



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,

v.

LAFORGE & BUDD CONSTRUCTION COMPANY
Respondent.

OSHR DOCKET
NO. 91-2264

**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 7, 1995. The decision of the Judge will become a final order of the Commission on May 8, 1995 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 27, 1995 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: April 7, 1995

DOCKET NO. 91-2264

NOTICE IS GIVEN TO THE FOLLOWING:

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Thomas M. Moore, Esq.
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9237 Ward Parkway, Suite 300
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Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242 0791

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consent to inspect the worksite and that, consequently, the inspection had not been conducted in accordance with the Fourth Amendment.

The Secretary petitioned the Commission for review of this matter, and the Commission directed review on April 7, 1993. On September 21, 1994, the Commission issued its decision, wherein it reversed the undersigned, finding that valid consent had been obtained, and remanded the case for a hearing on the merits. The case was initially set for hearing on December 20, 1994, but was reset for February 15, 1995, due to Respondent's requests for continuance. Prior to that date, the parties notified the undersigned that they had reached a stipulated agreement which obviated the need for a hearing, and, in an order dated February 14, 1995, the hearing was canceled. The order also noted that upon receipt of the stipulation a final decision and order would be issued which would encompass the merits of the citations as well as the Commission's ruling which would allow Respondent, if it so desired, an expeditious means of appealing any adverse issues to the appropriate court of appeals.

The parties submitted an executed joint stipulation on February 22, 1995, the specific terms of which are as follows:

This matter comes on for hearing before the Honorable Stanley M. Schwartz subject to all of the issues heretofore raised by Respondent in its Motion to Suppress and To Exclude, all of which are re-stated and re-affirmed by Respondent. Subject to those issues raised but denied by the Occupational Safety and Health Review Commission, Respondent agrees that the Secretary would be able to show:

- 1) Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission, hereinafter referred to as the Commission, by Section 10(c) of the Act, 29 U.S.C. § 659(c).
- 2) Respondent is an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5).
- 3) That Respondent was in violation of 29 CFR 1926.251(a)(1) regarding conditions related to a nylon sling. (Citation No. 1, Item 2)
- 4) That Respondent's employees were exposed to the hazard created by the violation of 29 CFR 1926.251(a)(1).
- 5) That Respondent had knowledge of the conditions which led to the citation for violation of 29 CFR 1926.251(a)(1).

6) That the violation of 29 CFR 1926.251(a)(1) should be considered an other than serious violation with a penalty of \$500 based on the following considerations: the size of the employer's business, the gravity of the violation, good faith of the employer, and prior history of violations.

7) That Respondent was in violation of 29 CFR 1926.652(a)(1) regarding conditions related to an excavation. (Citation No. 1, Item 4)

8) That Respondent's employees were exposed to the hazard created by the violation of 29 CFR 1926.652(a)(1).

9) That Respondent had knowledge of the conditions which led to the citation for violation of 29 CFR 1926.652(a)(1).

10) That the violation of 29 CFR 1926.652(a)(1) should be considered a serious violation with a penalty of \$2000 based on the following considerations: the size of the employer's business, the gravity of the violation, good faith of the employer, and prior history of violations.

The Complainant hereby withdraws Citation No. 1, Item Nos 1 and 3, and Citation No. 2, Item 1.

Respondent elects not to adduce any evidence but instead to rely on the issues raised previously in its Motion to Suppress and to Exclude Evidence.

Conclusions of Law

1. Respondent, LaForge & Budd Construction Company, Inc., 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 in "other" violation of 29 C.F.R. § 1926.251(a)(1).

3. Respondent was in serious violation of 29 C.F.R. § 1926.652(a)(1).

4. Respondent was not in violation of 29 C.F.R. §§ 1926.152(a)(1), 1926.350(a)(9) and 1903.2(a)(1).

Order

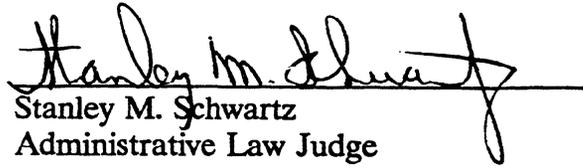
On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 and 3 of serious citation 1 are VACATED.

2. Item 2 of serious citation 1 is AFFIRMED as an "other" violation, and a penalty of \$500.00 is assessed.

3. Item 4 of serious citation 1 is AFFIRMED, and a penalty of \$2,000.00 is assessed.

4. Item 1 of "other" citation 2 is VACATED.


Stanley M. Schwartz
Administrative Law Judge

Date: MAR 20 1995