



UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.
TURNER CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 93-2968

**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 October 25, 1994. The decision of the Judge will become a final order of the Commission on November 25, 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 November 14, 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
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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.
Ray H. Darling, Jr.
Executive Secretary

Date: October 25, 1994

DOCKET NO. 93-2968

NOTICE IS GIVEN TO THE FOLLOWING:

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Robert A. Yetman
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,

Complainant,

v.

TURNER CONSTRUCTION COMPANY,

Respondent.

OSHR
 Docket No. 93-2968

Appearances:

Betty Klaric, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Keith Ashmus, Esq.
 Thompson, Hine & Flory
 Cleveland, Ohio
 For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arise under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act") to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act. The matter has been presented upon cross motions for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

On October 13, 1993, the Secretary issued a citation to Turner Construction Company (hereinafter "Turner") alleging that two serious violations occurred at Turner's worksite located at Akron Ohio during September 28, 1993 and proposed a total penalty in the amount of \$1,950 for the violations. A timely notice of contest was filed by Turner and on November 22, 1993 a complaint was filed by the Secretary with this Commission incorporating Item No. 2 of the citation. The Secretary "vacated" Item No. 1 of the citation

(alleging a violation of 29 C.F.R. § 1926.404(f)(6)) in the complaint. Respondent answered the complaint by admitting the jurisdictional allegations and denying that it had violated the Act as alleged. The remaining disputed allegation asserts that respondent violated 29 C.F.R. § 1926.1053(b)(16) at the time and place set forth in the complaint with a proposed penalty in the amount of \$975.00.

The cross motions for summary judgment are based upon the following joint stipulation of facts:

1. Respondent is and was a corporation with an office and place of business at 1301 East Ninth Street, Cleveland, Ohio 44114 where it was engaged in general contracting.
2. Respondent on or about September 28, 1993 had a workplace at 281 Locust, Akron, Ohio 44307 where it was the general contractor.
3. Respondent was engaged in handling goods or materials which have been moved in interstate commerce.
4. Respondent at all times hereinafter mentioned was an employer employing employees in the above-referenced business at the aforesaid workplace.
5. On September 28, 1993, Respondent had in use at its above-referenced worksite a portable wood ladder.
6. The ladder was in use on the third floor west of the worksite.
7.
 - A. The steps or treads on the ladder were 19-½ inches across, 3¾ inches wide, with rounded outside edges.
 - B. Each tread was attached to the rail by nails and a dado construction.
 - C. Each tread had a metal rod running beneath it from one rail to the other.
 - D. The fourth tread from the bottom had a crack in it.

- E. The crack was at the left front edge of the tread and extended from the end of the tread for a distance of approximately 1-½ inches horizontally towards the right. The crack ran along the front edge of the tread and extended approximately ½" deep from the front edge of the tread toward the back, at its deepest point.
 - F. The photograph was taken at the date of the inspection, at which time the ladder was removed from service. The view in the photograph is of the tops of the steps, with the ladder folded and lying on the floor. The cracked tread is the second one from the bottom of the photograph. The crack is visible at the top right edge of that step (as viewed in the photo), immediately adjacent to the rail.
- 8. The ladder had not been removed from service.
 - 9. The ladder was not tagged with a notice saying "do not use" or similar language.
 - 10. The ladder with the cracked step was used by Eric Johnson, 825 Leonard Street, Akron, Ohio.
 - 11. The ladder with the cracked step was used by Roy Walker, 447 Fuller Street, Akron, Ohio.
 - 12. Respondent's foreman worked on the job.
 - 13. Respondent's foreman made regular inspections.
 - 14. Respondent had more than 100 employees.
 - 15. Respondent had approximately 15 employees at the above-referenced worksite.

16. The inspection of the worksite by the Occupational Safety and Health Administration was conducted by compliance office Thomas Henry.
17. Mr. Henry presented his credentials to Chuck Heming and Dave Snyder, superintendents for Respondent.
18. Chuck Heming and Dave Snyder, superintendents for Respondent, attended the opening conference.
19. Mr. Snyder attended the closing conference with Mr. Henry.
20. Mr. Henry observed an employee of Respondent using the ladder with the cracked step.
21. The employee was of average size, weighing an estimate 200 pounds.
22. As a result of Mr. Henry's inspection, Item 2 of Citation No. 1 was issued on October 13, 1993.
23. The citation alleged a violation of 29 C.F.R. 1926.1053(b)(16).
24. A penalty of \$975.00 was assessed.
25. The factors considered in assessing the penalty were the gravity of the violation, the good faith of the employer, the size of the business of the employer, and the history of its previous violations.
26. Respondent timely contested the citation and the penalty.
27. The employer had all required notices posted, maintained all required safety records, and had in place adequate and properly enforced safety programs to protect its employees from workplace safety hazards.
28. The enclosed photograph may be admitted without objection as Complainant's Exhibit A.

29. While the parties disagree as to the issue of whether the step's structural integrity was impaired by the crack and therefore whether there was any increased likelihood of failure of the step, the parties agree that the consequences of failure of a step on a ladder could include the substantial probability of serious physical harm.

In its brief at footnote 2, Respondent asserts that stipulation 7A above should also state that the ladder step at issue was $\frac{3}{4}$ " thick in addition to the other dimensions listed. This fact, according to Respondent, was omitted from the stipulation due to a typing error and Complainant agrees that this information should be included. Since there is nothing in the record indicating that the Secretary disagrees with the additional dimension, the amendment is accepted as part of the joint stipulation of facts. As noted in the stipulation, the parties submitted a photograph taken by the Compliance Officer at the time of the inspection which purports to show the defect in the ladder.

Based upon the evidence submitted, the Secretary asserts that Respondent violated the provisions of 29 C.F.R. § 1926.1053(b)(16). That standard reads as follows:

Portable ladders with structural defects such as, but not limited to broken or missing rungs, cleats or steps, broken or split rails, corroded components, or other faulty or defective components, shall either be immediately marked in a manner that readily identifies them as defective, or be tagged with "Do Not Use" or similar language, and shall be withdrawn from service until repaired. (Emphasis supplied)

In order to establish that Respondent failed to comply with the standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.* 1981 CCH OSHD ¶ 25,578, *aff'd* 681 F.2d 69 (1st Cir 1982); *Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, P. 39,449 (1991). Respondent does not dispute the applicability of the standard to its work activity and the ladder in question. Respondent vigorously argues, however, that the ladder was not structurally defective. In Respondent's view the crack in the ladder step was a tiny flaw in the wood which did not impair the strength of the step.

Moreover, according to Respondent, it is not unusual for wood to contain “all sorts of discontinuities that do not impair in any way the strength of the wood” (Respondent’s Brief, p.4). The crack in the step was, at worst, a “cosmetic defect” which did not adversely affect the weight carrying capacity of the ladder step. *id*

Complainant, on the other hand, asserts that crack in the ladder step necessarily leads to the conclusion that the step was “broken” within the meaning of the standard and, therefor, constitutes a structural defect. Complainant relies upon the stipulation of the parties and the photograph of the ladder as sufficient proof that the crack constituted a structural defect. The photograph depicts the ladder lying flat on the ground with the steps facing the camera. Stipulation 7E states that the crack is at the left front edge of the tread while stipulation 7F states that the crack is at the top right edge of the step, as depicted in the photograph. Although the parties agree that a crack existed in one of the steps of the ladder, the photograph, after a close and careful examination, fails to show anything that can be clearly discerned as a crack or split in the wood of any of the steps shown in the photograph. Thus, the photograph is of no value to establish that a crack even existed in the ladder.

The parties agree, however, that a crack in the wood of one step existed at the time of the inspection. The crack was located in the front edge of a step and was approximately 1½” long and, at its deepest point, ½ inch deep. The step was ¾ inch thick and 3¼ inches wide. Each tread was attached to the rails by nails and “dado” construction which means that the rails provided additional support to the steps. Each step also had a metal rod of unknown dimensions extending along and supporting the bottom of each step. The issue is whether the described crack in a wooden step of a ladder under the construction conditions stated, constitutes a “structural defect.”

The “ladder” standard set forth at 29 C.F.R. § 1926.1053 is divided into two major subheadings; paragraph (a) deals with the proper construction and weight carrying capacities of ladders and paragraph (b) regulates the use of ladders. In this case Respondent was cited under subparagraph (b) for using a ladder which allegedly had a structural defect and, therefor, did not conform to the requirements of subparagraph (a) in terms of weight carrying capacity, *see generally* 29 C.F.R. § 1926.1053 (a)(1). It is apparent that Complainant

is concerned that the step containing the crack will fail when used by Respondent's employees with a likely result of injury to employees (joint stipulation No. 29) There is no evidence, however, that the step was less capable of carrying loads as required under subparagraph (a) of the standard, particularly when the crack in the wood ran longitudinally along the front edge of the step for a short and shallow distance. The crack, as described, was the equivalent of one board placed on top of another and placed in the interior of the side rail for support. There is no evidence that such a condition should be considered as a structural defect.

This is not a case where it can be concluded that the ladder contained an obvious defect which adversely affected its structural integrity and, therefore, a hazard to employees may be presumed *Odyssey Contracting Corp.* 16 BNA OSHC 1753(1994), *Hamilton Fixture*, 16 BNA OSHC 1073, 1091, (1993). In this case the crack in the wood was small and undetectable in the photograph submitted by the parties. It would be unreasonable to conclude that every wooden ladder containing a crack, no matter how small and no matter where located, should be declared defective and removed from service. Under the circumstances of this case, it is necessary that the Secretary present evidence that the crack in the step constituted a "structural defect." In other words, where the defect is not an obvious defect rendering the ladder unsafe, the Secretary must present evidence that the condition cited creates a hazard to employees. *Astra Pharmaceutical Products, Inc., supra.* Because that evidence was not presented in this case, the citation must be vacated.

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above. Federal Rules of Civil Procedure 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

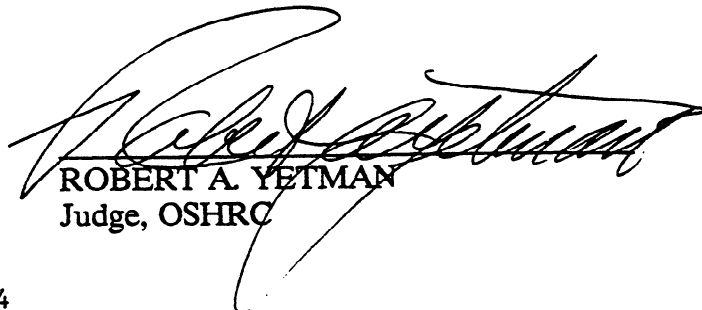
CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

3. At the time and place alleged, Respondent was not is serious violation of 29 C.F.R. § 1926.1053(b)(16).

ORDER

Serious Citation No. 1, Item 2 alleging a violation of § 1926.1053(b)(16) is vacated.



ROBERT A. YETMAN
Judge, OSHRC

Dated:

October 19, 1994
Boston, Massachusetts