United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. PETERSON CONSTRUCTION CO. Respondent.	OSHRC DOCKET NO. 95-1275

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 September 12, 1996. The decision of the Judge will become a final order of the Commission on October 15, 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 October 2, 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
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Petitioning parties shall also mail a copy to:

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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

Ray H. Darling, Jr. /SKA

Date: September 12, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1275

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 95-1275
PETERSON CONSTRUCTION COMPANY, Respondent.	:	

APPEARANCES:

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

On June 15, 1995, Peterson Construction Company (Peterson), a general contractor, was constructing a waste water treatment plant in Fremont, Ohio, when an employee fell 21 feet and was seriously injured. The Occupational Safety and Health Administration (OSHA) conducted an accident investigation. As a result of the investigation, OSHA issued a serious citation to Peterson on July 13, 1995. OSHA alleges that Peterson violated the fall protection standards at 29 C.F.R. §§1926.501(a)(2) and 1926.501(b)(1). OSHA proposed penalties of $5,600 for each violation. Peterson timely contested the violations and proposed penalties (Tr. 5). Peterson admits that it is

an employer engaged in a business affecting commerce within the meaning of §3(5) of the Occupational Safety and Health Act (Act) (Tr. 4-5).

The Accident

Construction on the waste water treatment plant started in September 1994. Peterson was responsible for, among other things, all carpentry work necessary for the construction of concrete decking and columns (Tr. 12, 130). Peterson employed approximately twenty-three employees to do the carpentry work (Tr. 129). By June 1995, the foundation, the concrete floor, and the columns supporting the second floor were completed (Tr. 49, 149). The plywood decking for the second floor was erected in preparation of the concrete pour (Tr. 22-23). The steel framework supporting the second floor decking consisted of stringers or steel "I" beams which were spaced 4 to 5 feet apart and ran the length of the floor, and "Span-Alls" joists which were spaced 2 feet apart and ran from stringer to stringer (Exhs. C-1, R-3; Tr. 22, 131-32). The second floor decking consisting of 3/4-inch plywood was secured to the Span-Alls by drilling holes in the decking and tying the plywood to the Span-Alls (Tr. 120).

On June 15, 1995, Gary Greene and Greg Mullins, carpenters, were assigned by their foreman, Ned Bartley, to strip the formwork from columns C-1 and C-3 and to construct wooden boxes to extend the height of the columns. The formwork used to form the columns on the first floor was approximately 16 inches short of the second floor, requiring additional formwork to be built on top of the columns (Tr. 12, 14, 23, 155).

Work started at 7 a.m. (Tr. 162). Greene, working on the second floor, unsecured a piece of 2- by 8-foot plywood decking adjacent to column C-1. Rebar used in the column was protruding through the second floor (Exh. R-1; Tr. 21-22, 170). Greene moved the piece of decking back from the rebar (column C-1), leaving an opening of approximately 12 to 14 inches (Tr. 21, 121, 167). At the same time, Mullins, working from a scaffold erected below the second floor, unbolted the formwork around column C-1. After the formwork was unbolted, Greene pulled it up through the opening he had created at column C-1. He stacked the formwork for later use on the second floor (Tr. 22).

Next, Greene sawed the wooden pieces for the box at a location approximately 10 to 15 feet from column C-1 (Tr. 23, 161). After cutting the pieces, Greene proceeded back to column C-1 to hand them to Mullins, who was tied off on the scaffold beneath the second floor (Tr. 94). Greene was not tied off (Tr. 15). As Greene reached the area where he had pulled the piece of decking away from column C-1, his feet apparently landed on the edge of the loose decking (Tr. 13). According to Bartley, the foreman, who was working 15 feet north of Greene, it appeared that the piece of loose decking came up sliding Greene through the opening (Tr. 153, 169). The opening was at least 12 to 14 inches by 2 feet[1]. Greene fell 21 feet to the lower level onto two 20-inch rebar which partially penetrated his back. The rebar was cut off at the site, and Greene was taken to the hospital for treatment. It was 10:30 a.m. Greene described his injuries as puncture wounds caused by the rebar, six broken ribs, broken back bones, and a collapsed lung (Exh. C-3; Tr. 16). Greene has not returned to work and is receiving workers' compensation (Tr.11).

Based on an anonymous telephone call, OSHA Compliance Officer Gattis initiated an investigation of the accident (Exh. C-2). He arrived at the worksite approximately two hours after the accident (Tr. 52). He was told by Peterson's project officer and safety director that the worksite had not been changed (Tr. 52). However, Gattis' understanding that three sheets of plywood decking were loosened by Greene was in error (Exh. R-2; Tr. 53). The testimony of Bartley and Alan Stechschulte, superintendent, shows that the additional plywood decking was removed after the accident. Torches on the second floor were used to cut off the rebar so Greene could be moved (Tr. 138, 145, 161, 167). Therefore, the court finds that prior to the accident only one piece of plywood decking was loosened and moved approximately 12 to 14 inches from column C-1.

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1 The measurement of the opening is based on the size of plywood decking in the area of column C-1, as described by Bartley who was at the site immediately after the accident (Tr.167, 170; see also Exh. C-1).

Discussion

Peterson disputes the alleged violations of the OSHA safety standards. In order to establish a violation of a safety standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Manufacturing & Welding, Corp.*, 15 BNA OSHC 1218, 1221-22, 1991-93 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Item 1 - Alleged Violation of §1926.501(a)(2)

Peterson was cited for a violation of §1926.501(a)(2) which requires 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. Employees shall be allowed to work on those surfaces only when the surfaces have the requisite strength and structural integrity.

The citation issued to Peterson alleges that:

> On or about June 15, 1995, an employee and his co-worker were exposed to injury by their employer while they had worked on the second floor of the building under construction, adjacent to a unprotected floor edge on a working surface of 1/4" plywood decking that his employer had not determined had the strength and structural integrity to safely support the employee and his co-worker while they were working on it.

The standard imposes an obligation on employers to inspect and make a determination as to the strength and structural integrity of the walking/working surfaces in the workplace. The record establishes without dispute that the second floor decking at column C-1 was a working/walking

surface; employees including Greene were working on the second floor decking; and Peterson knew or should have known that a piece of plywood decking was loosened and unsecured.

A walking/working surface is defined at §1926.500(b) as any surface on which employees walk or work including floors and formwork. By leaving the unsecured piece of plywood decking on the floor at column C-1, it remained part of the walking/working surface. It was Bartley, the foreman, who instructed Greene and Mullins to strip the column forms and build the box over column C-1 (Tr. 150, 174). To complete the job, Bartley knew or should have known that a piece of decking at column C-1 was loosened and unsecured (Tr. 155). While Greene and Mullins were performing their job, Bartley was working 15 feet away on the second floor. He was aware the piece of decking remained as part of the deck surface (Tr. 27, 102, 153, 161).

Further, Alan Stechschulte, Peterson's superintendent, agreed that Greene had to pull back the decking approximately a foot from around the column in order to pull the formwork (Tr. 121). Stechschulte was working approximately 75 feet from Greene at the time of the accident. He testified that prior to the accident, he also was in the area where Greene and Mullins were working and was aware of their job. He had directed Bartley to have Greene and Mullins strip the column and build the boxes (Tr. 127-128). Therefore, Peterson's knowledge of the condition and employee exposure are established.

The issue in dispute is whether the plywood decking had the "requisite strength and structural integrity" as required by the standard (Resp's. Written Closing Argument, pgs. 2-3). Peterson argues that the plywood used for the decking was 3/4 inch thick and not 1/4 inch as alleged in the citation. Compliance Officer Gattis testified he based the 1/4-inch finding in the citation on what he was told by Jim Deam, Peterson's safety director who accompanied him during the inspection (Tr. 62). However, the Secretary does not now dispute that the plywood was 3/4 inch thick. The alleged violation of § 1926.501(a)(2) was not based on the thickness of the plywood but on the lack of stability of the plywood after it was unsecured. Therefore, the citation is amended *sua sponte* to show the plywood thickness as 3/4 inch. Peterson is not prejudiced by this amendment.

Gattis agrees that 3/4-inch plywood decking was strong enough to support employees as long as it was secured (Tr. 66). However, the piece of plywood decking which was moved back to strip formwork from the column was not secured. The piece of decking merely laid on the Span-Alls

without being otherwise secured. The Span-Alls were spaced 2 feet apart. By not ensuring that the piece of decking was secured, its structural integrity was not maintained. It was no longer suitable as a walking/working surface. It could easily move, slide, lift up, or otherwise become unstable. Structural integrity requires that the walking/working surface remain unimpaired and sound. By failing to have the piece of decking refastened while continuing to work, its structural integrity was diminished.

Peterson violated the standard when it failed to ensure that the decking upon which Greene was walking/working at the time of the accident had the structural integrity to support him. Peterson allowed him to work on an unstable surface. The piece of decking was not secured. It was incapable of supporting Greene's weight and tipped up when he stood on it (Tr. 13, 59). Peterson presented no evidence that it took measures to determine whether the piece of decking on which Greene was working was stable and secure (Tr. 155, 166). Greene was not instructed to secure the decking or take measures to ensure he was not working on an unstable surface. Bartley was aware at all times what Greene and Mullins were doing (Tr. 155). He was working 15 feet from Greene at the time of the accident (Tr. 153). Bartley gave no specific instruction on how to do the job (Tr. 161, 171-72, 174).

Accordingly, a violation of §1926.501(a)(2) is established.

Item 2 - Alleged Violation of §1926.501(b)(1)

Section 1926.501(b)(1) provides:

> *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) 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.

OSHA's citation alleges that:

> On or about June 15, 1995 the employer did not protect his employees working adjacent to a floor edge on the second floor, from a fall of 21' to the first floor level of the building under construction.

The Secretary alleges that Peterson violated the standard when it allowed Greene to work near the exposed edge at column C-1 without any fall protection system in place. The record establishes that at the time of the accident Greene was not tied off or otherwise protected by a personal fall arrest system. According to Bartley, the foreman, he did not require Greene to have fall protection while doing this job. The opening at column C-1 when the piece of decking was moved back was 12 to 14 inches wide by 2 feet long. The opening was not protected by a guardrail system or safety net system (Tr. 14-15, 57-58).

The issue disputed by Peterson is whether the opening created an unprotected edge as contemplated by the standard (Resp's. Closing Argument, pg. 5). Peterson notes that there were guardrails at all floor sides or edges on the second floor. The floor opening in dispute was at an interior column, column C-1. The opening was caused when the plywood decking was moved away from the column. Peterson does not dispute that there was no fall arrest system, guardrail, safety net, or fall protection at the opening at column C-1.

"Unprotected sides and edges" are defined at § 1926.500(b) as "any side or edge (except at entrances to points of access) of a walking-working surface, *e.g.*, floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high." The Secretary argues that moving the piece of decking created a floor edge. However, the court finds that the opening is more appropriately considered a floor hole. A hole is defined at § 1926.500(b) as "a gap or void 2 inches (5.1cm) or more in its least dimension, in a floor, roof, or other walking-working surface." The opening at issue was at an interior column and not at the edge or side of the second floor decking. The opening was "in" the second floor. Therefore, as a floor hole, the standard at § 1926.501(b)(4) is applicable. Section 1926.501(b)(4) requires:

> Each employee on walking-working surfaces should be protected from falling through holes (including skylights) more than 6 feet (1.8 m) above lower levels, by personal fall arrest system, covers, or guardrail system erected around such holes.

The court, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, amends *sua sponte* the citation to allege a violation of §1926.501(b)(4). Peterson is not prejudiced by this amendment.

Sections 1926.501(b)(1) and 1926.501(b)(4) are related standards. The two standards address the same hazard and require the same forms of fall protection to protect employees. There is no substantive differences in the wording of the two standards. The opening through which Greene fell was the issue tried. The Review Commission has permitted such amendments *sua sponte* by the court. *See Morrison-Knudson Co./Yonkers Contract*, 16 BNA OSHC 1105, 1993 CCH OSHD ¶ 30,484 (No. 88-572, 1993), and *A. L. Baumgarten Construction, Inc.*, 1994 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994). Peterson was well aware throughout the proceedings that the Secretary was alleging the lack of fall protection at the area where Greene fell at column C-1. The amendment by the court merely substitutes a standard that more directly applies to the cited condition, a floor hole.

As discussed, the record establishes that the hole at column C-1 was 12 to 14 inches wide by 2 feet long. The employee working in the area was not protected from a fall in any way, and Peterson knew or should have known of the unprotected hole.

Accordingly, a violation of § 1926.501(b)(4) is established.

Employee Misconduct Defense

If a violation of a standard is found, Peterson appears to argue that it was due to unpreventable employee misconduct (Resp's. Written Closing Argument, pg. 6). Peterson failed to properly plead employee misconduct as a defense. However, the Secretary does not oppose raising the defense at this stage of the proceedings. The Secretary's recognition that the defense may have been tried is shown by his brief on the issue (Secretary's Posthearing Brief, pgs. 11-13). Pursuant to Rule 15(b), Federal Rules of Civil Procedure, the Commission has recognized that an unpled issue may be tried with the express or implied consent of the parties. Therefore, the court amends the pleadings to show that Peterson alleges an employee misconduct defense.

To prove employee misconduct, Peterson must show that (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated the rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578, 1994 CCH OSHD

¶ 30,345 p. 41,841 (No. 91-0237, 1994); *Mosser Construction Co.,* 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶ 29,546, p. 39,905 (No 89-1027, 1991).

An essential element of the defense is a showing that the employer has established a work rule designed to prevent the violation. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1810, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). Other than Gattis' testimony that Peterson's safety program and employee training in fall protection was adequate, there was no evidence of specific safety rules. A copy of Peterson's safety program and rules applicable to its worksite were not made part of the record. Further, even if its fall protection program were adequate, there was no evidence regarding any safety rules on securing plywood decking. The argument that Peterson had a work rule that employees tie off is not a defense to a citation alleging failure to maintain the structural integrity of the decking. *Power Plant Div., Brown & Root, Inc.*, 10 BNA OSHC 1837, 1840, 1982 CCH OSHD ¶ 26,159 (No. 77-2553, 1982). Also, with regard to fall protection, Bartley testified he did not require Greene to wear fall protection while constructing the box over column C-1 (Tr. 172, 174). Therefore, Peterson cannot assert that Greene violated its fall protection safety rule. Further, the record fails to establish that the safety rules were communicated to Greene. Greene testified that he had worked a "few times" on this job without being tied off and was not disciplined (Tr. 15).

Adequate enforcement is also a critical element of the employee misconduct defense. An employer may show a progressive disciplinary plan consisting of increasingly harsh measures taken against employees who violate the work rule. *See Asplundh Tree Expert Company*, 7 BNA OSHC 2074, 1980 CCH OSHD ¶ 24,147 (No. 16162, 1979). However, to prove that its disciplinary system is more than a "paper" program, an employer must show evidence of having actually administered the discipline outlined in its policy and procedures. *E.G. Connecticut Light & Pwr. Company*, 13 BNA OSHC 2214, 1987-90 CCH OSHD ¶ 28,508 (No. 85-1118, 1989) (evidence of verbal reprimands alone suggest an ineffective disciplinary system); *Pace Constr. Corp.,* 14 BNA OSHC 2216, 1991-93 CCH OSHD ¶ 29,333 (No. 86-758, 1991).

The record fails to establish that Peterson has an effective enforcement program. Other than describing its reprimand procedure consisting of verbal warnings, written warnings, and days off (Tr. 152), there is no evidence as to Peterson's enforcement. Greene testified he worked a few times

on the project without being tied off, and he was not disciplined (Tr. 15-16). On the day of the accident, no one instructed Greene to tie off or use fall protection (Tr. 16). Also, Stechschulte and Bartley acknowledged never reprimanding any employees on this job (Tr. 153).

Therefore, without evidence of adequate safety rules that were communicated and enforced, employee misconduct has not been shown.

Serious Classification

The violations were cited as serious. A violation is serious under section 17(k) of the Act if "an accident is possible and there is substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991-93 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991). The Secretary must show that if an accident occurred, exposure to the hazards addressed by the standards are likely to cause death or serious injury.

The unsecured piece of decking created an unstable work surface. Greene fell 21 feet and suffered serious injuries when the decking lifted up. Therefore, a serious violation of §1926.501(a)(2) is established. Also, when the piece of decking was pulled back from column C-1, an unprotected floor hole was opened. Stepping into such a hole without fall protection could cause serious injury or death. Thus, a serious violation of §1926.501(b)(4) is established.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under §17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. The gravity of the violation is the principal factor to be considered.

Peterson employs approximately 150 employees and was given 20 percent credit for size by OSHA (Tr. 54). There were twenty-three employees at the worksite. Peterson was not given credit for history and good faith because of receiving previous serious citations and due to the high gravity of the violations cited (Exh. C-4; Tr. 54-56). The court concludes that size and history were properly considered. However, 10 percent credit is appropriate for good faith based on the compliance

officer's findings that Peterson's safety program was adequate and employees received fall protection training and equipment. Gattis did not find any deficiencies in Peterson's written fall protection program (Tr. 104). Also, Peterson was cooperative during OSHA's accident investigation (Tr. 62, 78, 82, 104).

The gravity of walking/working on an unsecured deck is high. One employee was working on the unsecured piece of decking 21 feet above the lower level. By leaving the piece of decking unsecured and as part of the flooring, there was a false sense of stability. However, it is found that only one employee (Greene) was exposed to the hazard. Mullins, as alleged in the citation, was not shown to be exposed. Therefore, the court assesses a penalty of $4,000 for violation of §1926.501(a)(2).

With regard to the unguarded floor hole, the court finds the gravity to be moderate because the probability of an employee falling through the floor hole was low. The employee was exposed for less than 45 minutes. Further, the employee was the one who unsecured the piece of decking from the column. He should have been aware of the unprotected hole. It was visible and next to protruding rebar. The real hazard was not the unprotected floor hole but the unsecured piece of decking. Therefore, the court assesses a penalty of $1,000 for violation of § 1926.501(b)(4).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Citation No. 1, item 1, alleging a serious violation of §1926.501(a)(2), is affirmed and a penalty of $4,000 is assessed.

2. Citation No. 1, item 2, alleging a serious violation of §1926.501(b)(4), is affirmed and a penalty of $1,000 assessed.

KEN S. WELSCH
Judge

Date: September 3, 1996