineman with at least ten years' experience in electrical line construction. To become a journeyman required at least four years of periodic classroom work and 7,000 hours of on-the-job training, including work on energized lines. After culmination of the apprenticeship program, the lineman took and passed an examination a month prior to the accident. The employee's co-worker characterized Mr. Payne as a deliberate safe worker and stated that he had never seen him do anything unsafe while at work. Nothing contained in the record would put the supervisor or employer on notice that he was likely to work in violation of the standard. Contrast these facts with the current matter where the Respondent knew of hundreds of incidents where its employees did not work safely.

In the *Mountain States Telephone & Telegraph* case, the court concluded that the Commission was in error when it ruled that the employer had the burden of proof. The Commission decision was remanded for reconsideration.

Finally, in the *Pennsylvania Power & Light Company* case the court vacated the citation because the OSHA Act should not be construed to impose a civil penalty without fault on an employer "for the result of idiosyncratic, demented or perhaps suicidal self-exposure of employees to recognized hazards." At no time in the current matter has the Respondent alleged that its employees acted in this manner. Thus, in the two cases where the citations were vacated, the facts differ markedly from the instant matter.

The Respondent's posthearing brief also refers to an Administrative Law Judge decision and a number of Commission decisions presumably favorable to its position. In the *Field* case the Administrative Law Judge dismissed the citation. However, unlike the case at bar, there was no foreman on the job, and the company maintained an effective disciplinary program. Its work rules were very strict. Even there the judge remarked that if a supervisory employee were involved , the defense of unpredictable misconduct would be more rigorous, and the defense more difficult to establish. The current matter differs because there were many instances of work safety rules which were not subject to discipline.

The Respondent also cited eight cases decided by the Commission. The decision in the *Standard Glass Company*, issued in 1972, vacated the citation because of employee misconduct. It was there held that a single and brief hard hat violation unknown to the employer and contrary to both employer's instructions and a company work rule which was uniformly enforced did not necessarily constitute a violation of Section 5(a)(2) of the Act.

Even then the Administrative Law Judge held that if there were repeated violations of the Respondent's rules, the judge would perhaps have held that the citation should be sustained. Thus, in this case the facts are distinguishable from the matter under consideration.

The other cases decided by the Commission are of no value to the Respondent because in each instance the Commission rejected the defense of employee misconduct and affirmed the citations.

With respect to the proposed penalty, the compliance officer reviewed the various factors outlined in the Act. The total amounted to $7,125.00. At the hearing there seemed to be little concern regarding this phase of the case. However, I believe that there should be a reduction in the penalty for the violation of item 2 of the citation, relating to one hole cover. The recommended penalty was based on two uncovered holes, but the evidence regarding one hole revealed no danger because of the lumber protection. Instead of a penalty of $2,625.00 for this infraction, the penalty should be reduced to $1,625.00.

In conclusion, I find that the Respondent was in violation of the regulations shown in citation

1a, 1b, 1c and 1d, namely 29 C.F.R. §1926.502(b)(1), 29 C.F.R. §1926.502(a)(2), 29 C.F.R. §1926.502(b)(4) and 29 C.F.R. §1926.502(b)(9), and the recommended penalty of $4,500.00 is AFFIRMED.

I also find that the Respondent was in violation of the regulation as shown in citation 1, item 2, and the penalty of $1,625.00 is AFFIRMED.

/s/

Sidney J. Goldstein
Judge, OSHRC

Dated: September 12, 2001