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Secretary of Labor, :  
Complainant, :  
v. :  
King Concrete Construction :  
Company, Inc., :  
Respondent. :

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OSHRC Docket No. 97-1002

Appearances:

Karen E. Mock, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Mr. Joseph Gamboi  
King Concrete Construction Co., Inc.  
Staten Island, New York  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER**

On June 3, 1997, the Secretary issued four citations to King Concrete Construction Company, Inc. (King), for violations of 29 C.F.R. Part 1926. A hearing was held in Columbia, South Carolina, on April 7, 1998. Prior to the hearing, the parties reached a partial settlement agreement regarding Citation Nos. 1, 3, and 4. At the hearing, the respondent admitted that it violated 29 C.F.R. §§ 1926.501 (b)(2) and 1926.501(b)(2)(ii). It further admitted that these violations were serious. Respondent disputes only the classification of the violations as willful and the Secretary's proposed grouped penalty of \$49,000.

### Background

Sovran Construction, the general contractor, had a contract with the U.S. Army Corps of Engineers to build barracks for enlisted soldiers at Fort Jackson, South Carolina. Sovran subcontracted all concrete work to King. Respondent erected the concrete forms and placed all steel. The general contractor poured the concrete. On February 14, 1997, respondent submitted its fall protection plan which outlined protection for its employees while they were working on concrete formwork at heights between 9 feet 10 inches and 33 feet above the ground. Prior to the submission of this fall protection plan, respondent's supervisors were provided fall protection training. This training was provided by the general contractor's insurance company in January 1997. On this job, respondent employed approximately 48 construction employees, at least seven of whom were designated as leading edge employees. These employees worked on elevated formwork on the jobsite for at least three months prior to the Secretary's inspection which began on April 1, 1997.

### Violations

Willful Citation 2, item 1, alleges a violation of 29 CFR 1926.501(b)(2) as follows:

Each employee who was constructing a leading edge 6 ft. (1.8m) or more above lower levels was not protected from falling by guardrail systems, safety net systems, or personal fall arrest systems:

(A) Employees engaged in leading edge work on the roof area of Building Number 2, were not protected from falling and were exposed to falls of between 9 feet, 10 inches and 33 feet.

Willful Citation No. 2, item 1b, alleges a violation of 29 CFR 1926.501(b)(2)(ii) as follows:

Each employee on a walking/working surface 6 feet (1.8M) or more above a lower level where leading edges were under construction, but who was not engaged in the leading edge work, was not protected by a guardrail system, safety net system, or personal fall arrest system:

(a) Employees working near the leading edge work at the roof/attic area on Building #2, who were not engaged in leading edge work, were not protected from falling and were exposed to falls of between 9 feet, 10 inches and 33 feet.

### Willfulness

The Secretary contends that King's violations of §§ 1926.501(b)(2) and 501(b)(2)(ii) were willful.

A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), is one committed with an “intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41,123, 41,132 (quoting *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD § 27,893, p. 36,589 (No. 85-355, 1987). “It is differentiated from other types of violations by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference.” *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (NO. 82-630, 1991) (consolidated).

*Mobil Premix Concrete, Inc.*, 18 BNA OSHC 1010, 1013, 1997 CCH OSHD ¶ 31,416, p. 44,405 (No. 95-192, 1997).

The OSHA inspection in this case did not occur until April 1, 1997. Respondent, however, was aware of the need for fall protection on the jobsite at least three months prior to that inspection. In January 1997, the general contractor's insurance company provided a fall protection class to respondent's management employees. The quality assurance representative for the Corps of Engineers performed daily walk-around inspections. These inspections related to employee safety, as well as the quality of the work of the various contractors. Problems involving respondent's lack of fall protection for its employees were first noted by the Corps of Engineers' representative in late February or early March 1997. Respondent's employees who worked on the leading edge of the formwork, as well as those in other locations on top of the formwork, were not tied off, and no other fall protection was provided for these employees. Respondent elected to use monitors to watch its employees on the formwork, but they were not actually enforcing safety. The monitors were not constantly watching employees, but performed other work, including carpentry work, supervisory duties, and guiding the crane operator in the placement of materials atop the concrete formwork. Respondent's employees were consistently found to be working on the edge of formwork and on top of columns with no form of fall protection. These employees were exposed to falls ranging from 10 to 33 feet. When employees were tied off, they were often tied off to cables wrapped around unsecured rebar. This provided no protection for the exposed employees. Representatives of the general contractor, the Army Corps of Engineers and the insurance carrier repeatedly warned respondent's management about the lack of fall protection. Respondent often agreed to protect these employees, but later allowed the same employees to be exposed to these same fall hazards with no protection. The general contractor and the Army Corps of Engineers

reported a great deal of defiance from respondent concerning fall protection matters. On several occasions, respondent agreed to provide fall protection only after confrontation with these representatives.

Respondent demonstrated its recognition of the need to protect its employees working on top of the formwork by developing a fall protection plan and by providing monitors to watch employees working at elevations ranging from 10 to 33 feet above the ground. It demonstrated reckless disregard for the requirements of the Act and plain indifference for employee safety by allowing its monitors to perform work functions other than directly watching the movements of unprotected employees working at or near the edge of elevated formwork. The intentional nature of respondent's behavior is further demonstrated by its recurrent and ongoing failure to provide any form of fall protection for these workers except when forced by the general contractor or safety representatives of the Army Corps of Engineers. Prior to the OSHA inspection, respondent was confronted almost daily by these individuals regarding its lack of concern for the safety of its formwork employees.

Respondent's violations were clearly willful. King demonstrated both reckless disregard for the requirements of the Act and plain indifference for employee safety.

#### Penalty

Under §17(j) of the Act, in determining the appropriate penalty, the Commission must 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.

At the time of the OSHA inspection, King had forty-eight employees, all of whom worked on this jobsite. Normally, King employs fewer than ten people in its entire operation. These violations are of high gravity. If workers fell from the elevated formwork, the likely result would be death or serious physical injury. The classification of the violations as willful mitigates against a finding of good faith. King has a history of only one previous violation during the past three years. That violation did not involve the issue of fall protection for employees.

Upon due consideration of these factors, it is determined that a penalty of \$9,800 is appropriate.

At the conclusion of the hearing, a decision was issued from the bench affirming the partial settlement agreement and affirming the willful violations as alleged and assessing a grouped penalty of \$9,800 for those violations.

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

The terms of the partial settlement agreement reached by the parties prior to the hearing and read into the record are approved as follows:

Citation No. 1 is amended as follows:

1. Item 3 is renumbered as item 2c.
2. Items 4a and 4b -- references to Building 8 are deleted.
3. Items 7, 8 and 10a and 10b are withdrawn.

Citation No. 4 is amended as follows:

1. Items 1a, 1c, 2 and 3 -- references to Building 8 are deleted.
2. Item 1b is withdrawn.

Pursuant to the partial settlement agreement, the following violations are affirmed, as classified, and the following penalties assessed:

<u>Citation No.</u>	<u>Item No.</u>	<u>Standard Violated</u>	<u>Penalty Assessed</u>
1 (Serious)	1a & 1b	29 C.F.R. § 1926.302(e)(12)	\$ 450
1 (Serious)	2a & 2b 2c	29 C.F.R. § 1926.304(f) 29 C.F.R. § 304(i)(1)	\$ 750
1 (Serious)	4a 4b	29 C.F.R. § 1926.451(h)(4)(ii) 29 C.F.R. § 1926.501(c)(1)	\$ 600
1 (Serious)	5	29 C.F.R. § 501(b)(1)	\$
450			
1 (Serious)	6	29 C.F.R. § 1926.502(b)(2)	\$ 450
1 (Serious)	9a 9b	29 C.F.R. § 1926.502(h)(1)(iii) 29 C.F.R. § 1926.502(h)(1)(v)	\$1,500
1 (Serious)	11	29 C.F.R. § 1926.502(k)(5)	\$1,650
1 (Serious)	12	29 C.F.R. § 1926.652(a)(1)	\$ 750
3 (Repeat)	1	29 C.F.R. § 1926.550(a)(4)	\$1,500
4 (Other)	1a 1c	29 C.F.R. § 1926.25(a) 29 C.F.R. § 1926.25(b)	\$ 300
4 (Other)	2	29 C.F.R. § 1926.451(b)(1)	-0-
4 (Other)	3	29 C.F.R. § 1926.452(i)(7)	-0-

Citation No. 2

Item 1a, in violation of 29 C.F.R. § 1926.501(b)(2), and item 1b, in violation of § 1926.501(b)(2)(ii), are affirmed as willful violations and a grouped penalty for items 1a and 1b of \$9,800 is assessed.

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STEPHEN J. SIMKO, JR.  
Judge

Date: June 8, 1998