



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,

v.

TRIANGLE ENGINEERING CORPORATION
Respondent.

**OSHRC DOCKET
NO. 91-1841**

**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 20, 1993. The decision of the Judge will become a final order of the Commission on November 19, 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 November 9, 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:

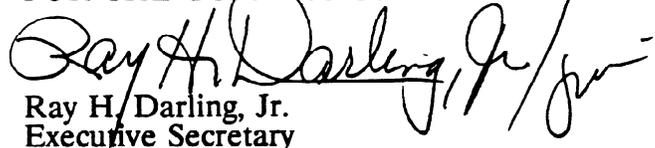
Executive Secretary
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
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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: October 20, 1993

DOCKET NO. 91-1841

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
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SECRETARY OF LABOR,

Complainant,

v.

TRIANGLE ENGINEERING
 CORPORATION,

Respondent.

Docket No. 91-1841

Appearances:

William Staton, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

James G. McLaughlin, Esq.
 Hato Rey, Puerto Rico
 For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected on March 26 through April 11, 1991, by a compliance officer of the Occupational Safety and Health Administration, Triangle Engineering Corporation ("Respondent") was issued three citations. Citations number 1 and

2 alleged five serious and five other-than-serious violations of the Act, respectively. Penalties totalling \$ 9375 were proposed.¹

Respondent timely contested all citations. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on April 7 and 8, 1992 in Hato Rey, Puerto Rico. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.²

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction. It is undisputed that at the time of this inspection Respondent was the general contractor engaged in the construction of a prison in Guaynabo, Puerto Rico. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.³ Accordingly, the Commission has jurisdiction over the subject matter and the parties.

¹ At the hearing the parties entered into a stipulated settlement as to two of the alleged serious violations and three of the alleged other than serious items. In addition, the Secretary, in his post hearing brief withdrew an additional alleged serious violation (Sec. Brief, 4-5). Thus, only the remaining two serious and two other than serious items still at issue are discussed.

² Extraordinary delay in this case has been caused by the contract court reporter's failure to produce a transcript of the proceedings for almost a year after their completion. Moreover, further delay has been engendered due to the fact that Respondent has filed for reorganization under the bankruptcy laws. Counsel who represented Respondent at the hearing applied for and was appointed as special counsel for the bankrupt by the bankruptcy court of Puerto Rico. This latter process took a great deal of time.

³ Title 29 U.S.C. § 652(5).

Background

This matter is concerned with the construction of the prison complex which was the subject of the **inspection** in Docket numbers 90-3417 and 91-0070. At the time of this inspection (which was conducted over a period of five days of visits), Respondent was still the general contractor on the project which involved the construction of the Metropolitan Detention Center in Guaynabo, Puerto Rico. Buildings "A" through "E" were at various stages of construction. Buildings "A" and "B" were about seven or eight stories high with about one story having been completed in each of the other buildings. Each of the buildings was of reinforced concrete design (Tr. III, 11 -15).⁴

Discussion

The Secretary, in Item 2 of the Citation alleging serious violations of the Act, claimed that Respondent failed to comply with the standard at 29 C.F.R. § 1926.405(j)(1)(i) in that temporary lighting had live parts exposed (empty bulb sockets) at level 2.5 east wall, Building B.⁵ A penalty of \$1125 was proposed.

The Compliance Officer ("CO") observed a socket for a temporary lamp without any lightbulb in it and another with a broken bulb in the socket (Tr. 24-26; Ex. C-2, C-3). Both sockets were energized (Tr. III, 24, 65). He testified that he estimated the empty socket was "approximately seven feet (7)" from the walking surface (Tr. III, 79) and the exposed filament of the broken bulb was at a height "below seven feet (7)" (*Id.*) He was of the

⁴ References to the official record of the case are as follows: "Tr. III" refers to the transcript of proceedings of April 7, 1992. "Tr. IV" refers to the transcript of proceedings of April 8, 1992. "C-" and "R-" refer to Complainant's exhibits and Respondent's exhibits, respectively. Post hearing briefs filed by the parties are referred to as "Sec. Brief" and "Resp. Brief."

⁵ The standard provides:

Fixtures, lampholders, lamps, rosettes, and receptacles shall have no live parts normally exposed to employee contact. However, rosettes and cleat-type lampholders and receptacles located at least 8 feet (2.44 m) above the floor may have exposed parts.

opinion that employees could receive an electrical shock if they came into contact with the exposed electrical parts when they were changing light bulbs (Tr. III, 27, 65-66) or if a curious employee, wondering if the circuit were energized, took hold of the socket (Tr. III, 66). The CO, however took no measurements of the height from the floor to any of the exposed parts (Tr. III, 62).⁶ Respondent's project manager placed the exposed wiring at a height of "about eight feet more or less" from the floor (Tr. IV, 8).

It is incumbent upon the Secretary to show that employees were exposed to or could reasonably be predicted to have access to a cited hazard.⁷ In addition, the cited standard requires specific demonstration that there are live parts "normally exposed to employee contact." I conclude that the Secretary has shown, through its sole witness, the CO, that employee contact could only occur if one of the live sockets were grabbed by an employee replacing bulbs or by a curious employee. I conclude that such contact is not "normal exposure" as contemplated by the standard. First, an employee engaged specifically in changing damaged or missing light bulbs would be specifically aware of the condition of the socket (empty or containing a broken bulb) that he would have to contact. Secondly, the possibility of an employee grabbing a socket just to see if it were energized is so remote as

⁶ Curiously enough this Compliance Officer took virtually no measurements, whether of distance, height or of voltage (Tr. III, 63, 75-76). Such inspections hardly comport with the construction standards which are replete with requirements dependent upon specific distances, voltages, Etc.

⁷ In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand* 13 BNA OSHC 2147 (1989).

to be inconsequential. Accordingly, in the absence of a showing of employee exposure, this item is vacated.⁸

A failure to comply with the standard at 29 CFR § 1926.500(d)(1) was alleged as item 3 of the serious citation.⁹ The Secretary maintained that open-sided floors or platforms were without the guardrails required by the standard. This condition was alleged to have existed at 4 specific locations as follows; a. at the southeast corner of level 3.5 in Building A, a 12 foot section of railing lacked the required midrail; b. at the northwest corner of level 4.0 in Building A, a railing was installed at a height of 25 inches not the 42 inches as required; c. at the southwest corner of level 1.0 in Building C, a 25 foot section of railing was missing the top rail; d. on the east side of the roof of Building B, a rail was installed at the height of 25 inches not 42 as required. A total penalty of \$1875 for these "grouped" violations was proposed.

As to instance d, the CO and Respondent's project manager are again at odds in their factual testimony regarding the height of the railing in the area where the crane operator had a set of controls. Neither witness measured the height of the railing which the CO estimated to be 25 inches while the project manager estimated its height to be between 40" and 42" (Compare; Tr. III, 35 with Tr. IV, 11-12; See also, C-6). The CO's

⁸ The standard exempts receptacles "located at least 8 feet above the floor." Respondent, claiming to come within the exemption, has the burden of proving that the exemption is applicable. The evidence as to the height of the sockets is in conflict. Both statements are, however, mere estimates. Neither party has shown why its witness's estimate should be credited over that of the other. Accordingly, Respondent has not meet its burden of proving the height be at least 8 feet.

Moreover, the fact that a general industry standard might set some other height at which such exposed wiring is exempt, is irrelevant since it is not applicable to the construction site in this case (See, Tr. III, 72-72).

⁹ This standard reads:

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...

estimate was based upon his observation of railings in the vicinity (Tr. III), while the Project Manager's estimate was based on the known height at which the protruding rebar would be spliced (Tr. IV, 11). Again, neither party measured or presented a reliable basis for their estimate of height. In this instance, I find that the Secretary failed to carry her burden of showing the existence of a violative condition by a preponderance of reliable evidence. Accordingly, the alleged violation, as to instance d, is vacated.

Respondent's only argument as to instances a, b and c is that the Secretary did not catch Respondent's employees in the act of being exposed to the violative conditions. Exposure is based not only on actual exposure to the condition but, as the term hazard implies, the potential for an accident. Thus, the question to be determined is whether, as a matter of fact, the employees, within reasonable predictability, were within the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263 (4th Cir. 1974). Given the nature of Respondent's role at this construction project, the overall testimony as to employee activities at the site and the evidence as a whole (Tr. III, 45), it is reasonable to infer that Respondent's employees had access to the zones of danger created by the missing rails as described in instances 1 through 3 of this item.

The three violative instances in total involve 25' of missing top rail, 12' of missing mid-rail at a height of about 20' (Tr. 36-38), and some railing installed at a height less than the prescribed 42". Little else is known about the dangers created by the railings missing in places other than near the crane operator's station. Falls of over 10' on a construction site could well result in broken bones. The alleged violation is thus serious even after eliminating the possibility of the 80' fall which has been vacated. The proposed penalty of \$1875 is however, not justified by this record. Assuming the occasional exposure of four employees to instances a, b and c (Tr. III, 45), I find that a penalty of \$250 is appropriate.

Accordingly, Serious item 3 is affirmed (as to three of the four cited instances) as a single serious violation of the Act for which a penalty of \$100 is appropriate.

The first item designated as other than serious alleged that Respondent was not in compliance with the standard at 29 CFR § 1926.405(a)(2)(ii)(E) by failing to protect all of

the light bulbs in the interior temporary wiring against contact and breakage.¹⁰ A penalty of \$750 was proposed.

There is no factual question that temporary lighting bulbs throughout the site were unguarded (Tr. III, 48-49). The violative condition has been established.

Respondent's sole defense rests upon the provisions of a general industry standard which is not applicable to this construction site. (See, 29 CFR § 1910.5). Respondent's defense is thus rejected.

Given the existence of virtually hundreds of unguarded bulbs but the lack of evidence as to any significant consequences other than some shattered glass, I find that a penalty of \$100 is appropriate.

Finally, non-serious item 5 claimed that a job made ladder used for access from level 3.0 to 3.5 had side rails extending 22" instead of the required 36" inches above landing level.¹¹ No penalty was proposed for this alleged violation.

The CO, apparently never measured the distance the railings extended above the floor. Since he climbed the ladder he was, nonetheless, close enough to make a reasonable estimate of the distances involved (Tr. III, 52). The fact that there may have been other guardrails within reach of the ladder does not eliminate the need to comply with the standard. Respondent's sole defense is thus rejected. The CO's testimony (Tr. III, 53-55) supports the finding of an other than serious violation with no monetary penalty. Accordingly, item 5 of Citation 2 is affirmed.

¹⁰ The standard provides:

All lamps for general illumination shall be protected from accidental contact or breakage....

¹¹ The standard cited, 29 CFR § 1926.1053(b)(1) states, in pertinent part;

When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (0.9 m) above the upper landing surface to which the ladder is used to gain access.....

FINDINGS OF FACT

All **findings** of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. The alleged violation of 29 C.F.R. 1926.25(a), Serious Item 1, is **VACATED** by virtue of the Secretary's withdrawal of the item in his post-hearing brief.

4. The alleged violation of 29 C.F.R. § 1926.405(j)(1)(i), Serious Item 2, is **VACATED**.

5. The alleged violation of 29 C.F.R. § 1926.500(d)(1), Serious Item 3, is **AF-FIRMED** as to instances 1 through 3 and **VACATED** as to instance 4. A penalty of \$250 is assessed therefor.

6. The alleged violations of 29 C.F.R. § § 1926.550(g)(4)(ii)(C), and 1926.550(g)(4)(ii)(I), Serious Item 4, Instances a and c, are **AFFIRMED** as other than serious violations of the Act pursuant to the agreement of the parties. Penalties of \$625 and 0, respectively are appropriated therefor.

7. The alleged violation of 29 C.F.R. § 1926.550(g)(4)(ii)(D), Serious Item 4, instance b is **VACATED** by the Secretary.

8. The alleged violation of 29 C.F.R. § 1926.550(c)(5), Serious Item 5, is **AF-FIRMED** pursuant to the agreement of the parties. A penalty of \$950 is appropriate therefor.

9. The alleged violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E), Non-serious Item 1, is **AFFIRMED**. A penalty of \$100 is appropriate therefor.

10. The alleged violation of 29 C.F.R. 1926.450(g)(2)(iv), Non-serious Item 2, is **VACATED** by the Secretary.

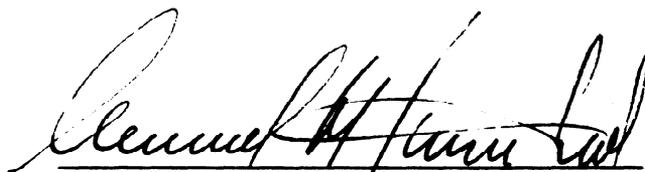
11. The alleged violation of 29 C.F.R. § 1926.500(f)(5)(ii), Non-serious Item 3, is **AFFIRMED** by virtue of Respondent's withdrawal of its notice of contest. No monetary penalty is assessed therefor.

12. The alleged violation of 29 C.F.R. § 1926.701(b), Non-serious Item 4, is **AFFIRMED** by virtue of the Respondent's withdrawal of its notice of contest. A penalty of \$375 is assessed therefor.

13. The alleged violation of 29 C.F.R. § 1926.1053(b)(1), Non-serious Item 5, is **AFFIRMED**. No monetary penalty is assessed therefor.

ORDER

The citations issued to Respondent, Triangle Engineering Corporation, on or about June 17, 1991 are **AFFIRMED**, **MODIFIED** or **VACATED** and monetary penalties are assessed as indicated in the above Conclusions of Law.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: **OCT 20 1993**
Washington, D.C.