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SECRETARY OF LABOR
Complainant,
v.
SOUTHERN FORMING, INC.,
Respondent.

OSHRC DOCKET
NOS. 92-2672
92-2674

**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 6, 1994. The decision of the Judge will become a final order of the Commission on February 7, 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 January 26, 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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.
Executive Secretary

Date: January 6, 1994

DOCKET NOS. 92-2672 & 92-2674

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
Complainant,

v.

SOUTHERN FORMING, INC.,
Respondent.

OSHRC Docket Nos.:

92-2672 & 92-2674

Appearances:

Stephen Alan Clark, Esquire
Office of the Solicitor
U. S. Department of Labor
Ft. Lauderdale, Florida
For Complainant

Eric Glatter, Esquire
Houston and Shahady
Ft. Lauderdale, Florida
For Respondent

Thomas L. Prieur, Vice President
Southern Forming Company
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest five citations issued by the Secretary of Labor (Secretary), pursuant to section 9(a) of the Act. The citations issued under two separate docket numbers (92-2672 and 92-2674) have been consolidated in this proceeding.

Docket No. 92-2674 contains three citations. Citation No. 1 alleges serious violations of eight standards. Citation No. 2 alleges willful and repeat violations of eight standards. Citation No. 3 alleges repeat violations of four standards of the Occupational Safety and Health Act of 1970 (Act).

Docket No. 92-2672 contains two citations. Citation No. 1 alleges serious violations of four standards of the Act. Citation No. 2 alleges repeat violations of three standards of the Act.

At the beginning of the hearing, counsel for respondent, Southern Forming, Inc. (Southern) moved to withdraw from the case, on the basis that Southern could not afford to pay him (Tr. 6, 17). The motion was granted (Tr. 26). Southern was represented at the hearing by Thomas Prieur, vice-president and part owner of the company (Tr. 31). At the time of the hearing, Southern (also known as Suncrete Construction) was no longer in operation (Tr. 32). Subsequent to the hearing, Southern filed for bankruptcy.

Southern presented no real defense to the allegations, admitting that the violations occurred (Tr. 202, 221), but arguing that all construction sites have "construction safety problems" and that Southern was doing the best it could. Southern also contends that it should not have borne sole responsibility for safety violations at the site.

Docket No. 92-2674

Southern was in the process of doing the formwork for a building under construction at Sunny Isles, Florida, in January 1992. On January 27, 1992, an employee of Southern's, Marcelle "Frenchie" Subileau, fell to his death while working on a stairway of the building (Tr. 47, 82-83). The Occupational Safety and Health Administration (OSHA) investigated the fatality and subsequently issued the citations that are at issue in the present case.

Citation No. 1

The Secretary alleges that Southern was in serious violation of eight construction safety standards.¹

Item 1a: § 1926.20(b)(2)

The Secretary alleges that Southern violated § 1926.20(b)(2), which provides:

¹ Section 17(k) of the Act provides that: a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

OSHA compliance officer Corey Neale first inspected Southern's site on January 28, 1992, and returned to the site several times after that. He interviewed approximately 32 employees, as well as making his own observations (Tr. 109).

Neale testified that Southern did not have an assured equipment grounding program on site, nor did it have ground fault circuit interrupters. Also, Southern had no hazard communication program on site. Southern had ongoing guardrail violations, both with inadequate and missing guardrails (Tr. 111). All of these factors demonstrate that Southern either did not have frequent and regular inspections of its jobsite, or that any such inspections were inadequate. Southern's practices could result in death or serious physical harm and, therefore, it was in serious violation of § 1926.20(b)(2).

Item 1b: § 1926.21(b)(2)

Southern was charged with a serious violation of § 1926.21(b)(2), which provides:

The employer shall 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 employees interviewed by Neale stated that, prior to the fatality, Southern did not hold any safety meetings at the site (Tr. 109-110). Neale's testimony is not refuted. The large number of violations that occurred at the site is indicative of a lack of employee training in the recognition and avoidance of unsafe conditions. The Secretary has established a serious violation of § 1926.21(b)(2).

Item 2: § 1926.100(a)

The Secretary alleged that Southern committed a serious violation of § 1926.100(a), which provides:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shocks and burns shall be protected by protective helmets.

On February 26, 1992, Neale observed Southern's president John Michael Hicks (whom Neale identified as "Mike Hicks") "making rounds through the building and also on the ground in the proximity of the perimeter and the crane without a hard hat," (Exhs. C-13, C-14; Tr. 112). Later, on March 6, 1992, Neale observed both John Hicks and foreman Rodney Hicks walking around the site without hard hats on (Tr. 112). John and Rodney Hicks were exposed to the hazard of falling objects. Southern was in serious violation of § 1926.100(a).

Item 3: § 1926.251(b)(1)

The Secretary alleges that Southern violated § 1926.251(b)(1), which provides:

Welded alloy steel chain slings shall have permanently affixed durable identification stating size, grade, rated capacity, and sling manufacture.

The inspecting officer testified that on January 8, 1992, Southern employees were using chain slings to lift the formwork (Exhs. C-15, C-16, C-17, C-18; Tr. 115). The chains were not in any way marked or tagged with the required identification (Tr. 116). Although the evidence clearly establishes a violation, it does not show there was a substantial probability death or serious physical harm could result therefrom. The violation of § 1926.251(b)(1) is of an other-than-serious nature.

Item 4a: § 1926.404(f)(6)

Southern was charged with a serious violation of § 1926.404(f)(6), which provides:

The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The evidence shows a skil saw used by Southern employees had a flexible electrical cord on which a ground prong was broken off, creating an open ground (Tr. 118; Exh. C-19). Southern was in serious violation of § 1926.404(f)(6).

Item 4b: § 1926.405(a)(2)(ii)(J)

The Secretary alleges that Southern was in violation of § 1926.405(a)(2)(ii)(J), which provides:

Extension cord sets used with portable electric tools and appliances shall be of three-wire type and shall be designed for hard or extra-hard usage. Flexible cords used with temporary and portable lights shall be designed for hard or extra-hard usage.

Southern employees used small extension cords with thin insulation instead of heavy duty insulation and proper gauge wiring as required (Tr. 119). Southern was in serious violation of § 1926.405(a)(2)(ii)(J).

Item 4c: § 1926.405(g)(2)(iv)

The Secretary alleges that Southern violated § 1926.405(g)(2)(iv), which provides:

Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Mr. Neale stated that he found one of the cords in use with the strain relief pulled loose from the receptacle. This condition exposed employees to possible electric shock (Tr. 118; Exh. C-20). A violation of § 1926.405(g)(2)(iv) is established.

Item 4d: § 1926.416(e)(1)

The Secretary alleged a violation of § 1926.416(e)(1), which provides:

Worn or frayed electric cords or cables shall not be used.

The inspector found a frayed or cut area on one of the electric cords used to power a skil saw (Tr. 119). This condition exposed employees to possible electric shock. A serious violation of § 1926.416(e)(1) is established.

Citation No. 2

Item 1a: § 1926.104(b)

The Secretary alleges a willful, or in the alternative, a repeat violation of § 1926.104(b), which provides:

Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

Neale explained that a photograph taken one to one and a half hours after the employee fatality on January 26, 1992, shows a "man standing on a column with his lanyard tied to a chain railing at the top level below him" (Tr. 121; Exh. C-12). He also observed several employees during his walk-around inspection who secured their lifelines below them (Tr. 121). This is indicated in exhibit C-22 which "shows a man with a lanyard, and he [has] attached it to one of the form pins behind him at the edge of the fourth elevation" (Tr. 123-124).

The Secretary has established a violation of § 1926.104(b). He alleges that the violation is willful.

Under long-standing Commission precedent, to establish a willful violation, it is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation, serious or nonserious. A willful violation is differentiated by heightened awareness of the illegality of the conduct or condition and by a state of mind of conscious disregard or plain indifference. *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-0355, 1987).

The Secretary has not established that Southern's violation of § 1926.104(b) was willful in nature. Southern's failure to ensure that each of its employees tie off above the point of operation has not been shown to be any more than a serious violation of the standard. No willful violation is found.

In the alternative, the Secretary alleges that Southern's violation is repeated. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). For this item and the others in Citation No. 2, the Secretary presented no testimony establishing that Southern had a Commission final order against it for a substantially similar violation. He did introduce C-4, which is a settlement agreement between the Secretary and Southern to which is attached copies of citations issued to Southern on June 25, 1991. These citations are the ones referenced in the current Citation No. 2 for willful and repeat violations. Item 1a states at the bottom of the citation:

The Southern Forming, Inc./Sun-Crete Construction Co., Inc., was previously cited for a violation of this Occupational Safety and Health standard or its [sic] equivalent standard 29 C.F.R. § 1926.500(d)(1) which was contained in OSHA Inspection No. 110143229, Citation No. 1, Item No. 6, issued on June 25, 1991.

Section 1926.500(d)(1) provides:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard whenever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Section 500(d)(1) is not the same standard as § 1926.104(b), nor is it substantially similar to it. The Secretary has failed to establish a repeated violation of § 1926.104(b). The violation is classified as serious.

Item 1b: § 1926.105(a)

The Secretary charges Southern with the willful and repeat violation of § 1926.105(a), which provides:

Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The inspection revealed that a Southern employee standing on some form work over one of the stairwells. The lanyard tied to his safety belt also was placed around a piece of reinforcing steel. The employee was exposed to a 30-foot fall (Tr. 126; Exh. C-23). The use of the lanyard around the piece of reinforcing steel does not provide adequate fall protection. Southern did not provide any alternative means of fall protection. The violation is established.

The Secretary alleges that the violation is willful, or, in the alternative, repeat. He failed to adduce evidence establishing that the violation belonged in either of these classifications. The violation is serious.

Item 1c: § 1926.1052(c)(1)

The Secretary charges Southern with a violation of § 1926.1052(c)(1), which provides:

Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with at least one handrail and one stairrail system along each unprotected side or edge. However, when the top edge of a stairrail system also serves as a handrail, paragraph (c)(7) of this section appears.

Neale observed employees using the stairwells at various times with no rails and unprotected sides (Tr. 127). Photograph, exhibit C-24, was taken from the steps where the deceased employee fell. No railing is on the stairway (Tr. 128).

The Secretary has established a violation of § 1926.1052(c)(1). He adduced no evidence showing that the violation was either willful or repeated. The violation is serious.

Item 1d: § 1926.1052(c)(4)(i)

Southern is charged with a violation of § 1926.1052(c)(4)(i), which provides:

Midrails, when used, shall be located at a height midway between the top edge of the stairrail system and the stairway steps.

Neale observed a chain midrail which was not at midpoint but was sagging within six inches of the floor (Tr. 131). The Secretary has established a serious violation of § 1926.1052(c)(4)(i).

Item 1e: § 1926.1052(c)(5)

Southern was charged with a violation of § 1926.1052(c)(5), which provides:

Handrails and the top rails of stairrail systems shall be capable of withstanding, without failure, a force of at least 200 pounds (890n) applied within two inches (5cm) of the top edge, in any downward or outward direction, at any point along the top edge.

When asked how he determined there was a violation, Neale stated that he demonstrated to one of Southern's foreman that the railing that Southern had installed was inadequate for the purposes of the standard: "I kicked one of the chains that they had in place as rails, and it came out of the wall along with the stanchion and some other members

that were there to support it" (Tr. 132). Prior to the demonstration, Neale explained "I took him up to see because he didn't understand."

Clearly, the railing provided by Southern did not adequately meet the terms of the standard. But the foreman's lack of understanding cannot be equated with a "conscious disregard or plain indifference" to the standard or the safety of employees. The violation was not willful.

The evidence also fails to show that the violation was of a repeat nature.

Item 1f: § 1926.1052(c)(8)

Southern is charged with a violation of § 1926.1052(c)(8), which provides:

Stairrail systems and handrails shall be so surfaced as to prevent injury to employees from punctures or lacerations, and to prevent snagging of clothing.

Neale testified that Southern was using a twisted type chain "which was stretched or deformed" whereby could get an employee "caught or snag" his clothing. (Tr. 132). The Secretary has established a violation of § 1926.1052(c)(8). The violation is serious.

Item 1g: § 1926.1052(c)(12)

The Secretary alleges that Southern violated § 1926.1052(c)(12), which provides:

Unprotected sides and edges of stairway landings shall be provided with a guardrail system. Guardrail system criteria are contained in subpart M of this part.

On January 28, 1992, compliance officer Neale noticed several different areas where the guardrails were inadequate. On February 6 and 26, Neale observed that there were no railings at all between some of the elevations and the floor in the stairwell (Tr. 133). The Secretary has established a serious violation of § 1926.1052(c)(12).

Item 2: § 1926.500(d)(1)

The Secretary charged Southern with a violation of § 1926.500(d)(1) which provides:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where

there is entrance to a ramp stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Neale observed several areas where Southern's guardrails were inadequate. Exhibit C-25 shows such an area. Neale described the photograph: "This is a typical stanchion that they had at various locations, the two-by-fours that [were] nailed into the side of the concrete with the chain running around the back of it with a single nail bent over to hold the chain guardrail up" (Tr. 134). Neale explained that if an employee fell against the chain, the two-by-four nails could easily pull out of the concrete (Tr. 135). Exhibit C-26 was taken on January 28. The midrail chain is shown sagging within 6 inches of the deck. The top rail is 4½ to 5 feet high and is attached to a free-standing electrical box at the other end, which is sitting on the stanchion (Tr. 135-136). Exhibit C-27 shows the electrical panel and Exhibit C-28 shows that the electrical panel to which the midrail was attached is free standing, and at the edge of the fourth elevation (Tr. 137). Exhibit C-29 is a January 28 photograph that shows a top-rail at eye-level. No midrail is provided (Tr. 138). Exhibit C-30 shows employees at the fifth and sixth stories of the stairwell where the employee fell to his death. No guardrails were provided (Tr. 139).

Exhibit C-31 is a photograph taken from the fourth elevation of the stairwell. The south stairwell has no guardrails. The chain guardrails along the perimeter of the north stairwell are sagging (Tr. 140). Exhibit C-32 is a close-up showing how the chain railing was attached to the anchor point. A double-headed nail was placed through one of the loops of the chain and bent over (Tr. 141). Exhibit C-33 shows "a typical anchor point into one of the concrete columns where [Southern] would use cut nails and drive a piece of ¾-inch plywood into the concrete column. Then they would take a two-by-four and nail that to the plywood, and they would take a single double-headed nail and put the loop of the chain over it and bend it to support the chain" (Tr. 141).

The Secretary has proven a violation of § 1926.500(d)(1). Southern had previously been cited for a violation of the same standard on June 25, 1991 (Exh. C-4, Citation No. 1,

item 6). The Secretary has established that Southern's violation of § 1926.500(d)(1) in the instant case is repeated.

Citation No. 3

Items 1, 2, and 3

In item 1, Southern was charged with the repeated violation of § 1926.59(e)(1) which provided:

Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met . . .

Item 2 alleges a violation of § 1926.59(g)(1), which provides:

Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

Item 3 alleges a violation of § 1926.59(h), which provides:

Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Neale found that Southern did not have a written hazard communication program at the site (Tr. 146). His investigation also revealed that there was no material safety data sheets (MSDS's) available on the site, even though employees were required to handle hazardous substance concrete, form oils, release agents, and a curing compound. The employees had received no information or training with respect to the use of hazardous chemicals (Tr. 147). The Secretary has established a violation of the standards cited in items 1, 2 and 3.

The violations were cited as repeated items. The Secretary adduced no evidence showing that Southern had previously violated the same or similar standards. The copies of the citations attached to the settlement agreements introduced as exhibits C-2, C-3, and

C-4 do not contain citations of the § 1926.59 standard. The violations are affirmed as serious.

Item 4: § 1926.404(b)(1)

The Secretary charged a violation of § 1926.404(b)(1), which provides:

The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

Neale testified that Southern “did not have any ground fault circuit interrupters on the site, portable or fixed, and their contention was that they were under an assured equipment grounding program, but they didn’t have any” of the required records (Tr. 147). He found that Southern’s “cords were broken, were missing ground prongs, frayed, the strain release pulled out,” indicating that the cords had not been inspected (Tr. 148). Southern had been previously cited for a violation of this standard on June 25, 1991, (Exh. C-4, Citation No. 1, item 3). Southern’s violation of § 1926.404(b)(1) was repeated.

Docket No. 92-2672

The citation issued under Docket No. 92-2672 resulted from an inspection conducted by OSHA compliance officer Joseph DeMartino on May 5, 1992, at Southern’s worksite at Delray Beach, Florida, where a three-story research facility was being constructed (Tr. 158-159).

Citation No. 1

Items 1 and 2

In item 1, the Secretary alleges that Southern violated § 1926.403(d)(1), which provides:

Means shall be provided to disconnect all conductors in a building or other structure from the service-entrance conductors. The disconnecting means shall plainly indicate whether it is in the open or closed position and shall be

installed at a readily accessible location nearest the point of entrance of the service-entrance conductors.

Item 2 alleges a violation of § 1926.404(b)(1)(ii), which provides:

All 120-volt, single-phase, 15 and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator not ore than 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground fault circuit interrupters.

DeMartino observed a “four-prong box laying on the ground, not mounted. It had four extension cords coming from it. Two of the cords were missing ground pins, and the box failed to test for . . . ground fault circuit interrupters.” The box was located “at the immediate access entrance on the east side of the building” (Tr. 164).

The Secretary has established serious violations of § 1926.403(d)(1), and § 1926.404(b)(1)(ii).

Item 3: § 1926.451(a)(4)

Item 3 alleges a violation of § 1926.451(a)(4), which provides:

Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor Scaffolds 4 feet to 10 feet in height having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

Mr. DeMartino explained that the photograph, exhibit C-42, shows part of the southeast portion of the building. “The second and third levels have no full rail system, single stranded chain at the second and third levels attached on widely spaced stanchions in excess of 15, 18 feet” (Tr. 165).

Southern was in serious violation of § 1926.451(a)(4).

Item 4: § 1926.1053(b)(6)

Item 4 alleges a violation of § 1926.1053(b)(6), which provides:

Ladders shall be used only on stable and level surfaces unless secured to prevent accidental displacement.

DeMartino observed a Southern employee working from a ladder on unstable ground (Exh. C-43; Tr. 168). The ladder was resting on dug-up ground. The ladder was unsecured (Tr. 177).

The Secretary has established a serious violation of § 1926.1053(b)(6).

Citation No. 2

Item 1: § 1926.500(b)(1)

Item 1 alleges a repeated violation of § 1926.500(b)(1), which provides:

Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

The inspector explained that exhibit C-44 is a photograph which shows "a floor opening with the beginning of the reinforcing rod columns in place and a single strand of chain rail deflected two feet from the horizontal on two sides" (Tr. 169). Exhibit C-45 shows a third level unguarded floor opening, exposing employees to a fall of 14 feet (Tr. 171).

The Secretary has established a violation of § 1926.500(b)(1). Southern was previously cited for a violation of this standard on June 25, 1991 (Exh. C-4, Citation No. 1, item 4). The violation is repeated.

Item 2: § 1926.500(d)(1)

Item 2 alleges a violation of § 1926.500(d)(1), previously quoted in the section under Docket No. 92-2674. Exhibit C-47 shows the northeast corner of the building. No perimeter guarding is at the corner where employees gained access to the top landing (Tr. 173). Southern was previously cited for a violation of § 1926.500(d)(1) on June 25, 1991 (Exh. C-4, Citation No. 1, item 4). The violation is repeated.

Item 3: § 1926.701(b)

Item 3 alleges a repeated violation of § 1926.701(b), which provides:

All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Exhibit C-49 shows rebar laying horizontally on an accessway, creating the hazard of impalement (Tr. 174-175). Southern was previously cited for a violation of this standard on June 25, 1991 (Exh. C-4; Citation No. 1, item 7).

The violation is repeated.

PENALTY DETERMINATION

Section 17(j) of the Act authorized the Commission to assess appropriate penalties after giving "due consideration" to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations. Upon consideration of these factors, it is determined that appropriate penalties for the affirmed items are as follows:

Docket No. 92-2674

Citation No. 1

<u>Item</u>	<u>Penalty</u>
1a	{ \$4,500.00
1b	{
2	\$4,500.00
3	\$1,350.00
4a	{
4b	{ \$ 900.00
4c	{
4d	{

Citation No. 2

<u>Item</u>	<u>Penalty</u>
1a	{
1b	{
1c	{ \$1,000.00
1d	{
1e	{
1f	{
1g	{
2	\$31,500.00

Citation No. 3

<u>Item</u>	<u>Penalty</u>
1	\$1,000.00
2	\$1,000.00
3	\$1,000.00
4	\$6,200.00

Docket No. 92-2672

Citation No. 1

<u>Item</u>	<u>Penalty</u>
1	\$ 900.00
2	\$ 900.00
3	\$2,100.00
4	\$1,500.00

Citation No. 2

<u>Item</u>	<u>Penalty</u>
1	\$4,200.00
2	\$4,200.00
3	\$2,400.00

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED that the items of the citations of Docket Nos. 92-2674 and 92-2672 be disposed of as follows:

Docket No. 92-2674

Citation No. 1

<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1a	§ 1926.20(b)(2)	Affirmed	{ \$4,500.00
1b	§ 1926.21(b)(2)	Affirmed	{
2	§ 1926.100(a)	Affirmed	\$4,500.00
3	§ 1926.251(b)(1)	Affirmed	\$1,350.00
4a	§ 1926.404(f)(6)	Affirmed	{
4b	§ 1926.405(a)(2)(ii)(J)	Affirmed	{ \$ 900.00
4c	§ 1926.405(g)(2)(iv)	Affirmed	{
4d	§ 1926.416(e)(1)	Affirmed	{

Citation No. 2

<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1a	§ 1926.104(b)	Affirmed as serious	{
1b	§ 1926.105(a)	Affirmed as serious	{
1c	§ 1926.1052(c)(1)	Affirmed as serious	{
1d	§ 1926.1052(c)(4)(1)	Affirmed as serious	{ \$1,000.00
1e	§ 1926.1052(c)(5)	Affirmed as serious	{
1f	§ 1926.1052(c)(8)	Affirmed as serious	{
1g	§ 1926.1052(c)(12)	Affirmed as serious	{
2	§ 1926.500(d)(1)	Affirmed	\$31,500.00

Citation No. 3

<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1	§ 1926.59(e)(1)	Affirmed as serious	\$1,000.00
2	§ 1926.59(g)(1)	Affirmed as serious	\$1,000.00
3	§ 1926.59(h)	Affirmed as serious	\$1,000.00
4	§ 1926.404(b)(1)(i)	Affirmed	\$6,200.00

Docket No. 92-2672

Citation No. 1

<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1	§ 1926.403(d)(1)	Affirmed	\$ 900.00
2	§ 1926.404(b)(1)(ii)	Affirmed	\$ 900.00
3	§ 1926.451(a)(4)	Affirmed	\$2,100.00
4	§ 1926.1053(b)(6)	Affirmed	\$1,500.00

Citation No. 2

<u>Item</u>	<u>Standard</u>	<u>Disposition</u>	<u>Penalty</u>
1	§ 1926.500(b)(91)	Affirmed	\$4,200.00
2	§ 1926.500(d)(1)	Affirmed	\$4,200.00
3	§ 1926.701(b)	Affirmed	\$2,400.00

_____/s/ Paul L. Brady

PAUL L. BRADY

Judge

Date: December 28, 1993