



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

CARIBCO INTERNATIONAL CORPORATION
Respondent.

OSHRC DOCKET
NO. 92-2758

**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 January 12, 1994. The decision of the Judge will become a final order of the Commission on February 11, 1994 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 February 2, 1994 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 black ink, appearing to read "Ray H. Darling, Jr.", written over a horizontal line.
Ray H. Darling, Jr.
Executive Secretary

Date: January 12, 1994

DOCKET NO. 92-2758

NOTICE IS GIVEN TO THE FOLLOWING:

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Hato Rey, PR 00918

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,

Complainant,

v.

CARIBCO INTERNATIONAL CORP.,

Respondent.

Docket No. 92-2758

Appearances:

Jane S. Brunner, Esq.
 U.S. Dept. of Labor
 New York, NY 10014

James G. McLaughlin, Esq.
 Esquire Bldg. - Suite 300
 Hato Rey, Puerto Rico

For the Complainant

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an inspection of Respondent's business site at the Facilities Fitness Building at Ft. Buchanan, San Juan, P.R., the Secretary of Labor issued two citations, one (citation No. 1) alleging four serious violations (Items 1-4), and two (citation no. 2) alleging one other

than serious violation. No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter. A hearing was held in San Juan, Puerto Rico. Both parties were represented and filed post-hearing briefs.

THE ALLEGATIONS

Citation 1-Item 3

Alleged Violation of 29 C.F.R. 1926.451(d)(10)

The Secretary alleged that the Respondent violated the standard at 29 C.F.R. 1926.451(d)(10) for failure to have guardrails on the open sides and ends of scaffolds more than 10 feet above the ground. The standard provides:

1929.451. Scaffolding

---(d) Tubular welded frame scaffolds.

---(10) Guardrails made of lumber, not less than 2X4 inches-- and

approximately 42 inches high, with a midrail of 1x6 lumber ---shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

An OSHA compliance officer testified that while conducting his inspection he noted six instances where employees of the Respondent were working on non-mobile tubular welded metal frame scaffolds eleven feet high that had no intermediate rails on the side and no guard rails at the end. He testified that all of the employees seen working on the scaffold were identified to him as Caribco employees by the Project Engineer for Caribco Mr. Lopez who accompanied him during the inspection. The employees were engaged in tying in forms on the building under progress and were exposed to a fall of over ten feet. The compliance officer described a photograph of the work scene as depicting two Caribco employees working on the scaffold at hazard of falling (Ex C-1). Lopez testified that the two people shown on the scaffold in photograph were both he and Santiseban, the compliance officer. Again Cruz, a laborer also testified he was working at another wall and was not one of the employees allegedly depicted in the photograph. Further describing the situation presented is the testimony of Rivera, the compliance officer who took the photograph that the two persons depicted were not Santiseban and Lopez. Having observed

the demeanor of the witness as they testified and having considered all the circumstances which bear upon the weight of their testimony I do not accept the contention of both Lopez and Cruz as to the identification of those employees in the photograph seen working by the compliance officer. Firstly, the testimony of Cruz lacked the definiteness and certainty associated with truth. He was extremely nervous and shifty on the stand, and his testimony was tinctured with understandable bias in favor of his employer. Lopez similarly being the Project Engineer and Safety Official similarly testified in a hesitant manner. His testimony fluctuated and lacked the definiteness and certainty associated with truth. My opinion is that he framed his testimony as to the work activities on the scaffold and to the hazards alleged thereon so as to serve his best interests and that of his employer. The Court is not bound to give full faith and credit to the evidence of an interested witness, even though not directly impeached or contradicted. The credibility of such a witness must be determined as a question of fact. In this case I am unable to accept the testimony of both Lopez and Cruz as to the violation alleged under Citation No. 1, Item 3. I find that the testimony of both Santiseban and Rivera is both reliable and worthy of belief. The totality of the evidence fully establishes that employees were working on the scaffold without intermediate guardrails on the sides and with no railings on the ends subject to a hazard of falling and sustaining severe injuries. Accordingly, the citation is affirmed. Under all the existing facts and circumstances herein, a penalty of \$1225 for said violation is consistent with the criteria set forth in 17(j) of the Act.

Citation No. 1-Item #4

Alleged Violation of 29 C.F.R. 1926.500(d)(1)

The Respondent was cited for a serious violation of 29 CFR 1926.500(d)(1), for failure to guard with a standard railing or its equivalent every open-sided floor six feet or more above the adjacent floor. The compliance officer testified that he observed an employee working on an open sided floor which was 40 feet long and 20 inches in depth, 16 feet above ground level which was not guarded by a railing or equivalent and was subject to a fall of 16 feet to the ground-the employee was seen working 6 inches from the edge of the platform. There was no credible evidence which directly refuted the findings by the compliance officer. In short, the preponderance of the evidence fully demonstrates that an

employee of the respondent was working on an unguarded open sided-floor and was subject to a fall which could cause serious injuries, all of which were known to the respondent's foreman who was in the vicinity. Accordingly, the citation item is affirmed. Under the existing facts and circumstances, a penalty of \$500 is appropriate.

Citation No. 1-Items 1 & 2

Alleged Violation of 29 C.F.R. 1926.20(b)(1) & 21(b)(2)

The two items alleged concern the alleged inadequacies in the respondent's safety program. Item 1 alleges a serious violation of 1926.20(b)(1) for failure to initiate and maintain an accident prevention program. Item 2 alleges failure to instruct employees to avoid unsafe conditions. The compliance officer testified that the entire safety program of the respondent was deficient. The scaffolding lacked the necessary guardrail protections, the scaffolding lacked the necessary cross bracing on both sides for the necessary stability, employees were working on such hazardous scaffolds with full knowledge of the foreman, an employees admitted that he had not been given any safety training and that the foreman Lopez was himself not safety conscious nor experienced in recognizing or correcting hazards. This observation was based on the finding of numerous fall hazards all within knowledge of the foreman who took no corrective action. The totality of the evidence clearly demonstrates the absence of a clearly designed, strictly enforced safety program. While there was a printed safety program it is seriously questioned whether it was used at all or merely window dressing. This is borne out by total ignorance of the foreman as to whether said program discussed something as vital as guard rails on tubular welded frame scaffolds, guardrails on open sided floors or platforms or the need for cross bracing. While there is an intimation that safety meetings were held, no tangible demonstrative evidence was produced showing how often, what the subjects were, who was present at the meetings, etc. Considering the presence of the indicated fall hazards and the lack of knowledge by the foreman on said subject it is reasonable to conclude that the respondent did not initiate and maintain a safety program as required, and I so find. Accordingly, a violation of 29 CFR 1926.20(b)(1) is affirmed. The evidence further demonstrates that the employees were not instructed in the recognition and avoidance of hazards. The compliance officer stated he had asked

employees exposed to a fall hazard from the scaffolds whether they had any safety training which was answered in the negative.(T31). Moreover, he also stated that the foreman said "he was not prepared to give the training to the employees because he lacks the knowledge on safety but that arrangements will be made with someone else to carry on the training." (T31) Again, the presence of the fall hazards, the employees admission of lack of training and all the circumstances herein fully demonstrate an absence of an appropriate safety program directed towards the construction areas of respondent's workplace. Actually Caribco knew that an adequate safety program which was fully carried out by daily inspections and training was needed. This is borne out by the presence of its having a printed safety manual; alas, its safety manager was not fully familiar with the contents thereof, and did not enforce nor show adequate knowledge of safety. The evidence demonstrates a violation of 29 CFR 1926.21(b)(2) and I so find. Under all the existing facts and circumstances and taking into consideration the criteria set forth in 17(j) of the Act a combined total penalty for violation of 1926.20(b)(1) and 1926.21(b)(2) of \$700 is appropriate.

Citation No. 2-Item 1

Alleged Violation of 29 C.F.R. 1926.451(d)(3)

Caribco was also charged with an other than serious violation of 29 CFR 1926.451(d)(3) because of failure to have the tubular welded scaffolds properly braced by cross-bracing or diagonal braces, or both for stabilization. The testimony of the compliance officer with accompanying photograph (Exh. C-1) fully shows that only one side of each scaffold frame was braced which could cause lateral instability as the employees worked thereon. Thusly, they would be exposed to a possible fall. Accordingly, this citation is affirmed, with no penalty assessed.


Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. The allegation of serious violations of 29 CFR 1926.20(b)(1) and 29 CFR 1926.21(b)(2) are **AFFIRMED** and a combined total penalty of \$700 is assessed.
2. The allegation of a serious violation of 29 CFR 1926.451(d)(10) is **AFFIRMED** and a penalty of \$1225 is assessed.
3. The allegation of a serious violation of 29 CFR 1926.500(d)(1) is **AFFIRMED** and a penalty of \$500 is assessed.
4. The allegation of an other than serious violation of 29 CFR 1926.451(d)(3) is **AFFIRMED** with no penalty assessed.



IRVING SOMMER
Judge

DATED: JAN 10 1994
Washington, D.C.