UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
PARMER BUILDING CORPORATION
Respondent.

OSHRC DOCKET
NO. 91-3048

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 April 8, 1993. The decision of the Judge will become a final order of the Commission on May 10, 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 April 28, 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.
Executive Secretary

Date: April 8, 1993

DOCKET NO. 91-3048

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

PARMER BUILDING CORPORATION,

Respondent.

OSHRC DOCKET NO. 91-3048-S

APPEARANCES:

Olivia Tanyel Harrison, Esquire
Dallas, Texas
For the Complainant.

Richard B. Parmer
Pasadena, Texas
For the Respondent, *pro se*.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a 1500-acre construction project for Formosa Plastics Corporation ("Formosa"), where Respondent, Parmer Building Corporation ("Parmer"), was engaged in steel erection; the project was located just outside of Point Comfort, Texas and involved over ninety employers. OSHA initiated its inspection at the end of March 1991 due to the fatality of an employee of another company, but began a comprehensive inspection of the entire site at the beginning of April 1991. Parmer's work areas were inspected on April 18,

1991, and the company, after being issued one serious and one "other" citation, contested only the serious citation. A hearing was held on September 25, 1992.[1]

The Evidence

Robert Konvicka, the OSHA compliance officer ("CO") who observed the alleged violations, was the only individual who testified at the hearing. He testified that Donald Jones, the CO who inspected Parmer's work areas on April 18, saw no violations at that time, but that he himself observed the cited conditions on May 29 while inspecting another company; he was on top of a boiler with the foreman of the other company when he saw two employees standing on the railings of an aerial lift basket 200 to 300 feet away. One employee was on the top railing and was tied off to an angle brace on the structure; the other was on the midrail, and both were engaged in connecting a horizontal girder between two columns. Konvicka identified C-1 as a photo he took of the scene. He noted the conditions were readily visible from where he was, that he watched the employees for seven to eight minutes, and that they were working out of the basket and did not go onto the structure. (Tr. 45-48; 51-58; 61-63; 68-69; 75-78; 82-84; 91-92; 97; 101-05).

Konvicka said that 1926.556(b)(2)(iii) forbids tying off to a structure while working out of a lift because it could shift or fail and cause an employee to fall on girders or braces and sustain serious injury or death; the employee in this case told him his lanyard was 10 feet long, which, coupled with the fact that it would have slid down the brace in the event of a fall, could have resulted in a fall of 22 feet.[2] Konvicka stated the lanyard was not tied around the column, although this was not discernible from C-1, but that even if it was the condition would still have violated the standard. He further stated he did not see a second or third lanyard on the workers, but that tying off to both the structure and basket while going back and forth would violate the standard because if an employee fell he would be

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[1]Serious citation number 1 initially had four items alleging violations of 29 C.F.R. §§ 1926.21(b)(2), 1926.104(d), 1926.556(b)(2)(iii) and 1926.556(b)(2)(iv), respectively; however, the Secretary withdrew items 1 and 2 prior to the hearing, leaving for resolution only items 3 and 4.

[2]Konvicka noted the employees were about 52 feet from the ground, and that the second rope leading from the basket in C-1 could have been the other employee's tie-off. (Tr. 89-90).

stretched between the structure and the basket. Konvicka opined the lift should only have been used to work out of, that the employees were on the railings because it would go no higher, and that a ladder should have been used to access the work area. (Tr. 55-60; 63-65; 74-78; 84; 89; 93-100).

Konvicka said that 1926.556(b)(2)(iv) requires standing on the floor of a lift basket because being on the rails could cause an employee to fall out or back against the controls and cause the lift to move. He was not aware the controls in this case were operated with a foot pedal, but noted the standard was violated in any case because the employees were on the railings. Konvicka said the Formosa safety representative was not with him when he saw the violations, and that although he should have stopped his inspection and discussed the situation with Parmer's job superintendent he did not do so because he did not know where he was; however, he did discuss the matter with the superintendent the following day. (Tr. 54; 61-64; 68-71; 88-89).

Discussion

1926.556(b)(2)(iii) provides as follows:

> Belting off to an adjacent pole, structure, or equipment while working from an aerial lift shall not be permitted.

Respondent asserted at the hearing that the employees were working in and out of the basket, and that to have 100 percent fall protection they tied off to the basket when in it and also to the structure when leaving the basket. While the CO's opinion was that this would have violated the standard, Respondent's assertion need not be addressed because there is no evidence to support it. As noted above, the CO was the only individual who testified. His testimony, which was credible and unrebutted, clearly establishes the employees were working in the basket during the seven to eight minutes he observed them. It also establishes, when considered together with C-1, that both employees were tied off to the structure in violation of the standard. Accordingly, Respondent was in violation of 1926.556(b)(2)(iii).

1926.556(b)(2)(iv) provides as follows:

> Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

Although Respondent asserted at the hearing that the employees were not in a "work position" because they were going in and out of the basket, this assertion is rejected based on the foregoing. Respondent also asserted that the lift controls could not have been triggered by an employee falling back on them because the controls can only be activated by sliding one's foot into the foot pedal and depressing it. Regardless, it is clear from the CO's testimony and C-1 that both employees were standing on the railings and could have fallen out of the basket; therefore, a violation of 1926.556(b)(2)(iv) is established.

Respondent's final assertion is that it was not in serious violation of the standards because the CO, in spite of his belief the conditions could have resulted in serious injury or death, did not inform company representatives of the situation until the next day. The CO, as noted *supra*, candidly admitted that he should have stopped his inspection and discussed the violations with the job superintendent. However, Commission precedent is well settled that in order to prove a serious violation the Secretary's burden is to show that, had there been an accident, the result would likely have been death or serious injury. *Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061, 1983-84 CCH OSHD ¶ 26,372, p. 33,454 (No. 79-4945, 1982). It is apparent that had one of the employees in this case fallen, the result would likely have been death or serious injury. Consequently, while the CO should have brought the situation to the attention of Parmer's management upon observing it, that he did not does not refute the serious nature of the violations.

Turning to the assessment of an appropriate penalty, the Commission is the final arbiter of penalties in all contested cases. *Brennan v. OSHRC*, 487 F.2d 438, 442 (8th Cir. 1973). In assessing penalties, the Commission is to give due consideration to the employer's size, history and good faith, and to the gravity of the condition. The parties stipulated that Parmer had a total of twenty employees, twelve of whom were at the site, and although the company has been found in violation of the subject standards its good faith was apparent at the hearing. The gravity of the condition is the most important consideration. The

gravity in this case was somewhat lessened by the fact that both employees were partially protected because they were tied off. In addition, the abatement measure for both violations was the same, that is, the employees should have stayed in the basket. Under the circumstances of this case, it is concluded that the assessment of a penalty of $500.00 for each violation is appropriate.

Conclusions of Law

1. Respondent, Parmer Building Corporation, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was not in violation of 29 C.F.R. §§ 1926.21(b)(2) and 1926.104(d).

3. Respondent was in serious violation of 29 C.F.R. §§ 1926.556(b)(2)(iii) and 1926.556(b)(2)(iv).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 and 2 of serious citation number 1 are VACATED.

2. Items 3 and 4 of serious citation number 1 are AFFIRMED, and a penalty of $500.00 for each item is assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: MAR 29 1993