UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.
JOSEPH B. FAY CO.
Respondent.

OSHRC DOCKET
NO. 92-1692

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 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 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 24, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1692

NOTICE IS GIVEN TO THE FOLLOWING:

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Pittsburgh, PA 15238

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/A
1825 K Street, N.W.
Washington, DC 20006 1246

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SECRETARY OF LABOR,

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v.

JOSEPH P. FAY COMPANY,

Respondent.

Docket No. 92-1692

Appearances:

Alan Kammerman, Esq.
Department of Labor
Office of the Solicitor
New York, New York

For the Complainant

Robert Papp
Safety Director
Joseph P. Fay Co.
Pittsburgh, Pa.

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

Following an OSHA inspection of Respondent's worksite at the Columbia-Portland bridge in Columbia, N.J., the Secretary of Labor (Secretary) issued to Respondent Joseph P. Fay Company (Fay) a citation charging a serious violation of 29 C.F.R. 1926.500 (d)(1). A hearing was held in New York, New York. Both sides were represented and filed post-hearing briefs. No jurisdictional issues are in dispute.

BACKGROUND

Joseph P. Fay Company is a Pennsylvania corporation with its principal office in Pittsburgh, Pa. It is engaged in general contracting and/or bridge demolition work. During the period at issue, it was removing a deck on a bridge located in Columbia, New Jersey.

ALLEGED VIOLATIONS

Serious citation 1 alleges:

29 C.F.R. 1926.500 (d)(1): 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:

a. South side of Bridge-On or about 4/14/92, employee(s) performing bridge re-hab were exposed to falls in excess of 25 ft. to the ground below.

The cited standard provides:

(d) Guarding of open-sided floors, platforms, and runways.

(1) 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.

ALLEGED VIOLATION OF 29 C.F.R. 1926. 500(d)(1)

The Secretary alleges that the employer violated 29 C.F.R. 1926.500(d)(1) by permitting employees to work at the unguarded open sides of the bridge exposing them to a fall of over 25 feet.

The compliance officer testified he observed two men wearing white suits walking on the bridge and estimated they were 3-4 feet from the edge and were at a hazard of falling more than 50 feet. These observations were made from the ground level at a distance of an estimated 100 feet. He further stated that 15-20 minutes later he was on the roof and saw two employees of the Respondent wearing white suits cutting metal and assumed they were the same men previously observed, since he saw nobody else so dressed.

The Respondent's safety manager Papp testified that his employees are instructed to stay no less than 6 feet from the roof edge and that on the date in question he personally observed them walking along the barrier further to the north on the roof at a point approximately 15-16 feet from the edge.

To prove a violation of section 5 (a)(2) of the Act, 29 U.S.C. 659(a)(2), the Secretary must show by a preponderance of the evidence that among other things, the cited employer failed to comply with the standard.

The evidence in this case is in my opinion totally insufficient to sustain the Secretary's burden of proof that Respondent's employees were subject to a hazard. Firstly, there is a serious question as to whether the compliance officers observation that the two men observed walking on the bridge were in fact employees of Respondent. This was assumed because they wore white suits; yet, the testimony shows there were other employees working on the roof for the general contractor who were doing lead burning and could be similarly dressed prior to the arrival on the roof of the compliance officer inasmuch as he arrived there 15-20 minutes after his observation. Conceivably they could have finished their operation and discarded the white attire, so that he saw none on other employees. He made no inquiry of the two Respondent employees in the white suits as to when they arrived on the roof, how they got there etc. so as be more definite and certain as to his assumptions. Moreover, he assumed whoever was walking on the bridge was only 3-4 feet from the edge. Not only is this rank conjecture, but is directly contradicted by the testimony of Papp who stated all his employees reached no less than 6 feet from the edge and in fact in walking on the bridge were 15-16 feet away; this statement was made on his personal observation on the date of the alleged violations. The conjectural testimony of the compliance officer about seeing unknown and unnamed men walking together with his rough estimate of their closeness to the roof edge is of little probative value when seen in the light of the definite testimony of Papp describing his personal observations. The testimony of Papp which was straightforward, frank and convincing and appeared to be truthful and honest demonstrated that Respondent's employees were not exposed to a hazard herein.

In short, the evidence is insufficient to prove the existence of a hazard. The quantum of evidence advanced by the Secretary could not convince a reasonable man that the facts so alleged are more probably true than false. The totality of the evidence shows the facts alleged by the Secretary to be unreliable and unworthy of belief.

As Judge Learned Hand stated in *N.L.R.B. v. Remington Rand*, 94 F2d 862, 873 (2nd Cir. 1938), we must rely in making findings upon "the kind of evidence on which responsible

persons are accostomed to rely on in serious affairs." The Secretary's evidence was not of such reliability.

The record in this case does not establish by a preponderance of the evidence that the Respondent violated 29 C.F.R. 1926.500 (d)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issue has been found specifically and appears herein. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

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

The citation alleging a violation of 29 C.F.R. 1926.500(d)(1) is VACATED.

IRVING SOMMER
Judge

DATED: MAR - 1 1993
Washington, D.C.