SECRETARY OF LABOR, Complainant, v. OLYMPIA DRYWALL COMPANY, and its successors, Respondent.	OSHRC DOCKET NO. 98-1981

APPEARANCES:

For the Complainant:
Danielle L. Jaberg and Margaret T. Cranford, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas.

For the Respondent:
Russell Pae, Controller, Olympia Drywall Company, Houston, Texas

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This preceding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 USC §651, et seq. (the Act) to review a citation issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed assessment of penalty therein issued pursuant to §10(a) of the Act.

On November 4, 1998, Respondent, Olympia Drywall Company, was issued one Serious Citation alleging a single violation of the standard set forth at 29 CFR 1926.25(a). The citation reads as follows:

> 29 CFR 1925.25(a): During the course of construction, form on scrap lumber with protruding nails was not kept clear:
> (a) At the jobsite, 2X4's with protruding nails were not cleared.

A penalty in the amount of $2,100 was proposed by the Secretary.

Respondent filed a timely notice of contest and this matter was assigned for EZ Trial proceedings pursuant to Commission Rules 29 CFR 2200.200 et seq. A hearing was conducted on April 1, 1999 and, in accordance with Commission Rule 209(f), a decision was issued from the bench vacating the citation and proposed penalty. Findings of fact and conclusions of law as required by Commission Rule 90(a) are set forth at transcript pages 118 to 125, as amended, attached hereto.

All findings of fact relevant and necessary to a determination of the contested issues have been made as required by Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Serious Citation No. 1, Item No. 1, dated November 4, 1998, alleging a violation of 29 CFR 1926.25(a) and the penalty proposed thereto are vacated.

SO ORDERED

Robert A. Yetman
Judge, OSHRC

Dated:

BENCH DECISION

JUDGE YETMAN: As I indicated to you earlier, EZ proceedings, unlike conventional proceedings, encourages decision from the bench, and that's no easy task in these cases. This case, however, I believe is in a posture for ruling from the bench.

First of all, jurisdiction is admitted. The Respondent agrees that it is subject to the provisions of the Act so that's not an issue here.

This case involves a violation of 1926.25(a): essentially, whether Respondent's employees were exposed to debris and other hazardous materials at the worksite. The Secretary's burden in any case, and this case in particular, is fourfold. First, the Secretary has to establish that the standard cited applies to the employer's worksite; two, that the employer failed to comply with the provisions of that standard; three, that employees had access to the cited condition; and four, that Respondent knew or with the exercise of reasonable diligence could have known of the violative condition. And I cite *Astra Pharmaceutical* at 681 F.2d, 69, First Circuit case, 1982, and *Gary Concrete Products*, 15 BNA 1051.

The Secretary must establish this violation by preponderance of the evidence; that is, that the conclusion to be reached from the facts is more probably true than false. It's not a very stringent burden for the Secretary to meet. In this case there seems to be no doubt that debris was at the worksite in Exhibits 1 and 2. The Respondent does not deny that those conditions existed. The conditions clearly represent a tripping hazard and possible puncture wounds as a result of the protruding nails. It is not necessary, Mr. Pae, as you tried to argue, that the pointed end of the nail must be protruding from the board. Reinforcing bars, for example, as you well know in construction work, must be guarded. So, just falling on a nail, whether it's at the pointed end or at the heard, could cause a puncture wound or an injury.

There is no evidence on this record that the Respondent caused the hazardous condition, but that's not determinative of the issue. The issue is whether Respondent's employees were exposed to that hazard. Under the circumstances of this case, the Secretary has established that the standard applies to the Respondent's work activities. In other words, if Respondent's employees were exposed to the condition, then the hazardous condition should have been removed by the Respondent, notwithstanding the fact that someone else may have created the hazard.

The other elements of the burden of proof create some problems. Secondly, did the Respondent fail to comply with the terms of the standard; and thirdly, did the Respondent's

employees have access to those hazardous conditions. Those two elements in this case are coupled together. For an employee exposure, it is not necessary to establish actual exposure of the employees to the hazard. To prove a violation, the evidence need only show that the employees in the course of their duties will be, are, or have been in the zone of danger. In those cases where there is no actual exposure, it is sufficient if the Secretary establishes that it is reasonably predictable that the employees had access to the hazardous conditions. I cite *Phoenix Roofing Company*. It's a Review Commission case, 1993-95 CCH at Paragraph 30, 699.

At a multi-employer worksite such as here, the employer must show that it took reasonable steps to protect its employees, even if it had not created the hazard. If the condition was created by the carpenters or the electricians or the plumbers or any other craft on the job site, the employer must make reasonable efforts, first, to discover those hazards and, secondly, correct the hazards or bring them to the attention of the responsible parties to correct the hazards. In other words, an employer cannot knowingly expose any of its employees to a hazardous condition even if that employer has not created the hazard.

In this case the evidence in support of an employee exposure is based solely upon employee admissions to the compliance officer. Employee admissions to the compliance officer are admissible and, in many cases, the Secretary relies upon employees admissions to establish, at least in part, elements of the case. The reason for that is that these statements are related to the employee's work activity and, therefore, are admissible. However, as I indicated before, employee admissions, with nothing more, is a weak case, if that's the only evidence that the Secretary is relying upon. And why is that?

Well, first of all, there's no way to test the accuracy of the compliance officer's recollection of the statement, or his interpretation of that statement. Secondly, the employee making the statement isn't available for cross examination. So we have to take the compliance officer's interpretation of the statement at face value. Now, again, even though it's admissible, it is not entitled to great weight unless there is some corroborative evidence in support of those statements.

In this case, one of the employees who allegedly made a statement to the compliance officer was on the stand and contradicted what the compliance officer has said. So that person's testimony is totally discredited, based upon what the compliance officer has said with respect to those statements at the worksite and what the employee has said under oath here today. The only other testimony presented by the Secretary is the testimony of Javier -- I guess I'm pronouncing it

right -- Martinez, the cousin of the person who testified here today. That person is not present and there's no way to test the accuracy of whatever statement that person made to the compliance officer at the worksite.

The test, as I indicated before, to establish a violation under the standard is a fairly easy one to meet. All the Secretary need establish is that employees -- It is reasonable predictable, reasonably predictable, that the employees will have access to the hazard. The Secretary offers two theories here. One, that employees had to go to the restroom facilities during the day and, therefore, had to go through the areas where debris was located. Secondly, the taco truck arriving on a daily basis and the employees breaking from their work activities to go to the taco truck for their break. This is strictly speculation by the compliance officer. There's no direct evidence that anyone ever did this. On the other hand, we have testimony from the employees and also the superintendent and the foreman that the employees were never in the areas where debris had accumulated.

This case illustrates the risk of relying solely upon employee admissions to the compliance officer. Based upon this record, the Secretary has failed to establish by a preponderance of the evidence that employees indeed were exposed or likely to be exposed to the hazardous conditions at the worksite. The only evidence in support of the Secretary's case here is an uncorroborated admission by one employee to the compliance officer; at least credible evidence. However, the evidence on the other side of the equation from the Respondent's witnesses is direct, it's affirmative and it hasn't been attacked successfully during cross examination.

Accordingly, I find that the Secretary has failed to establish employee exposure to the hazardous conditions and that the citation is vacated.

That will end this matter. Thank you very much.

[Whereupon, the hearing was closed.]