UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
E. R. DEL MORAL, INC.
Respondent.

OSHRC DOCKET
NO. 92-2734

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 March 10, 1994. The decision of the Judge will become a final order of the Commission on April 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 March 30, 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

Ray H. Darling, Jr.

Date: March 10, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2734

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-2734
E. R. DEL MORAL, INC.,	:	
Respondent.	:	

Appearances:

Jane S. Brunner, Esq.
U.S. Department of Labor
New York, New York

For the Complainant

Rafael Rodriguez, Esq.
San Juan, Puerto Rico

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

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.

Respondent is a corporation which was engaged in construction and related activities. On May 11, 1992, E. R. Del Moral's worksite at Road # 2, Km. 80.4, San Daniel Ward, Arecibo, Puerto Rico was inspected by an OSHA compliance officer. Subsequently, on July 27, 1992, the company received two citations resulting from this inspection. Respondent filed a timely notice of contest to the citations and penalties. A hearing was held on May 18, 1993, in Hato Rey, Puerto Rico. Both parties were represented at the hearing and both parties have filed post-hearing briefs. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

DISCUSSION

Alleged serious violation of 29 C.F.R. section 1926.451(m)(6)

Serious Citation 1, item 4 alleges:

> Standard guardrails and toeboards were not installed at all open sides and ends on carpenter's bracket scaffolds more than 10 feet above the ground or floor.

At the hearing on May 18, 1993, the compliance officer, Radames Santisteban, testified that he observed two sections of carpenters' metal bracket scaffolds, 16 feet above ground level, which were not provided with railings at the ends, and the intermediate railing along the side was too low (only 12 inches above the platform). Mr. Santisteban observed Respondent's employees doing rigging work from these scaffolds, four feet away from the unguarded ends and six inches away from the improper midrails. These conditions are depicted in a drawing made by the compliance officer designated as exhibit C-1. There are no photographs of this condition, as the compliance officer testified that his camera malfunctioned.

The compliance officer further testified that Respondent acknowledged that the ends of the scaffold were unguarded allegedly because materials had to be brought up that way. Respondent basically raised an affirmative defense that compliance with the cited standard was impossible/infeasible. In addition, the compliance officer noted that Respondent's employees on the scaffold were wearing safety belts while they were stationary, but were not tied off as they moved from place to place along the twenty foot length of scaffold.

In response to Respondent's affirmative defense of impossible/infeasible, the Secretary asserts that even if the guardrails at the ends of the scaffolds had to be removed at various times to allow materials to be brought up, the scaffold ends could have been guarded at all other times while materials were not being brought up to protect Respondent's employees. In addition, the compliance officer noted that during the approximately 45 minutes that he was there, no materials were brought up to the scaffold (transcript, p. 8-15, Secretary's brief, p. 3-8).

Respondent argues that the Secretary has failed to prove that Respondent's employees were exposed to a fall hazard due to the absence of end guardrails or improper midrails. Respondent asserts that its employees were working on the scaffold and each of them wore a safety belt with a rope attached to a sound and rigid structure. The only time that the compliance officer saw them untied was when they moved from place to place along the 20 foot scaffold.

Respondent readily admits that the ends of the scaffold were unguarded because materials, such as steel rods, had to be brought up that way. The installation of a railing at the end of the scaffold would be impossible/infeasible as it would have prevented the bringing up of the materials in a safe manner. If the Respondent had installed removable railings at the end of the scaffold, as suggested by the compliance officer, Respondent asserts that this would create a more hazardous condition for its employees, because the employees would have to untie themselves and walk to the end of the scaffold to remove the guardrail every time materials were brought up, thereby exposing themselves to a fall hazard as they would have no protection at all once the guardrail was removed. Further, if permanent railings were installed at the ends of the scaffold, the great weight of bringing up the steel rods could collapse the railings, thereby exposing the employees to a greater fall hazard.

Respondent further argues that it more than fully complied with the OSHA standard by providing- not one- but two protections to its employees, i.e. safety belts and proper guardrails around the perimeter of the scaffold, except at the ends for the reasons previously explained. If a technical violation of the standard is determined to exist, it should be adjudged only a de minimis violation, as the ``violation'' had no direct or immediate relationship to the safety and health of its employees (transcript, p. 98-119, Respondent's brief, p. 3-5).

The totality of the evidence concerning this citation item clearly establishes a violation of the standard as cited. Respondent readily admits that the ends of the scaffold were unguarded so that materials could more readily be brought up to the scaffold. Respondent has also failed to prove that compliance with the standard as cited was in any way impossible/infeasible. Further, the Secretary has established

noncompliance with the requirements of the cited standard and employee exposure. In addition, Commission precedent requires a finding that the use of safety belts does not constitute ``equivalent protection'' as that term is used in section 1926.451(m)(6). See Secretary of Labor v. Wander Iron Works, 8 BNA OSHC 1354 (No. 76-3105, 1980).

The Secretary proposed a penalty of $1,750 for this citation item. Having considered the statutory criteria, I conclude that the penalty proposed by the Secretary is appropriate.

Alleged serious violation of 29 C.F.R. section 1926.500(d)(1)

Serious Citation 1, item 5 alleges:

> Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides.

The compliance officer testified during the hearing that he observed four foot wide beam-support platforms, fifteen feet above the concrete floor which were not provided with standard guardrails. He noted in instance 1, on both sides of the fixed ladder, there was no intermediate railing for a length of 12 feet; in instance 2, in the center section, there were no rails at all for two 8 foot lengths; and in instance 3, in the southwest area, there was no intermediate railing for a length of 12 feet. The compliance officer further observed that Respondent's employees were performing the work of tying rods and were working just inches away from each of the improper railings.

In addition, the compliance officer noted that during the approximately 25 minutes that he was there, no materials were brought up to the platform. These conditions are depicted in a drawing made by the compliance officer designated as exhibit C-2. There are no photographs of this condition, as the compliance officer testified that his camera malfunctioned (transcript, p. 20-32, Secretary's brief, p. 8-13).

Respondent strongly disagrees with the compliance officer's observations. Respondent asserts that the beam-support platforms did have the proper guardrails(instance 1, instance 3). To support its contention, Respondent introduced into evidence, exhibit, R-1, which is a photograph taken on March 21, 1992 (almost 2 months prior to the inspection) which shows beam-support platforms with guardrails. Though the photograph was not taken on the date of the inspection, Respondent notes that the picture clearly shows the beam-support platform with complete railings at the time that the picture was taken. Respondent asserts that it is unreasonable to suggest that the railings were in place on the date of the picture and then removed shortly thereafter. In addition, Respondent's witness, Mr. Espada, testified that the railings were complete in instance 1 and instance 3 and were missing in instance 2 as materials were being brought up. Further, the witness testified that he and the other employees were wearing safety belts while working on the platform, as employees were not allowed to work without them.

As in citation 1, item 4, Respondent readily admits that in instance 2 here, the ends of the platform were unguarded because materials had to be brought up that way. The installation of a railing at the end of the platform would be

impossible/infeasible as it would have prevented the bringing up of the materials in a safe manner (transcript, p. 98-119, Respondent's brief, p. 5-10).

The record concerning this citation item fully demonstrates a violation of the standard as cited. The compliance officer gave his testimony in a straight forward, frank, and convincing manner and appeared to be truthful and honest and his testimony was sufficient to make out a prima facie case of a violation of the standard at issue. Respondent readily admits (as in citation 1, item 4) that the ends of the platform were unguarded so that materials could more readily be brought up to the platform. Respondent has also failed to prove that compliance with the standard as cited was in any way impossible/infeasible.

In addition, Respondent's introduction into evidence of exhibit R-1 (a photograph of jobsite conditions taken almost two months prior to the inspection) is not sufficiently persuasive to provide an adequate defense for Respondent. Further, there can be no dispute that the Secretary has authority to adopt and enforce a specification for a particular abatement measure in a particular circumstance, such as guardrails for open floor and platform edges. If a specification standard does not provide for an alternative form of compliance, the fact that an employer has implemented an alternative measure instead of the specified measure cannot justify vacating a citation. Section 1926.500(d)(1) does not make compliance with any other personal protective equipment standard an exception to its requirements and does not designate safety belts the equivalent of guardrails. See Secretary of Labor v. R & R Builders, 15 BNA OSHC 1383 (No. 88-282, 1991), Secretary of Labor v. Ormet Corporation, 14 BNA OSHC 2134 (No. 85-531, 1991), Secretary of Labor v. Spancrete Northeast, Inc., 14 BNA OSHC 1215, 1585 (No. 88-2645, 1990).

The Secretary proposed a $3,500 penalty for this citation item. Under all the existing facts and circumstances herein, a penalty of $3,500 for said violation of the standard is consistent with the criteria set forth in section 17(j) of the Act.

Alleged serious violation of 29 C.F.R. section 1926.20(b)(1)

Serious Citation 1, item 1 alleges:

> A safety program was not initiated and/or maintained to provide compliance with the general safety and health provisions of the standard.

At the hearing, Mr. Santisteban testified that during his inspection of Respondent's construction site, he examined E. R. Del Moral's written safety program and concluded that the company was not enforcing the program and not utilizing its best efforts to provide a safe worksite or to control potential hazards to its employees.

The compliance officer based this particular citation on the additional serious violations that he had observed during his inspection. He also noted that Respondent's safety officer, Mr. Hiram Soto, who accompanied Mr. Santisteban during the inspection, did not appear to be very familiar with the safety standards of the construction industry to effectively maintain the company's safety program. Mr. Santisteban also testified that he had notified Respondent's project engineer, Mr. Jose Arroyo, that he noted that the company had problems with its overall safety program. In addition, the compliance officer testified that neither Respondent's safety officer, nor its project engineer denied that the company had some problems with its safety program. The project engineer even acknowledged to

him that the company was trying to maintain a safe workplace but there were times when they had gotten ``a little behind'' on safety concerns in order to speed up the construction project (transcript, p. 33-37, Secretary's brief, p. 13-15).

E. R. Del Moral asserts that it did have an adequate safety program and was not in violation of the standard cited. Respondent argues that if the compliance officer alleges that the company's safety program and work rules are not adequate to eliminate hazards at the jobsite, the Secretary has the burden to indicate to the company what other steps need to be taken to accomplish this goal. Respondent further maintains that the compliance officer did not suggest that any additional measures should be initiated by Respondent because the company was already doing everything it could to maintain a safe workplace. In fact, the Secretary's own attorney in this case stipulated at the hearing that E. R. Del Moral was complying with every OSHA construction standard, other than the ones for which it was cited (transcript, p. 116-117, Respondent's brief, p. 10-12).

As to this citation item, I find that the Secretary has established a violation of the standard by a preponderance of the evidence presented. The evidence and testimony presented reflect that E. R. Del Moral knew or should have known of the potential hazards to its employees. Though the Respondent did have a written safety program, there is very little indication that the company was enforcing the safety program, communicating it in an effective manner to all of its employees, or utilizing its best efforts to provide a safe workplace for its employees by regular safety meetings and training of all of its employees to recognize and avoid hazards at the jobsite. See Secretary of Labor v. R & R Builders, 15 BNA OSHC 1383 (No. 88-282, 1991), Secretary of Labor v. T. E. Driskell Grading Company, 14 BNA OSHC 1092 (Nos. 88-1397 and 88-1546, 1989).

The Secretary proposed a $1,750 penalty for this citation item. Taking into consideration all relevant factors and the gravity of the offense, a penalty of $1,750 is assessed.

Alleged serious violation of 29 C.F.R. section 1926.21(b)(2)

Serious Citation 1, item 2 alleges:

> The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The compliance officer testified that during the closing conference he had ascertained from Respondent's project engineer, Mr. Arroyo, and Respondent's safety officer, Mr. Soto, that E. R. Del Moral's employees had not yet received training to avoid fall hazards at the worksite, though such training was being set up. Mr. Santisteban also noted that during the inspection, while being accompanied by Mr. Soto, several of E. R. Del Moral's employees on the scaffold and several employees on the platform specifically told him that they had received no training to recognize and avoid any fall hazards to which they were exposed (transcript, p. 37-41, Secretary's brief, p. 15-17).

Respondent argues that it did not violate the standard cited as it readily trained its employees to recognize hazards and avoid them at the worksite. Mr. Jose Arroyo, Respondent's project engineer, specifically testified that he himself had instructed employees regarding the various hazards that they

could encounter at the worksite and was especially concerned with their avoiding any problems with fall hazards. He also testified that it was company policy for employees to wear safety belts whenever they worked on scaffolds or platforms. Further, he noted that he had instructed his carpenters how to build and install railings. In addition, Mr. Arroyo considered Mr. Soto, E.R. Del Moral's safety officer, to be very experienced and competent regarding safety matters. Respondent's employees, Mr. Arce and Mr. Espada, both testified that they wore safety belts and had been trained in their use (transcript, p. 95-118, Respondent's brief, p. 12-13).

The record concerning this citation item fully demonstrates a violation of the standard cited. The standard requires that employees be instructed how to recognize and avoid dangerous conditions that they may reasonably be expected to encounter in their workplace. Having reviewed the entire record in this case, I find that the standard applies to the cited working conditions. Furthermore, I find that the requirements of the standard were not met. E.R. Del Moral's employees were exposed to the violative condition and the company had knowledge that the violative conditions existed. See Secretary of Labor v. Pressure Concrete Construction Company, 15 BNA OSHC 2011 (No. 90-2668, 1992), Secretary of Labor v. Ford Development Corporation, 15 BNA OSHC 2003 (No. 90-1505, 1992).

A penalty of $1,750 for the violation is consistent with the criteria set forth in section 17(j) of the Act under all the existing facts and circumstances and is assessed for this citation item.

Alleged other violation of 29 C.F.R. section 1926.350(j)

Other Citation 2, item 1 alleges:

> Oxygen cylinders in storage were not separated from fuel-gas cylinders, reserve stocks of carbides, or highly combustible materials (especially oil or grease) by a minimum distance of 20 feet or by a noncombustible barrier at least five feet high having a fire-resistance rating of at least 1/2 hour.

At the hearing, Mr. Santisteban testified that during the walkaround inspection he had observed one oxygen cylinder and one acetylene cylinder that were side by side in their carrying cart, tied with a chain. The regulators had been removed from both cylinders, and the carrying cart was located about 3 feet from the entrance of the materials shack. The compliance officer also noted that one of Respondent's employees was working about two feet from the cylinders (transcript, p. 41-46, Secretary's brief, p. 17-18).

E.R. Del Moral asserts that it is not guilty of violating the cited standard. The oxygen cylinder and an acetylene cylinder were side by side in their carrying cart but they were not ``in storage'' but were ``available for immediate use''. During the hearing, Respondent argued that the standard does not define the term ``storage'' and does not forbid the placing of an oxygen cylinder and an acetylene cylinder together when not in storage (transcript, p. 83-87, Respondent's brief, p. 14-15).

Taking into consideration the arguments of both parties and the testimony and record evidence in this case, I conclude that a violation of the standard as cited has been proven. The Secretary has clearly established that one oxygen cylinder and one acetylene cylinder were stored side by side in their carrying

cart tied with a chain. E. R. Del Moral did not rebut this evidence and did not show that the cylinders were available for immediate use in the area in which they were located. Accordingly, a violation of the cited standard has been established. See Secretary of Labor v. Gabriel Fuentes Jr. Construction Company, 15 BNA OSHC 1330 (No. 90-2404, 1991), Secretary of Labor v. Wagner Construction Company, 14 BNA OSHC 1423 (No. 88-2432, 1989).

Alleged other violation of 29 C.F.R. section 1926.500(b)(6)

Other Citation 2, item 2 alleges:

> Manhole floor opening(s) were not guarded by standard covers or protected by standard railings.

The compliance officer testified that he had observed a manhole four feet by three and one-half feet at ground level at the company's construction site that was not provided with a standard cover nor protected by a standard railing. Mr. Santisteban also noted that some of Respondent's employees walked within three to four feet of the open manhole. The compliance officer testified that though Respondent asserts that the manhole was being utilized by an electrical subcontractor, he personally observed no work being done during the approximately ten minutes he was at that location (transcript, p. 46-49, Secretary's brief, p. 18-19).

Respondent argues that the manhole was not guarded because it was being used by an electrical subcontractor, whose employees had been doing some electrical work in that area earlier in the day and apparently had failed to replace the manhole cover. Further, the company contends that the citation

issued by the Secretary does not apply here. The standard only applies to manholes with an entrance aperture for working or inspection purposes on a floor level. E.R. Del Moral asserts that the cited standard does not apply to a manhole on a dirt road being used for electrical purposes (transcript, p. 87-90, Respondent's brief, p. 15-16).

Taking into consideration all the record evidence and credible testimony presented regarding this citation item, the undersigned concludes that the Secretary has failed to establish the existence of the recognized hazard as cited. Consequently, this citation item is hereby vacated.

The Employer correctly argues that the cited standard does not apply to the violation described here. Inasmuch as the cited cavity was located outside of the edifice it cannot be considered a ``floor opening'' and the citation for alleged violation of 29 C.F.R. section 1928.500(b)(6) is vacated. See Secretary of Labor v. CBI Na-Con, Inc., 13 BNA OSHC 1841 (No. 87-802, 1988), Secretary of Labor v. Daniel Construction Company, 9 BNA OSHC 2002 (No. 13874, 1981).

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 specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or 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. Citation 1, item 1, alleging a serious violation of 29 C.F.R. section 1926.20(b)(1), is affirmed and a penalty of $1,750 is assessed.

2. Citation 1, item 2, alleging a serious violation of 29 C.F.R. section 1926.21(b)(2), is affirmed and a penalty of $1,750 is assessed.

3. Citation 1, item 4, alleging a serious violation of 29 C.F.R. section 1926.451(m)(6), is affirmed and a penalty of $1,750 is assessed.

4. Citation 1, item 5, alleging a serious violation of 29 C.F.R. section 1926.500(d)(1), is affirmed and a penalty of $3,500 is assessed.

5. Citation 2, item 1, alleging an other violation of 29 C.F.R. section 1926.350(j), is affirmed and a penalty of $0 is assessed.

6. Citation 2, item 2, alleging an other violation of 29 C.F.R. section 1926.500(b)(6), is vacated.

IRVING SOMMER
Judge, OSHRC

DATED: MAR 10 1994
Washington, D.C.