



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
KARL & ASSOCIATES
Respondent.

OSHRC DOCKET
NO. 95-1688

**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 April 17, 1996. The decision of the Judge will become a final order of the Commission on May 17, 1996 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 May 7, 1996 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: April 17, 1996

DOCKET NO. 95-1688

NOTICE IS GIVEN TO THE FOLLOWING:

Deborah Pierce-Shields
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
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Ed Karl
karl and Associates
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Reading, PA 19607

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

KARL & ASSOCIATES,
Respondent

Docket Nr. 95-1688

Appearances:

Joseph Crawford, Esq.
Office of the Solicitor
U.S. Department of Labor
Philadelphia, PA
For Complainant

Ed Karl
Karl & Associates
Reading, PA
For Respondent

BEFORE: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

I Findings of Fact and Opinion

Respondent, Karl & Associates, is a firm engaged in rendering various industrial environmental services throughout the Delaware Valley. In September, 1995, it was engaged in the work of removing asbestos from building 1 of the Publicker distillery located on South Columbus Boulevard in Philadelphia. The distillery had been closed following a fire some years earlier. Building 1 was to be demolished, and the City of Philadelphia required that asbestos be removed prior to the demolition.

On September 14, an accident occurred in building 1. A grate, located on the sixth floor, collapsed, causing one Karl employee, Norman Williams, to fall two or three floors down a shaft. A large roller, which had been on the grate and fell with him, wedged him against the wall of the shaft, preventing him from falling to the bottom. Mr. Williams suffered serious injuries.

OSHA dispatched Compliance Officer Harold Williams to the site that day. CO Williams was unable to open his inspection then because the site had shut down. He returned the following morning and conducted an inspection that resulted in the issuance of one serious citation with one item to Respondent. That item was further divided into three parts alleging violations of 29 CFR §§ 1926.850(b) and (i), and 29 CFR § 1926.859(g). Respondent filed a notice of contest and this matter was docketed with the Commission. On December 18, the Chief Judge designated it for E-Z Trial under Subpart M of the Commission's Rules, 29 CFR §§ 2200.200 *et seq.* Consequently, no complaint or answer was filed, nor was any discovery conducted. At trial, counsel for the Secretary withdrew the alleged violation of 29 CFR § 1926.859(g) (item 1c of the Citation).

There is, of course, no dispute that the grate on which Mr. Williams was located gave way and that he suffered a fall and serious injuries as a result. Evidence submitted at trial indicates

that, although the building was surveyed and various areas marked off as being hazardous, this particular grate was regarded as being safe. Respondent's foreman, Mr. Gandia, indicated that everyone stood on it from time to time.

Respondent does not challenge OSHA's jurisdiction in this matter. Respondent's only defense is that Mr. Williams and the only witness to the accident, Mr. Johnson, were on an unauthorized break at the time. Respondent believes that they had gone to the grate because a window there affords a view of the Delaware River. Mr. Williams and Mr. Johnson, on the other hand, both assert that they had moved to the area of the grate to complete the task of removing asbestos from behind a furnace. They both indicate that they had started this job on the side of the furnace opposite the grate and removed all asbestos within reach. However, some remained to be removed, and this required them to move to the area of the grate in order to reach it. Mr. Gandia confirmed that there was asbestos to be removed from this area and that he had assigned Williams and Johnson to that task.

Respondent supported its claim that Williams and Johnson were on a break with an alleged admission to that effect made by Mr. Johnson to Mr. Karl. The latter secretly taped the conversation in which the supposed admission took place, and replayed the tape in Mr. Johnson's hearing at trial. Mr. Johnson indicated that he had

been apprehensive about saying anything with which Mr. Karl, his employer at the time, might take issue, and firmly reasserted the version of events to which he had testified. I sustained counsel's objection to the admission of the tape. Because it was clear that Mr. Karl's questions to Mr. Johnson strongly suggested the response that Mr. Karl wanted, and that Mr. Johnson was reluctant to answer, the tape did not serve to undermine the account of events given by Messrs. Williams and Johnson. I find their account to be accurate.

Moreover, even if they were on an unauthorized break at the time of the accident, it is not clear that that fact would constitute a defense to the citation. Mr. Gandia indicated that the grate in question was frequented by many employees, at least some of whom were there in the course of their duties. The grate was not identified as hazardous, although clearly it should have been, and appropriate action taken to secure or isolate it. Because the grate was used by Respondent's employees both in the course of their duties and apparently on breaks, it is clear the Secretary has demonstrated a violation of both 29 CFR §§ 1926.850(b) and (i).

Respondent has not challenged the Secretary's proposed penalty of \$1,250; consequently, it is affirmed.

II Conclusions of Law.

Respondent, Karl & Associates, is an employer engaged in a business affecting commerce within the meaning of section 3(5) of

the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

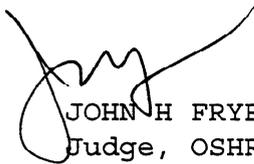
Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Respondent, Karl & Associates, was in serious violation of the standards set out at 29 CFR §§ 1926.850(b) and (i). A penalty of \$1,250 is appropriate.

VI. ORDER

Citation 1, item 1 is affirmed as a serious violation of the Act.

A total civil penalty of \$1,250 is assessed.


JOHN H. FRYE, III
Judge, OSHRC

Dated: **APR 15 1996**
Washington, D.C.