SECRETARY OF LABOR,

Complainant,

v.

DILLINGHAM CONSTRUCTION PACIFIC BASIN LTD, and its successors,

Respondent.

OSHRC DOCKET NO. 99-0787

APPEARANCES:

For the Complainant:
Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, Rocklin, California

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.* (the "Act") to review a citation issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed penalty thereon issued pursuant to §10(a) of the Act. On April 9, 1999, Complainant issued a citation to Respondent alleging one willful violation of the standard set forth at 29 CFR §1926.704(a) and proposed a penalty in the amount of $70,000.00. A timely notice of contest was filed by Respondent and, after the filing of a complaint and answer, a hearing was held in Agana, Guam. Respondent admitted the jurisdictional allegations in its answer to the complaint and generally denied the remaining allegations. The parties have filed post hearing memoranda and the matter is ready for decision.

Respondent, Dillingham Construction Pacific Basin Ltd., was the prime contractor for a major addition to the Micronesia Mall located on Guam. During the installation of precast concrete beams in the "transition area" of the addition, the beams collapsed and one employee of a subcontractor, the Circle A Company, was fatally injured.

The testimony at the hearing revealed that Respondent was responsible, *inter alia*, for the installation of the precast concrete[1] members. The American Structural Engineers Company was responsible for the design of the addition and Rocky Mountain Pre-Stress was responsible for manufacturing the prestress concrete beams. Employees of the Circle A Company were responsible for ground work and backfilling. On October 28, 1998, Respondent was engaged in installing a ledger beam and three double T beams. The ledger beam was attached to two existing concrete columns by placing each end of the beam on an extension on each column known as a corbel. The ledger beam was approximately 34 feet long and 41 inches high (Tr. 358). A six inch ledge was at the bottom of the beam and double T beams sat on that ledge. The total width of the three double T beams was approximately 27 feet and one end of each double T was placed upon the ledge of the ledger beam and the other end upon an inverted T beam which was already in place. Each double T had two stems approximately 30 inches high which sat upon the ledger beam and inverted T beam with the exception of one stem which, because of the configuration of the transition area, could not be placed upon the inverted T beam. The length of the double T beams was 39, 48 and 57 feet.

The ledger beam and the double T beam were designed to be supported without shoring (Tr. 9); however, because of a design defect, a corbel had not been constructed by the designers for one stem of a double T beam. Thus, Respondent's superintendent placed shoring under that stem to stabilize the beam. In addition, each beam had metal flanges which were designed to be welded to an adjacent beam to provide stability to the structure (Tr. 173-179). According to Mr. Michael Gigone, the general manager for Rocky Mountain Pre-Stress, the welds are designed to be temporary connections until the permanent connection[2] between the beams are made (Tr. 362,363). The welds are designed "to prevent rotation in the [ledger] beam when double T's are placed on it, and to prevent any movement . . . off of the corbel by the [ledger] beam" (Tr. 174). Moreover, according to Mr. Gigone, it is the custom and practice of the pre-stress construction industry to weld each beam as soon as it is put in place (Tr. 176). Because of the difficulty experienced in placing the beams on October 28, no welds were completed on that day. Indeed, the work of placing the beams was not completed until 6:30 p.m. the evening of October 28. Respondent's project superintendent, Mr. Nakamura, stated that the ledge beam was

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[1] Precast concrete is defined at §1926.700(a)(5) as follows:

> (5) *Precast concrete* means concrete members (such as walls, panels, slabs, columns, and beams) which have been formed, cast, and cured prior to final placement in a structure.

[2] Permanent connection of the beams consist of the placement of reinforcing bars and pouring the concrete slab over the beams (Tr. 363).

installed first and the double T beams were put in place with the longest double T installed first (Tr. 482-484). Nakamura testified that the ledger beam was not welded because of adjustments that were required to the double T beams and because one stem of a double T was supported by shoring (Tr. 484-487). No further work was performed on October 28 after the double T beams were placed on the ledger beam and the inverted T beam.

The following morning, October 29, Mr. Nakamura ordered welder Hernani' Delagente, Respondent's employee, to commence welding the beam plates described above. Although Mr. Nakamura did not have a clear recollection of giving orders to the supervisor for subcontractor Circle A (Tr. 500-502,522), the weight of the evidence supports the conclusion that he ordered employees to backfill dirt in the transition area directly below the beams which had been put in place the prior evening (Tr. 544-546,553,245-246,272). There is also unrebutted testimony that "Chinese workers" were removing shoring in the transition area that morning below the newly installed beams (Tr. 499-500). Mr. Delagente commenced welding with his assistant at approximately 7:00 a.m. (Tr. 287-288). At approximately 7:30 a.m., Mr. Welson Hadley, an employee of Circle A Construction, along with three other Circle A employees commenced backfilling soil in the transition area beneath the beams (Tr. 245-246).

Suddenly, the ledger beam and the double T beams fell to the ground fatally injuring a Circle A employee who had been assigned to be a spotter in the transition area (Tr. 258-259). According to welder Delagente, he was positioned at the second level of the transition area and had completed two welds. While he was in the process of welding another plate, he heard a big bang and, looking behind him, he saw "the precast was falling down" (Tr. 287-289). No welds had been completed on any of the beams prior to his work activity that morning (Tr. 287-288).

Based upon the foregoing, Complainant issued a citation to Respondent alleging a violation of 29 CFR §1926.704(a) as follows:

29 CFR 1926.704(a): Precast concrete wall units, structural framing and tiltup wall panels were not adequately supported to prevent overturning and to prevent collapse until permanent connections were completed.

a) On the second level between the existing mall and new north garage, the precast concrete structural framing members, consisting of three-double Ts and one-ledger beams, were not adequately supported to prevent collapse in that none of the temporary support connections had been completed; exposing employees working on top of and underneath the precast concrete to the hazard of being struck by the collapsing precast concrete.

The standard set forth at 29 CFR §1926.704(a) reads in its entirety as follows:

(a) Precast concrete wall units, structural framing, and tilt-up wall panels shall be adequately supported to prevent overturning and to prevent collapse until permanent connections are completed.

Discussion

In order to establish that Respondent failed to comply with the cited standard, the Secretary must prove that (1) the standard applies; (2) the Respondent failed to comply with the terms of the standard; (3) employees had access to the cited condition; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHD ¶25,578 Aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products,* 15 BNA OSHC 1051,1052;; 1991-93 CCH OSHD ¶29,344 (1991). With respect to these elements, Complainant asserts that (1) since permanent connections had not been put in place; that is, the installation of reinforcing bars and pouring concrete on top of the double T beams, the cited standard, which requires adequate support for the beam until the application of permanent connections, is applicable; (2) that Respondent failed to provide adequate support by welding the precast beams as required by the standard, (3) employees were exposed to the hazardous condition because Respondent, as the prime contractor creating the condition and having control over the worksite, directed employees of a subcontractor into an area where they were exposed to the hazardous condition and (4) Respondent's representative at the site, Superintendent Nakamura, knew or with the exercise of reasonable diligence, could have known of the hazardous condition (Complainant's post-hearing brief). Respondent, on the other hand, vigorously argues it was in compliance with the standard (brief p. 16). Counsel for Respondent points to the fact that the beams had been put in place on October 28 and had remained in position for 12 to 13 hours until the collapse. The firm argues that placing the ledger beam on the corbels and the double T beams on the ledger beam and the inverted T beam constitutes "permanent connection as contemplated by the standard" (Respondent's brief p. 2,7). If the beams had not been adequately supported, argues Respondent, they would not have remained standing in place for 13 hours (brief p. 19). Moreover, the collapse of the concrete structure was the result of an unforeseeable event; that is, the arm of the excavator coming in contact with the ledger beam and dislodging that beam from the corbels (Respondent's brief p. 2,6). Thus, welding the connections would not have prevented the collapse, (brief p. 9). Respondent concludes that it should not be held responsible for the negligent act of an employee (the excavator operator) which was unforeseeable.

In addition, Respondent argues that Superintendent Nakamura, "never directly ordered employees of Circle A to work under both the completed areas of the overall construction project as well as the transition area" (Respondent's brief p. 21 citing Tr. 491). According to Respondent, the Secretary has failed to establish employee exposure to the hazard attributable to Respondent and, further, that there is no evidence that Mr. Nakamura knew or with the exercise of reasonable diligence, could have known, of the violative condition. Because the Secretary failed to present sufficient evidence to sustain her burden of proof, according to Respondent, the citation should be vacated (Resp. brief p. 23).

With respect to the first element of proof, both parties agree and the evidence supports the conclusion that the standard applies to Respondent's work activity. It is clearly established that Respondent was engaged in the installation of precast concrete framing. The parties dispute the meaning of "permanent connections" within the standard. The phase is not defined in the standard and no case has been found defining the term. Respondent asserts that placing the concrete beams at their permanent location constitutes permanent connection (*See* Tr. 217,221) and relies upon the fact that the beams stayed in place for 13 hours to support that view.

The weight of the evidence supports the conclusion, however, that "permanent connection" means the installation of reinforcing bars and pouring concrete over the beams (Tr. 132,179). Respondent's witness, Edward Tan, who is the principal manager for American Structural Engineers, the firm which designed the structure, agreed that the concrete surface over the beams was necessary for lateral restraint as a permanent connection (Tr. 218). The most convincing testimony, however, was presented by Mr. Michael Gigone, Vice President of Rocky Mountain Pre-Stress, the manufacturer of the concrete beams. Mr. Gigone clearly described the purpose for the metal plate connections which were built into the beams. Mr. Gigone stated that the plates are designed to be welded during construction; thus, the ledger beam should have been welded as soon as it was put in place and before the double T beams were installed (Tr. 175). The purpose of the welds is to prevent "rotation" of the ledger beam when the double T beams are put in place, to ensure that the ledger beam is not knocked off the corbels by the double T beams and to prevent the dislodgement of the beams by "unknown construction loads or natural loads, *i.e.*, earthquakes or being hit by another piece . . ." (Tr. 185,187-188). Mr. Gigone testified, without contradiction, that the welds are for temporary construction loads and are not designed to be part of the permanent load carrying mechanism (Tr. 179). *See, also* Tr. 362-363,427,428. The welds are designed "to prevent the overturning or significant movement of the beam during the construction process until the concrete topping has been poured, reinforced and cured" (Tr.

180). Moreover, it is the custom and practice in the industry to weld the beams as soon as they are put in place (Tr. 176,377,378). For these reasons, it is concluded that permanent connections within the meaning of the standard had not been completed on October 29, 1998 and structural framing (the prestress concrete beams) had not been adequately supported (by welding the components together) to prevent overturning and collapse. Thus, Respondent failed to comply with the terms of the standard.

With respect to employee exposure, the testimony of Respondent's Superintendent Nakamura is less than enlightening. He appeared to be hesitant and contradictory in his testimony regarding this point. He stated that he may or may not have had a conversation with the supervisor of the Circle A employees on the morning of the collapse regarding performing work in the transition area (Tr. 500). He later stated that he did not recall having a conversation with the Circle A supervisor. However, a rebuttal witness called by the Secretary, Mr. Michael Stephens, testified, without contradiction, that he was present during the conversation on October 29 between Mr. Nakamura and the Circle A supervisor and he heard Mr. Nakamura give instructions for Circle A employees to enter the transition area and backfill soil (Tr. 5412,544,546,553). Thus, it is concluded that Respondent directed Circle A employees to work in the transition area prior to the completion of the welding requirement.

Respondent acknowledges that it had control of the work area (Tr. 504), brief p. 20) and had authority to restrict access to hazardous areas (Tr. 508). Nevertheless, Respondent argues that Superintendent Nakamura "never directly ordered employees of Circle A to work under . . . the transition area" (brief p. 21). The record, however, supports the conclusion that Respondent's representative directed Circle A employees to work in the transition area with knowledge that the welding task had not been completed. Thus, employees controlled by Respondent were directed to work in a hazardous area created by Respondent and under its control. Accordingly, the Secretary has established employee exposure and that Respondent knew, or with the exercise of reasonable diligence, could have known of the violation. *See Underhill Construction Corp.* 513 F.2d 1032 (2nd Cir 1975)) *Flint Engineering and Construction Co.* 15 OSHC 2052 (1992).[3]

The Secretary further alleges that the violation is serious within the meaning of section 17(b) of the Act. As tragically demonstrated in this case, employees were exposed to serious injury and death from the hazardous condition created by and under the control of Respondent. Moreover, Respondent

[3] Respondent also argues, apparently, that this matter should be vacated because Complainant failed to state in the citation and complaint the date of the alleged violation (brief p. 11). However, administrative pleadings are liberally construed and easily amended. *See* Rule 15(b) FRCP *Quality Stamping Products* 7 OSHC 1285 (1979). Moreover, pleadings may be amended to conform to the evidence. It is clearly established that Respondent vigorously defended the violation as alleged for October 29, 1998.

knew, or with the exercise of reasonable diligence, could have known of the violation. (Section 17(k)); *CBI Services, Inc.* 1991-93 OSHD ¶29,924; *Kaiser Aluminum and Chemical Co.* 1982 OSHD ¶26,162. Accordingly, the Secretary has sustained her burden to establish a serious violation as alleged.

In the alternative, the Secretary alleges that the violation is willful within the meaning of section 17(a) of the Act (*See* commission Rule 30(c)). Although not defined in the Act, "willful" has been defined by the Courts as "conscious and intentional disregard of the conditions," "deliberate and intentional misconduct," "utter disregard of consequences" and other similar descriptions. *See Brock v. Morello Brothers Construction, Inc.,* 809 F.2d 161 (1st Cir. 1987). In order to establish a willful violation, it is necessary to determine the "state of mind" of the employer at the time of the violations. The standard of proof requires that the Secretary produce evidence establishing that the respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements. of the statute. *A. Schenbek and Company v. Donovan,* 646 F.2d 799, 800 (2nd Cir. 1981); *Morello Brothers Construction supra* at 164; *Georgia Electric Co. v. Marshall,* 595 F.2d 309, (5th Cir. 1979). Willful violations are distinguished by a "heightened awareness of illegality - of the conduct or conditions - and by a state of mind-conscious disregard or plain indifference." *Williams enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶27,893. The Tenth Circuit has determined that an employer's failure to comply with a safety standard under the Act is "willful" if done knowingly and purposely by an employer who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements. *United States v. Dye Construction Co.*, 510 F.2d 78,81 (10th Cir. 1975).

Complainant's burden to establish a willful violation has been defined by the Commission as follows:

> To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p. 36,589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶30,046, p. 41,256 (No. 89-433, 1993). A violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one - whether the employer's belief concerning the interpretation of a rule

> was reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶29,240, p. 39,168 (No. 82-630, 1991).

Secretary of Labor v. S. G. Loewendich and Sons, 16 BNA OSHC 1954, 1958 (1994)

Although an employer's good faith belief that alternative protective measures are superior to the requirements of a safety standard will not relieve that employer of a finding of a willful violation, *Secretary of Labor v. Trinity Industries, Inc.*, 16 BNA OSHC 1670, 1673, (11th Cir. 1004), the Review Commission has held that "[a] willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer's efforts are not entirely effective or complete" (citations omitted), *Secretary of Labor v. Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169 (1987). In other words, an employer who knowingly and in good faith substitutes its own safety measures to provide employee protection in place of the requirements of a standard may be found in willful violation of the standard; however, an employer who seeks, in good faith to comply with the standard and fails, may not be found to have willfully violated the Act.

Both parties focus upon the actions of Superintendent Nakamura to support their respective arguments that Respondent was or was not in willful violation of the standard. Complainant points to the fact that Mr. Nakamura had 35 years' experience in the construction industry and 22 years' experience as Respondent's superintendent. He has worked on approximately 20 precast concrete jobs involving a large number of components (Tr. 511,527). Secondly, Respondent possessed safety manuals and written procedures relating to construction activities, including bracing and connecting precast members; however, these documents were not at Respondent's worksite and Superintendent Nakamura was not aware that Respondent had any written policies regarding the erection of prestress concrete (Tr. 68,140,514,521). Third, Complainant argues that Mr. Nakamura was responsible for selecting "tool box meeting" topics but provided no training for precast construction (Tr. 527; Complainant's brief p. 26). In addition, Complainant states that Mr. Nakamura's credibility is questionable. Complainant points to his testimony that he never ordered the welding of precast members during construction (Tr. 513,514) and, on cross-examination, his admission that it is Respondent's normal practice to weld precast members when they are set unless alignment of the beam is required (Tr. 516).

Complainant also questions Nakamura's testimony that this was his first experience with angled beams and a missing corbel (Tr. 485-488,525,526). Nakamura stated that he relied upon a structural engineer to solve this problem; however, he nevertheless assumed the task (Tr. 519,520). Complainant

argues that Nakamura should have contacted a structural engineer rather than relying upon his own solution (Complainant's brief
p. 28).

Complainant asserts that Respondent; specifically, Mr. Nakamura, had a "heightened awareness" that the transition area was not stable because the welding of the components had not been completed. Despite that awareness, Nakamura failed to keep employees away from the zone of danger and assigned employees of Circle A Company to work in the transition area below the unsecure beams. Moreover, Nakamura knew that those employees would use heavy equipment, such as excavators and backhoes, to complete the backfilling task (Tr. 532). Nakamura failed to protect employees from the hazard which he recognized; that is, sparks produced by the welding operations (Tr. 533-34). Finally, Complainant relies upon the testimony of welder Delagante who testified that he "didn't know why the people were working under the precast before it was welded. I think that's dangerous, but I didn't say anything to anyone" (Tr. 298-299). Thus, according to Complainant, Mr. Nakamura, with his experience in precast construction, possessed a heightened awareness of the hazard and was plainly indifferent to that hazard.

Respondent, on the other hand, vigorously disputes that the violation, if affirmed, falls within the penumbra of willful as defined by the Commission. Respondent argues that the welds were not completed immediately upon placement of the beams because additional alignment was required. Moreover, the beams were securely in place the evening of October 28 and remained in place for approximately 13 hours. Thus, the beams would have stayed in place indefinitely without the welds. The collapse, according to Respondent, could only have occurred due to an unexpected and unforeseeable event; the arm of the excavator contacting a supporting member causing the collapse.[4] Since Mr. Nakamura was not aware of the existence of the standard, any fault attributable to him, and Respondent, can only be characterized as poor judgment. Respondent cites *Secretary of Labor v Propellex Corporation*, 1999 CCH OSHD ¶31,792 (R.C. 1999) as support for its argument that Mr. Nakamura did not possess the "heightened awareness of the illegality of the conduct or conditions" constituting the alleged violation, (Respondent's brief p. 24-26).

[4] There is disputed testimony regarding possible causes for the collapse. Respondent speculates that the arm of the excavator must have struck the prestress components causing the collapse. However, the operator of the excavator testified without contradiction that his machine did not strike any part of the structure prior to the collapse nor did he observe the backhoe strike the building. The Secretary's expert speculated that the collapse may have been caused by "rotation" of the ledger beam. However, there is no convincing support in the record for this theory. Thus, the record provides no cause for the collapse.

As previously stated, both parties rely upon Mr. Nakamura's "heightened awareness" of the violation or lack thereof, to support their opposing arguments. The latest Commission pronouncement regarding the "heightened awareness" element, as noted by Respondent, is set forth in the *Propellex* case *supra*. The Propellex Company is a manufacturer of maximum hazard explosives and was cited for willful violations after a large explosion at an outside facility located on company property injured five employees. The explosion was the result of employees having a fire in a barrel within nine feet of explosives to warm themselves during cold weather. In addition, employees were allowed to smoke in the area where explosives were located. The Commission affirmed the violations as serious based upon evidence that an experienced foreman and the lead person for the employees who engaged in these activities had knowledge of the location of the open fire and that smoking was conducted within the immediate area of explosives.

On these facts, however, the Commission found that the Respondent did not have a "heightened awareness" of the violations. With respect to the foreman, the Commission stated "While [the foreman] may have known of employee smoking and the use of the burn barrel near the explosives, the evidence in the record is insufficient to show that even if he did know, he appreciated the hazards these conditions posed," *ibid* at 46,592. With respect to the lead person, the Commission stated "[n]or is there evidence to establish that [the lead person] had a heightened awareness of the violations. [She] testified that she did not believe that the burn barrel was problematic because it was already at the demilling site when she started working there and because nobody asked her to move it. She believed that the use of the barrel was 'safe.' She allowed employees to smoke in the demilling area on their breaks because she believed [the foreman] authorized it " *id*. The Commission concluded that she exercised "poor judgment"; however, the Secretary failed to establish that the firm, through its foreman and lead person, had the requisite "heightened awareness" to establish a willful violation.

By applying the teachings of *Propellex* to the facts of this case, I am constrained to find that Respondent's foreman, Nakamura, did not possess a heightened awareness of the hazard sufficient to sustain a willful violation. First, Mr. Nakamura was not aware of the existence of the standard violated nor is there any evidence that he knew of the consequences of failing to weld the precast components. Moreover, he was not aware that Respondent had any safety policies regarding the erection of precast components. Thus, as stated by the Commission in *Propellex supra*, even if he was aware of the requirements to weld the components, there is no evidence that he "appreciated" the hazards posed by failing to weld. Accordingly, I am compelled to vacate the willful designation for the violation alleged.

With respect to the penalty, the record clearly establishes a high gravity factor for the violation. Employees were placed in a zone of danger which resulted in the death of an employee. The firm is a large firm; however, there is no listing of previous violations nor is there any evidence regarding Respondent's "good faith." Accordingly, based upon the high gravity of the violation, a penalty in the amount of $7,000.00 is assessed.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested 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 denied.

ORDER

Citation 1, item 1, is AFFIRMED as a serious violation and a penalty in the amount of $7,000.00 is ASSESSED.

Robert A. Yetman
Judge, OSHRC

Dated: May 5, 2000