United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. WHITACRE ENGINEERING CO. Respondent.	OSHRC DOCKET NO. 94-3186

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 July 19, 1995. The decision of the Judge will become a final order of the Commission on August 18, 1995 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 August 8, 1995 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: July 19, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-3186

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SECRETARY OF LABOR, Complainant, v. WHITACRE ENGINEERING CO., Respondent.	OSHRC Docket No. 94-3186S

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DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970, 29 U.S.C., § 651, *et seq*, hereinafter referred to as the "Act."

Whitacre Engineering Company (Whitacre), a reinforcing steel contractor, at all times relevant to this action was an employer engaged in a business affecting commerce within the meaning of the Act.

In August 1994, Chris Matthewson, a compliance officer with the Occupational Safety and Health Administration (OSHA), received an anonymous telephone call that an employee had been impaled on a reinforcing steel bar at a construction site in Mansfield, Ohio. After calling the local hospital to confirm the accident, Matthewson telephoned his supervisor and was assigned the investigation (Tr. 47-48).

The investigation was conducted from August 31 to September 1, 1994, at a construction site at 913 Bowman Street, Mansfield, Ohio. The site was a steel mill owned by Armco, Inc., who hired Eichleay Corporation as general contractor to construct a large continuous caster used to form steel slabs (Tr. 10-11, 33). The project began January 19, 1994 (Tr. 33). Whitacre, a subcontractor, was hired to install the reinforcing steel for the foundation of the caster (Tr. 11). Whitacre commenced work in April 1994 and had fourteen to fifteen employees at the site under the supervision of foreman Ken Ziegler (Tr. 33, 41, 84).

It is uncontroverted that on August 29, 1994, an employee of Whitacre, who had finished tying off horizontal reinforcing steel, was descending the wall to the foundation floor when he apparently slipped and fell (Tr. 11-12). He fell approximately 3½ feet and was impaled in the side by a vertical reinforcing steel rod. The rod stood 20 to 22 ½ inches high and was not capped or otherwise guarded (Exh. C-3; Tr. 12, 55, 84). The employee was in the hospital several days (Respondent's Statement of Position, pg. 1 [unnumbered]).

As a result of Matthewson's investigation, Whitacre was cited for serious violations of 29 C.F.R. §§ 1926.500(d)(2), 1926.651(c)(2), 1926.701(b) and 1926.1053(b)(9). A penalty of $2,625 was proposed for each violation. Whitacre timely contested the violations and requested simplified proceedings. Without objection, the case proceeded in accordance with the simplified proceedings rules at 29 C.F.R. § 2200.200, *et seq.*

On March 28, 1995, after a conference pursuant to Rule 207 failed to resolve the matter or significantly narrow the issues other than coverage, a hearing was held in Mansfield, Ohio. The parties have submitted their posthearing brief/statement of position, and the case is ready for disposition.

ALLEGED VIOLATIONS

Item 1 - Alleged Violation of § 1926.500(d)(2)

Section 1926.500(d)(2) provides, in part, that "runways shall be guarded by standard railing, or the equivalent . . . on all open sides, 4 feet or more above floor or ground level." A "runway" is defined at § 1926.502(f) as "a passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings." The OSHA citation alleges:

> [T]here was an aluminum pick used for employees to walk on to get to the ladder to climb down to the foundation floor. There was no railing on one side in that employees were exposed to an 8 ft. 8 in. fall.

Facts

Matthewson testified that during his investigation, he observed employees of Whitacre using an aluminum pick (scaffold) to walk across to a ladder used to access the foundation floor (Tr. 49, 67). The pick had a guardrail on one side but not on the other side (Exh. C-1, C-2; Tr. 49). The pick was 28 inches wide and 30 feet long (Tr. 66). The employee shown in Matthewson's photograph standing approximately midway on the pick was 8 feet 8 inches above the foundation floor (Exh. C-1; Tr. 49, 65). While crossing the pick, employees were not tied off or otherwise prevented from falling from the open side (Tr. 67). Matthewson did not see them holding onto the guardrail on the other side (Tr. 68). After being notified by Matthewson, a guardrail was installed on the open side the next day by Eichleay (Tr. 32, 64-65).

Thomas Burnett, the former field safety engineer for Eichleay Corporation, testified that he observed all employees including Whitacre's using the aluminum pick to access the foundation area (Tr. 14, 35). He estimated the distance to be 15 feet from the end of the pick where the ladder was located to the foundation floor (Tr. 35). The pick was owned and placed for access to the foundation by Eichleay two weeks before the OSHA inspection (Tr. 25, 35-36). Burnett testified that no one from Whitacre complained about the lack of a guardrail on one side (Tr. 14-15, 36). However, Burnett testified that he was trying to get

Eichleay's ironworkers to install a guardrail, but the job was running behind schedule (Tr. 37). He recognized the danger in an employee's falling which could cause serious injury or death (Tr. 15).

Keith Lepage, president of Whitacre, testified that he did not consider the pick a hazard to his ironworkers (Tr. 92). Whitacre argues that it was common practice for the ironworkers to "traverse and perform work routinely on beams less than 12 inches wide" (Respondent's Statement of Position, pg. 3 [unnumbered]). He agreed that Ziegler, his job foreman, was aware there was no guardrail on the pick (Tr. 92). Lepage testified that it was difficult to go to the general contractor to complain about all hazardous conditions, and "[I]f we had to stop and let somebody know every time there's danger situation, you would never get anything done" (Tr. 92-93).

<u>Discussion</u>

In order to establish a violation of a standard, the Secretary must prove that (1) the standard is applicable; (2) the terms of the standard were violated; (3) employees were exposed or had access to the violative condition; and (4) the employer knew or should have known of the violative condition. *See e.g., Gray Concrete Products, Inc.,* 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,349, p. 39,449 (No. 86-1087, 1991).

Based on the record, a violation of § 1926.500(d)(2) is established. The aluminum pick constituted a "runway" within the meaning of § 1926.502(f) in that employees were using it as a passageway which was elevated above the ground level. There was no guardrail or equivalent on one side, and the pick was more than 4 feet above the ground level. Whitacre's employees were observed walking on the pick, and Lepage admitted that Whitacre was aware of the condition. Thus, it is found that the terms of § 1926.500(d)(2) were applicable and were not complied with; Whitacre had employees exposed to a fall hazard; and Whitacre was aware of the violative condition.

Whitacre's belief that its employees as ironworkers did not need the guardrail is rejected. Section 1926.500(d)(2) does not grant that option; it states that runways shall be guarded "on all open sides." The use of the word "shall" makes the use of the guardrail mandatory. There was no evidence that a variance was sought.

Whitacre's argument that the violative condition was the general contractor's responsibility is also rejected. Despite the evidence showing that the pick belonged to, and was placed by Eichleay who was responsible for installing the guardrail, Whitacre is not relieved from the responsibility of protecting the safety of its employees. To establish a multi-employer defense, Whitacre must show by a preponderance of the evidence that (1) it did not create the hazardous condition; (2) it did not control the violative condition such that it could have realistically abated the condition in the manner required by the standard; and (3) it took reasonable alternative steps to protect its employees or it did not have notice that the violative condition was hazardous. *See Capform, Inc.*, 16 BNA OSHC 2040, 2041, 1992 CCH OSHD ¶ 29,918 (No. 91-1613, 1992). Whitacre has failed to show that it is entitled to this defense. Whitacre failed to take any alternative steps to protect its employees. Whitacre's employees were observed on the pick without being tied off or otherwise protected from the fall hazard. Whitacre failed to complain to Eichleay or request Eichleay to install the guardrail. Although Lepage conceded that Whitacre has some responsibility and was aware of the condition, the record fails to show how, if at all, Whitacre met its responsibility to protect the safety of its employees. Accordingly, Whitacre's violation of § 1926.500(d)(2) is affirmed.

In classifying the violation, a "serious" violation is "deemed to exist . . . if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . in such place of employment unless the employer did not, and could not with exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Based on the record, there can be no dispute that if an employee fell 8 to 15 feet to the cement foundation with debris, including protruding steel bars, death or serious physical injury could result. Also, Whitacre was aware of the lack of a guardrail, as evidenced by its admission, and the fact that this was the only means of access to the foundation. Thus, the violation of § 1926.500(d)(2) is found to be serious.

A penalty of $1,500 is deemed appropriate. There was an adequate guardrail on one side of the aluminum pick making it less likely of an accident occurring. Also, the record reflects that the guardrail was installed the next day; Whitacre has no history of prior OSHA

violations for the past three years; and, although Whitacre employed over 175 employees, there were fourteen to fifteen employees at this site.

Item 2 - Alleged Violation of § 1926.651(c)(2)

Section 1926.651(c)(2) provides:

> [A] stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet . . . or more in depth so as to require no more than 25 feet . . . of lateral travel for employees.

The OSHA citation describes the alleged violation as follows:

> . . . [T]here was a trench that employees crossed to get to their work area. This trench did not have any safe means of egress in that there were no steps, ladders, or ramps.

Facts

Matthewson testified that from the contractors' trailers, including Whitacre's, there was a trench that employees crossed to get to the site of the foundation (Tr. 53). The trench measured 17 feet wide at the base and 22 feet wide across the top (Tr. 52). It was approximately 25 feet long (Tr. 68). The trench's wall nearest the trailers was 32 inches deep, and the other wall was 65 inches deep (Tr. 52, 70). Matthewson described the walls of the trench as steep -- "almost vertical" (Tr. 53). In each wall of the trench, there were steps apparently cut with a shovel; one step cut into the 32-inch wall and two steps cut into the 65-inch wall (Tr. 53, 70). He described the steps as inadequate, shallow, crumbling and sloping (Tr. 70). Although he did not see Whitacre's employees in the trench, Ziegler told him that he regularly crossed the trench to get to the foundation site (Tr. 71). On the second day of his inspection, Eichleay installed wooden steps with railings (Tr. 70). Matthewson acknowledged that at the time of his inspection, he did not know that it was a violation of the standard although he was having difficulty climbing the steps (Tr. 52).

Burnett testified that the trench was dug by the electric company to run conduit and that Eichleay cut the steps into the walls so that employees could more easily cross the trench (Tr. 17, 38-39). Like other contractors' employees, he saw Whitacre's employees

crossing through the trench (Tr. 16). He testified that employees could use the steps, but he did not consider it as safe as a structurally built ramp or stairs (Tr. 28).

Discussion

Based on the record, the Secretary has failed to established that there was a violation of § 1926.651(c)(2). Whitacre's employees were not working in the trench excavation but were crossing through it to get to their jobsite. There was only one side of the trench excavation deeper than 4 feet; the other side was less than 3 feet deep. The regulation requires a safe means of egress so as not to require an employee to laterally travel more than 25 feet. With one wall of the trench excavation measuring less than 3 feet, there was a safe means of egress with less than 25 feet of lateral travel. Thus, the trench excavation complies with the requirements of § 1926.651(c)(2). There was a safe means of egress as required by the standard.

Therefore, the alleged violation of § 1926.651(c)(2) is vacated.

Item 3 - Alleged Violation of § 1926.701(b)

Section 1926.701(b) provides that "[a]ll protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement."

The OSHA citation alleges:

> On or about August 29, 1994, at the construction site in the steel mill in Mansfield, Ohio, there was rebar at the base of the caster foundation sticking vertically out of the concrete 20 to 22½ inches. The rebar did not have any protective device to protect employees from impalement.

Facts

There appears to be no dispute of the facts. Below the area where employees were tying off horizontal reinforcing steel on the wall, there were reinforcing steel bars (rebar) protruding from the concrete foundation. The exposed vertical bars measured 20 to 22½ inches high with no covers or other guarding. The protruding bars were approximately 8 to 10 inches from the wall (Exhs. C-3, C-4; Tr. 39, 55).

On August 29, 1994, an employee of Whitacre was climbing on the wall to tie off the horizontal reinforcing steel. While tying off the horizontal pieces, he used his safety belt (Tr. 72). While descending the wall, the employee apparently slipped and fell 3 ½ feet onto the protruding rebar (Tr. 12, 72). The ends of the protruding rebar were not caped or otherwise covered (Tr. 18-19, 72). The employee was impaled in the side and was taken to the hospital where he remained for several days (Tr. 84).

Burnett, former safety supervisor for Eichleay, testified that three to four weeks prior to the accident, he spoke with Whitacre's foreman about the unprotected vertical rebar throughout the foundation (Tr. 20, 40). In other areas of the foundation, 2 x 4-foot wooden covers were tied over the top of the rebar or mushroom caps were used to cover the tops of the rebar (Exh. C-5; Tr. 20). However, in the area where the accident occured, nothing was done to cover the rebar.

Discussion

The record establishes that at the time of the accident, § 1926.701(b) was applicable; the protruding rebar was not guarded to protect against the hazard of impalement; Whitacre's employees were exposed to the hazard; and Whitacre was aware of the unguarded rebar. The standard is clear; it requires reinforcing steel bars to be covered to prevent impalement. Whitacre failed to provide this protection. The record establishes that Whitacre used plastic mushroom caps or job-made 2 x 4-foot wooden covers in other areas of the jobsite (Exh. C-5; Tr. 20). Although Whitacre questions the caps' effectiveness, there is no evidence as to why such caps were not installed in this area. Also, it is noted that the mushroom caps were manufactured for the purpose of protecting employees. Further, if Whitacre did not choose to use the caps, it could have used the job-made 2 x 4-foot wooden covers. However, the evidence establishes that Whitacre failed to provide any protection to its employee who was working immediately above the exposed rebar. Accordingly, the violation of § 1926.701(b) is affirmed.

The violation of § 1926.701(b) is considered "serious" as evidenced by the employee's injury and the potential for serious injury or death. Also, Whitacre was informed of the unguarded reinforcing steel three or four weeks prior to the accident.

A penalty of $2,625 is deemed appropriate and reasonable. In determining a penalty, consideration was given to the fact that installing reinforcing steel is Whitacre's sole business and that an employee was injured due to its failure to guard protruding rebar in any manner. Credit was given in that Whitacre employed 175 employees; it has no history of prior OSHA violations; Whitacre was cooperative during the inspection; and the violation was immediately abated.

Item 4 - Alleged Violation of § 1926.1053(b)(9)

Section 1926.1053(b)(9) requires that "the area around the top and bottom of ladders shall be kept clear." The OSHA citation alleges:

> . . . [T]here was a steel ladder leading down to the foundation floor. At the base of the ladder there was bent over rebar that could cause a tripping hazard in that stepping off the ladder employees could trip over the bent rebar.

Facts

Matthewson testified that during the inspection, he observed Whitacre's employees working in the foundation near an access ladder. Bent rebar was found at the base of the ladder, which he considered to be a tripping hazard (Tr. 57-58). Matthewson agreed that the ladder could not be moved to another area, and he recommended that a wooden platform be placed over the rebar around the base of the ladder (Tr. 58-59).

Burnett, former safety supervisor for Eichleay, testified that the access ladder was placed at the location approximately one week prior to the OSHA inspection (Exh. C-5; Tr. 21). Like other employees, Whitacre's employees were observed using the ladder (Tr. 22). There were only two ladders accessing the foundation (Tr. 22). When initially observed by Burnett, the rebar at the base of the ladder was vertical. Burnett asked Whitacre to bend

the rebar so that employees were not exposed to an impalement hazard. Whitacre complied with Burnett's request (Tr. 22).

Lepage testified that his company could bend the rebar but that Eichleay had to build the wooden platform. Also, he considered the elimination of the impalement hazard more important than the tripping hazard (Tr. 93).

Discussion

Section 1926.1053(b)(9) requires that the area around the top and base of the ladder be "kept clear" of potential hazards to employees accessing the ladder. Because of their eventual use in the foundation, the protruding rebar could not be removed or cut off. Also, both parties concede that the ladder could not be moved to another location. Whitacre did eliminate the impalement hazard by bending the rebar (Exh. C-5). However, there still remained a tripping hazard. The possibility of tripping at the base of the ladder which employees use to access the foundation is considered one of the potential hazards to which the standard is directed. Although aware of the tripping hazard, there is no evidence that Whitacre attempted to elimate the hazard. Accordingly, a violation of § 1926.1053(b)(9) is affirmed.

Based on the record, the violation of § 1926.1053(b)(9) is classified as "other than serious" with no penalty. Whitacre took appropriate action to eliminate the impalement hazard. In bending the rebar, the photograph shows that to some extent there was a path to and from the ladder, thus reducing the likelihood of tripping. Further, the record fails to establish that tripping in this area could cause death or serious injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

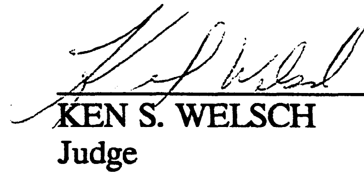
It is hereby ORDERED:

1. Serious violation of item 1, § 1926.500(d)(2), is AFFIRMED with a penalty of $1,500 assessed.

2. Serious violation of item 2, § 1926.651(c)(2), is VACATED.

3. Serious violation of item 3, § 1926.701(b), is AFFIRMED with a penalty of $2,625 assessed.

4. "Other than serious" violation of item 4, § 1926.1053(b)(9), is AFFIRMED with no penalty assessed.



KEN S. WELSCH
Judge

Date: July 11, 1995