



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,

v.

OCEAN CONCRETE CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 91-3449

**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 July 1, 1993. The decision of the Judge will become a final order of the Commission on August 2, 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 July 21, 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
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.
Executive Secretary

Date: July 1, 1993

DOCKET NO. 91-3449

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Mr. Bill Davis
Ocean Concrete Contractors, Inc.
1074 Tenth Avenue South
Post Office Box 51447
Jacksonville Beach, FL 32240

Mr. Greg A. Schwartzenberger
East Coast Concrete Contractors
1153 Beach Boulevard
Jacksonville Beach, FL 32250

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
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SECRETARY OF LABOR,

Complainant,

v.

OCEAN CONCRETE CONTRACTORS,
INC.,

Respondent.

OSHRC Docket No. 91-3449

Appearances:

Stanley E. Keen, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Greg A. Schwartzberger, Esq.
Ocean Concrete Contractors, Inc.
Jacksonville Beach, Florida
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 a citation and proposed penalty issued by the Secretary of Labor (Secretary) pursuant to Section 9(a) of the Act. Respondent, Ocean Concrete Contractors, Inc. (Ocean), was engaged as a subcontractor in the construction of a building at the United States Naval Submarine base at Kings Bay, Georgia. Ms. Linda Campbell, a

compliance safety and health officer, conducted an inspection of the worksite that gave rise to the issuance of the citation.

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

The standard states, in pertinent part, as follows:

(b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing and toeboards or cover. . . .

The citation alleges that in Building B-2 there were no standard railings at number 3 stairwell.

There is no dispute that at the time of the inspection there was a 5 x 8 foot floor opening in Building B-2. The opening which was intended to accommodate the number 3 stairwell was approximately 8 feet above the ground level. There were no guardrails around the opening (Exh. C-4, Tr. 12, 13, 36). Ms. Campbell testified that she observed employees at the edges of the floor opening (Tr. 29).

Mr. John Lewis, a construction representative for the Navy, accompanied Ms. Campbell during the inspection. He also testified there were no guardrails around the opening (Tr. 53). Mr. Greg Schwartzenberger appeared on behalf of Ocean. He did not refute the allegations, but explained the nature of the forming system Ocean used. He stated that starting on one end of the building, there is a continued process of dismantling forming and pouring. In regard to this process, he acknowledged that, "[D]id we take handrails down and not put them up? More than likely, yes."

The evidence shows the violation occurred as alleged.

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

The standard requires, in pertinent part, as follows:

(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.

The citation alleges that there were no standard railings on open sides and ends of the platform in Building B-2. The parties stipulated that there were no railings on the open-sided platform and that employees worked to the edges (Exhs. C-2, C-3, C-5; Tr. 12-13).

Mr. Schwartzberger again did not deny the allegations but explained the problems associated with the dismantling of the scaffold system. He stated that in the area of the open-sided platform, the scaffold is taken down piece by piece. In this process, he believed the rails were more than likely taken down and not replaced (Tr. 77-78).

The standard was violated as alleged.

Alleged Violation of 29 C.F.R. § 1926.701(b)

The standard requires as follows:

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

The citation alleges that protruding reinforcing steel near the number 3 stairwell in Building B-2 was not capped. The parties stipulated that steel rebars protruded at lengths of up to 3 feet near the number 3 stairwell. They were not capped or otherwise guarded to eliminate the hazard of impalement. Employees worked at or near the rebars. Ms. Campbell testified that employees worked at the edge of the platform and floor opening with rebars 8 feet below (Exhs. C-1, C-3; Tr. 28-30).

Mr. Schwartzberger indicated that Ocean was bound by contract to work near the uncapped rebar. He stated that he had complained to the general contractor about the problem. He also stated that it was too expensive for Ocean to purchase caps (Tr. 81-82).

Ocean violated the standard as alleged.

The violations are alleged to be of a serious nature. For a violation to be determined serious under § 17(k) of the Act, there must be a substantial probability that death or serious physical harm could result therefrom. The violations under 29 C.F.R. § 1926.500 could result in serious injury or death from a fall of 8 feet to a concrete floor or impalement on steel reinforcement rods. The violations of 29 C.F.R. § 1926.701(b) could also result in serious injury or death if an employee tripped or fell on the rebars protruding 2 ½ to 3 feet.

The Commission, in all contested cases, has the authority to assess civil penalties for violations of the Act. Section 17(k) of the Act provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect 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.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission, and the foregoing factors do not necessarily accord equal weight. Generally speaking, the gravity of the violation is the primary element in the penalty assessment. *Trinity Industry, Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992); *Astra Pharmaceutical Prods, Inc.*, 10 BNA OSHC 2070, 1982 CCH OSHD ¶ 26,251 (No. 78-6247, 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981).

Having considered the foregoing factors and that at least five employees were exposed, it is determined that appropriate penalties for violation of § 1926.500(b)(1) is \$1,500.00, for violation of § 1926.500(d)(1) is \$1,500.00, and for violation of § 1926.701(b) is \$1,200.00.

FINDINGS OF FACT 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 upon the foregoing decision, it is ORDERED:

(1) The citation alleging violation of 29 C.F.R. § 1926.500(b)(1) is affirmed and a penalty in the amount of \$1,500.00 is hereby assessed:

(2) The citation alleging violation of 29 C.F.R. § 1926.500(d)(1) is affirmed and a penalty in the amount of \$1,500.00 is hereby assessed; and

(3) The citation alleging violation of 29 C.F.R. § 1926.701(b) is affirmed and a penalty in the amount of \$1,200.00 is hereby assessed.

/s/ Paul L. Brady

PAUL L. BRADY

Judge

Date: June 22, 1993