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SECRETARY OF LABOR,

Complainant,

v. : OSHRC Docket No. 92-0851

CENTEX-ROONEY
CONSTRUCTION COMPANY,

Respondent.

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

Centex-Rooney Construction Co. ("Rooney"), a large construction company with over 1,000 employees, was involved in the construction of a number of 2-story hotel buildings at a resort in Florida. At issue in this case is whether Rooney committed violations of one electrical safety standard and two fall-protection standards. We conclude that the Secretary failed to establish a violation of the electrical standard, but did establish repeated violations of the two fall-protection standards. We assess a total penalty of $25,000.

Ground Fault Circuit Interrupters

The Secretary alleged that Rooney violated 29 C.F.R. § 1926.404(b)(1)(ii),[1] based

[1]That standard provides in pertinent part:

§ 1926.404 Wiring design and protection.

. . . .

(b) *Branch circuits*--(1) *Ground-fault protection* - (i) *General*. . . .

(continued...)

on the compliance officer's discovery of one inoperative ground fault circuit interrupter ("GFCI") among the approximately 100 he tested. At issue is whether the Secretary proved that the company knew or with the exercise of reasonable diligence could have known of that violative condition.[2] The record indicates that Rooney's GFCI's were randomly checked at regular intervals more often than once a month. Rooney's safety manager testified that "I would go around . . . on my day-to-day routine, and . . . check different . . . breakers." Another company official testified that Rooney required its subcontractors to test GFCI's once a week. In addition, a master electrician with forty years of experience testified that GFCI manufacturers "say[ ] to test them once a month." The Secretary characterizes Rooney's efforts as "a haphazard, hit-or-miss type of daily inspection," but offers no affirmative evidence to show what would constitute reasonable diligence under the circumstances.

We find that the Secretary has failed to establish a lack of reasonable diligence in checking for malfunctioning GFCI's and therefore Rooney is not chargeable with knowledge of the single defective GFCI the compliance officer discovered. The fact that only one faulty GFCI out of 100 was discovered may not by itself prove that the employer was reasonably diligent. GFCI's are generally reliable. However, when we consider that fact together with the evidence that Rooney checked GFCI's on a regular basis, and the Secretary's failure to introduce any contrary evidence, *see Milliken & Co.*, 14 BNA OSHC 2079, 2084, 1991-93 CCH OSHD ¶ 29,243, p. 39,178 (No. 84-767, 1991), *aff'd*, 947 F.2d 1483 (11th Cir. 1991), the preponderance of the evidence establishes that Rooney was reasonably diligent. We

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[1](...continued)

> (ii) *Ground-fault circuit interrupters*. All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

[2]*See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), (listing the four elements of the Secretary's prima facie case, the last of which is a showing that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

therefore find that the Secretary failed to carry his burden of proving employer knowledge and vacate the citation item.[3]

FLOOR OPENINGS AND GUARDRAILS

Rooney was cited under 29 C.F.R. § 1926.500(b)(1)[4] for failing to cover or guard floor openings in a number of buildings on the site. The evidence shows that these 5-foot-long, 16-inch-wide "pipe-chase openings" between the floor and the wall were created at the time the concrete forms were removed and that Rooney immediately covered them with ¾-inch plywood secured by special concrete screws called tapcons. However, as subcontractors and tradespeople entered the structure to perform their work, the plywood covers would be removed and sometimes not replaced.

Rooney was also cited under 29 C.F.R. § 1926.500(d)(1)[5] for failing to provide adequate guardrails at the perimeter of the walkways that encircled the second floor. The evidence again shows that Rooney initially installed fall protection, in this case wire-rope guardrails, but that subcontractors either removed them or made them ineffective by stretching them.

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[3]In light of our disposition of the employer knowledge issue, we need not reach the other defense Rooney raised on review, that the Secretary failed to prove that the standard applied to the condition cited.

[4]That standard provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (b) *Guarding of floor openings and floor holes.* (1) Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section.

Section 1926.500(f)(5)(2) specifies that covers "shall be capable of supporting the maximum intended load and so installed as to prevent accidental displacement."

[5]That standard provides:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (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, or the equivalent . . . on all open sides.

At issue as to both these items is whether the Secretary established that Rooney knew or with the exercise of reasonable diligence could have known about the existence of the uncovered floor openings and the sagging cable guardrails. We conclude that the Secretary has carried that burden. The evidence shows that Rooney was aware that subcontractors routinely removed the plywood covers over the pipe chases and regularly removed or stretched the cable guardrails in order to do their work. Rooney employed a full-time four-man safety crew to maintain adequate guardrails, and admitted that there were times when it decided to "beef up" its safety crew to twelve or fourteen employees when it "got behind."[6] Since the record shows that the Secretary has established the remainder of his prima facie case as well as knowledge, *see Astra Pharmaceutical Products*, we conclude that Rooney failed to comply with the cited standards.

Rooney's charge that it is unfair for OSHA to expect a general contractor to follow its subcontractors around and abate their violations is without merit. An employer is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. *See Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1899, 1991-93 CCH OSHD ¶ 29,854, p. 40,750 (No. 89-1394, 1992). That was all that was expected of Rooney here. Yet, as the judge noted, the violative conditions were in plain view, they had existed for a significant period of time before the Secretary's inspection, and Rooney could have ascertained their existence through the exercise of reasonable diligence. *See Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981).

We also find that Rooney failed to establish the unpreventable employee misconduct defense. To establish this affirmative defense, an employer must show that "it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules when they were violated." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1816, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). The judge found that while Rooney had work rules addressing these hazards, and the

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[6]There was argument, but no evidence, on whether a crew of four was sufficient to maintain guardrail compliance on a project of this size, where, as Rooney emphasized, there were hundreds of tradespeople and "miles of cable."

rules were adequately communicated to its own employees and to subcontractors' employees, Rooney nevertheless failed to discover the magnitude of the non-compliance or to take effective measures to enforce the rules when they were violated. In his findings, the judge emphasized the lack of documentation of what Rooney claimed to be a progressive enforcement strategy consisting of verbal reprimands, financial punishments, and other disciplinary measures. Noting the testimony of two subcontractor's employees that the pipe chase openings had been left uncovered for months, we must agree with the judge that the evidence fails to establish that Rooney effectively enforced those work rules. We therefore affirm the violations of section 1926.500(b)(1) and section 1926.500(d)(1).

REPEATED CHARACTERIZATION

The evidence also establishes that both the floor opening and the perimeter guardrail violations were properly characterized as repeated under section 17(k), 29 U.S.C. § 666(k), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Under *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979), generally, the Secretary may establish a prima facie case of substantial similarity by showing that the employer has received a prior citation for failing to comply with the same standard and that the citation has become a final order of the Commission. The burden then shifts to the employer to rebut that showing. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1994 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994) (citing *Potlatch*). Rooney does not dispute that citations involving identical standards had become final orders. It claims that the current citations should nevertheless not be considered repeated because the previous citations involved different conditions, at different sites, in different cities. Geographical proximity is not necessarily a factor in determining substantial similarity, however, and the hazards and the means of abatement were the same in both sets of citations. *Cf. Monitor*, 16 BNA OSHC at 1594, 1994 CCH OSHD at p. 41,825 (no repeated characterization where hazards and means of abatement were distinct). Since Rooney has failed to rebut the Secretary's evidence of substantial similarity, we affirm the violations as repeated.[7]

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[7]We decline to accept Rooney's invitation to re-examine the test for a repeated violation set forth in *Potlatch*. Rooney has provided us with no justification for abandoning our precedent.

PENALTIES

The Act requires the Commission to assess a penalty "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." 29 U.S.C. § 666(j). In determining the gravity of the violation, the primary element in penalty assessment, we consider the number of the employees exposed, the duration of their exposure, any precautions taken against injury and the degree of probability that any injury would occur. *Quality Stamping Prods.*, 16 BNA OSHC 1927, 1928, 1994 CCH OSHD ¶ 30,516, p. 42,187 (No. 91-414, 1994), *petition for review filed*, No. 94-3978 (6th Cir. Sept. 19, 1994).

Section 1926.500(b)(1)

The judge assessed a $10,000 penalty for the repeated floor-opening violation as proposed by the Secretary. After examining the penalty factors in relation to this item, we agree with the judge that a penalty of $10,000 is appropriate. Although we agree with Commissioner Foulke that Rooney's safety program serves to mitigate this penalty, the fact that this violation is classified as repeated diminishes the otherwise significant impact of a good safety program and an unlikely accident.[8] Moreover, although the photographs

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[8]Commissioner Foulke dissents from the penalty amount assessed for the violation of § 1926.500(b)(1) involving the pipe-chase openings. The grounds for this disagreement rest on evidence of Rooney's good faith and the very low gravity of the hazard. Specifically, despite finding this violation "repeated," Commissioner Foulke would assess a penalty lower than that assessed by his colleagues based upon: (1) the quality and results of Rooney's overall safety program (the judge even commends Rooney for its program in his decision); (2) a low probability of injury since the hazard was located in a relatively remote, low-trafficked area of the job site and the openings were quite narrow. In fact, the location and size of the hazard is such that it would almost require an intentional act on the part of an employee for an injury to occur. In addition, it is clear that Rooney was attempting to comply with the applicable standards since it had at all times during the construction at least one crew of employees whose sole job was to continually re-cover floor-openings and replace guardrails that had been intentionally removed by employees of other employers at the job site. The record in this case fully documents the fact that Rooney has expended on this project a significant amount of money to comply with all applicable OSHA standards. While the oversight function of Rooney's overall safety program needed improvement, Commissioner Foulke believes that the penalty assessed for the floor-opening violation is inappropriate when the factors enumerated above are fully considered.

showed that the location and dimensions of the openings made it unlikely that an accident would occur, the evidence indicates that a variety of trades people walked or worked near the openings on a regular basis and that a fall through these openings might well result in serious injury. The evidence Rooney offered to show that signs were posted warning subcontractors not to remove the plywood covers was contradicted by the independent plumber and electrician who testified that they had never seen such signs.

Section 1926.500(d)(1)

The judge reduced the $25,000 penalty proposed for the guardrail violation to $15,000, stating only that the $25,000 penalty was "too harsh under the circumstances presented." Having examined the penalty factors as they relate to this item, we agree with the judge that a $15,000 penalty for the guardrail violation is appropriate. Considering the question of gravity, as with the floor-opening violation,[9] the testimony established that an array of tradespeople continually made use of the walkway to transport materials and gain access to their work area. Additionally, this violation exposed the employees to a 9-foot fall out of the building, as opposed to a fall within the more restricted pipe-chase openings at issue in the previous item, thus increasing the probability of serious injury. Finally, as noted with respect to the previous item, the classification of this violation as repeated dilutes the impact of an otherwise significant safety program.[10] As a mitigating factor we note that, in most instances, some protection was provided by existing cable guardrails even though they were no longer equivalent to a solid guardrail as required by the standard. None of Rooney's other objections -- *e.g.*, that there were no injuries involved, that Rooney spent substantial sums on safety, and that the subcontractors whose employees actually committed the violations were penalized much less than Rooney -- are among the statutory factors we consider in assessing a penalty.

Taking into account the statutory factors, we assess a penalty of $10,000 for the repeated violation of section 1926.500(b)(1) and a penalty of $15,000 for the repeated violation of section 1926.500(d)(1).

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[9]Commissioner Foulke notes his finding that the evidence is dissimilar in this regard.

[10]*See supra* note 9.

ORDER

Accordingly, we vacate the violation of section 1926.404(b)(1)(ii), affirm the repeated violations of sections 1926.500(b)(1) and 1926.500(d)(1), and assess a total penalty of $25,000.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: December 2, 1994

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SECRETARY OF LABOR, Complainant, v. CENTEX-ROONEY CONSTRUCTION CO., INC., Respondent.	Docket No. 92-0851

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on December 2, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

December 2, 1994
Date

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0851

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SECRETARY OF LABOR Complainant, v. CENTEX ROONEY CONSTRUCTION CO. Respondent.	OSHRC DOCKET NO. 92-0851

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 May 14, 1993. The decision of the Judge will become a final order of the Commission on June 14, 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 June 3, 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:

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Petitioning parties shall also mail a copy to:

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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) 634-7950.

FOR THE COMMISSION

Date: May 14, 1993

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0851

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SECRETARY OF LABOR,

Complainant,

v.

CENTEX-ROONEY CONSTRUCTION CO.,

Respondent.

OSHRC Docket No. 92-851

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Joe F. Canterbury, Jr., Esquire
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For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

This case results from an inspection of respondent's worksite conducted by the Secretary of Labor under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et. seq.*). The Secretary seeks affirmation of serious and repeat citations and proposes penalties in the aggregate amount of $58,500.00.

Respondent, Centex-Rooney Construction Co.,[1] is a large construction contractor. At the time of the Secretary's inspection, respondent was under contract with Disney World to construct several hotel complexes on Disney's property in Lake Buena Vista, Florida. One of these projects was designated as "Alligator Bayou" which consisted of sixteen identical two-story buildings intended to become resort lodges. Each building contained several hotel rooms and had a walkway or balcony around the second floor perimeter. Above the second floor was an attic which housed the air conditioning and other mechanical systems required for the building.

Respondent was the general contractor at the Alligator Bayou project and was responsible for erecting and constructing the walls and slabs of each building. This was accomplished by use of a tunnel form system whereby the concrete walls and slabs were poured simultaneously and then heated to cure the concrete in about 24 hours. Respondent's employees were engaged in this phase of the construction and also in removing the forms after the concrete cured. Upon removal of the forms, it was respondent's obligation to install perimeter guardrails around the second floor balconies or walkways and to cover all floor openings to protect against fall hazards during the completion of the project. Respondent utilized carpenters, cement finishers and laborers in its operations (Tr. 225, 272), as well as a safety crew which was responsible for installing and maintaining the fall protection devices just described (Tr. 398, 399). Numerous subcontractors were also engaged at the worksite in connection with the installation of electrical, plumbing, sprinkler and duct systems, and roofing, plastering and painting work (Tr. 261, 269, 280, 309).

On July 17, 1991, Compliance Officer Ron Anderson was assigned to conduct a scheduled inspection of respondent's worksite. Upon his arrival at the site, Anderson was advised of the company's policy to require a warrant before inspection (Tr. 86-88). Anderson proceeded to obtain a warrant and returned to the site on July 23, whereupon he conducted an opening conference with Mike Corless, respondent's project safety director,

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[1] The record reflects that respondent corporation purchased Frank J. Rooney, Inc., during the period preceding the Secretary's inspection and is the direct successor corporation (Tr. 138, 139).

and representatives of the various subcontractors. In the company of Corless, Anderson then proceeded to make an inspection of the worksite during the course of which he took photographs, interviewed employees and observed what he considered to be violations of Occupational Safety and Health Administration (OSHA) standards. Subsequently, the Secretary issued citations, each of which has been contested by respondent, and these citations are now before the court for resolution.

Serious Citation No. 1

Item 1

This item charges respondent with a serious violation of 29 C.F.R. § 150(c)(1)(viii)[2] for permitting to remain on its worksite a portable fire extinguisher that was not fully charged. It is undisputed that Anderson observed this condition on August 1, 1991, in a location near fuel storage tanks while in the company of respondent's safety director (Tr. 20) and respondent admits the existence of the partially charged extinguisher in its brief (Resp. Brief, pg. 5).

Respondent argues that it had a policy which required its project safety director (Corless) to make regular inspections of its worksite which included a responsibility to check each fire extinguisher to verify that it was fully charged. Corless was unable to explain how the partially discharged extinguisher had been allowed to remain on site but testified that he had placed a fully charged extinguisher in this location during the week which preceded the Secretary's inspection (Tr. 21).

Respondent's sole defense to this charge is that it lacked knowledge of the violative condition. It is well established in Commission precedent, however, that constructive knowledge of a hazardous condition can be imputed to an employer where the circumstances

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[2] 29 C.F.R. § 1926.150(c)(1)(viii) provides:

> (c) *Portable firefighting equipment--(1) Fire extinguishers and small hose lines.* (i) A fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.
>
> > (viii) Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10A-1970.

reflect that knowledge could be acquired through the exercise of "reasonable diligence." *Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981). The facts of this case bring respondent within the ambit of this concept. Corless admitted that the extinguisher in question was equipped with a visible gauge reflecting the fact that it was not fully charged (Tr. 21). If, as respondent maintains, regular and frequent inspections were made, it is difficult to understand how this condition could have been overlooked. In any event, the condition was in plain view and could have been detected through the exercise of reasonable diligence.

Respondent makes one point which serves to support a conclusion that a reduction of the proposed penalty for this item is appropriate. Apparently, respondent provided an adequate number of fire extinguishers at this worksite. Anderson testified a fully charged extinguisher was available in the carpenter's shed which was only about 50 feet from the location of the defective extinguisher (Tr. 236). This circumstance tends to reduce the gravity of the situation and affords a basis for a reduction of the penalty proposed for this item.

Serious Citation No. 1

Item 2

This item charges respondent with utilizing electrical receptacles in a "wet location," which receptacles were not "designed" for such use in violation of 29 C.F.R. § 1926.405(j)(2)(ii)[3].

Anderson observed this condition at the pre-fab yard north of building 34 where a temporary power panel was utilized to provide electricity to the carpenter's shed. The panel was in an open area unprotected from weather conditions (*i.e.,* it lacked gaskets and outlet covers) and, therefore, created the potential for electric shock to respondent's carpenter using power from an extension cord plugged into the panel (*See* Exh. C-1; Tr. 113-115).

In its brief, respondent argues that the Secretary did not prove that the panel was in a "wet location" and, therefore, the standard does not apply. This argument is without

[3] 29 C.F.R. § 1926.405(j)(2)(ii) provides:

(ii) A receptacle installed in a wet or damp location shall be designed for the location.

merit. Respondent's project safety director admitted the panel was located "outdoors" and that "in Florida it rains, you know, every day" (Tr. 31). While the court has found no decisions which have considered the meaning of the term, it is reasonable to conclude that a "wet location" is one which is exposed to the elements to the extent that rain or moisture may penetrate the receptacle. Under such conditions, the standard requires appropriate measures (gaskets or covers) be taken to protect the receptacles from such an eventuality and prevent the possibility of electrical shock.[4] Since respondent did not comply with this requirement, this item will be affirmed.

Serious Citation No. 1

Item 3

During the course of his inspection, Anderson observed and photographed ladderway floor openings between the second floor and the attic in four buildings at the worksite which openings were not protected by guardrails or toeboards (Exhs. C-2, C-3; Tr. 117). He concluded that this condition constituted a violation of 29 C.F.R. § 1926.500(b)(2).[5]

As previously noted, respondent was responsible for installing fall protection devices in each building after the concrete had been poured and the forums were removed from the walls and floors. Max Sons, who was in charge of respondent's safety crew, testified that his crew initially installed plywood covers over these ladderway openings which remained in place until removed to provide access to employees who performed work in the attic. According to Sons, when the covers were removed, guardrails were installed around the perimeters of these openings (Tr. 398-403). Sons admitted, however, that subcontractors working in the attic would routinely remove the guardrails and his crew would reinstall them as soon as this situation was discovered (Tr. 404).

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[4] James Powers, called by respondent as an expert in electrical systems, testified that OSHA standards do not require "covers" but do require that "outside panels" must "be protected from the weather" (Tr. 419).

[5] 29 C.F.R. § 1926.500(b)(2) provides:

> (2) Ladderway floor openings or platforms shall be guarded by standard railings with standard toeboards on all exposed sides, except at entrance to opening, with the passage through the railing either provided with a swinging gate or so offset that a person cannot walk directly into the opening.

In contrast to Sons' testimony, two employees of subcontractors engaged at the project gave testimony which reflects that the unguarded ladderway openings were allowed to exist for prolonged periods. Zimmie Chavis, employed by Lapin Sheetmetal Company, worked at the project during the pertinent period (Tr. 253-255). He worked in the attic of each building installing ducts for the air-conditioning system (Tr. 256). "From the general conversation on the job" Chavis learned that the OSHA inspector had been initially refused entry to the jobsite "maybe a week or two" before the inspection occurred (Tr. 257). He testified, until it was learned that OSHA would inspect the site, the ladderway openings were not protected by either covers or guardrails (Tr. 259) and that he, together with numerous employees of other subcontractors and Centex-Rooney employees, regularly worked in these unprotected areas (Tr. 260). He also testified, when it became known that OSHA would inspect the worksite, guardrails were installed around the openings just prior to the Secretary's inspection (Tr. 259), but these guardrails were later removed when the "clean-up" began and he and other employees (including Centex-Rooney employees) worked in these areas after the guardrails were removed (Tr. 264-267). Don Bradshaw, an employee of McLoud Plumbing Company, also worked in the attic during the pertinent period and corroborated Chavis' account of the circumstances which occurred before, during and after the Secretary's inspection relative to the unguarded ladderway openings. He verified that no guarding was installed around the openings until it become known that OSHA planned an inspection and that numerous employees of both Centex-Rooney and the various subcontractors worked around these openings (Tr. 308-310). Both Chavis and Bradshaw were credible witnesses, and their testimony prevails over that of Sons. It is concluded that numerous employees of the various contractors engaged at the worksite (including employees of Centex-Rooney) were permitted to work around the unguarded ladderway openings for significant periods. This constitutes a serious violation of the cited standard since it presents the hazard of a 9-foot fall to a concrete floor which could result in serious injury or possible death (Tr. 119-120).

Serious Citation No. 1

Item 4

This item charges respondent with a violation of 29 C.F.R. § 1926.601(b)(8)[6] for transporting an employee in the bed of a pickup truck without providing a firmly secured seat for his protection.

During his inspection Anderson observed and photographed (Exh. C-4) an employee of respondent riding in the bed of a moving pickup truck. The employee was sitting on a five-gallon bucket turned upside down which was not secured to the bed of the truck (Tr. 122, 123). Anderson concluded this situation created a serious hazard since the employee was subject to being thrown from the truck in the event the truck hit a bump or made a sudden stop (Tr. 124). Anderson's testimony went unrebutted by respondent.

It further appears respondent was aware of this practice prior to the Secretary's inspection of the "Alligator Bayou" project. Minutes of a progress meeting conducted by respondent on July 31, 1991 (Exh. C-5), in connection with the "Magnolia Bend" project (a companion project under construction in the same vicinity) reflect respondent was aware that employees were riding in the beds of pickup trucks and did not condemn the practice.

This appears to be a clear cut violation of the cited standard, and this item will be affirmed.

Repeat Citation No. 2

Item 1

This item charges respondent with a violation of 29 C.F.R. § 1926.404(b)(1)(ii)[7] for its use of a defective ground fault circuit interrupter (GFCI) on an extension cord used to

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[6] 29 C.F.R. § 1926.601(b)(8) provides:

> (8) Vehicles used to transport employees shall have seats firmly secured and adequate for the number of employees to be carried.

[7] All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. Receptacles on a two-wire, single-phase portable or vehicle-mounted generator rated not more that 5kW, where the circuit conductors of the generator are insulated from the generator frame and all other grounded surfaces, need not be protected with ground-fault circuit interrupters.

provide electrical power to a carpenter shed in the pre-fab yard. While this item was originally characterized as "repeat," at the hearing the Secretary's counsel moved to reclassify the charge to "serious" and this motion was granted (Tr. 11-13).

It is undisputed in the record that Anderson, while in the company of Corless, discovered a nonfunctioning GFCI in a power panel which supplied electricity to a carpenter shed (Exh. C-1; Tr. 126-128). Anderson believed that the cord running from the panel provided power for operation of a radial saw in the shed. In actuality two cords ran from the panel. One cord carrying 220 volts ran from the panel and was directly wired into the saw. Anderson conceded no GFCI was required in this situation (Tr. 503, 504). The second cord carried 110 volts and was used to power a fan in the carpenter shop. While this second cord required a GFCI to prevent electrical shock, Anderson conceded that potential for serious injury was more remote than would be the case had the cord been used to power the saw as Anderson originally surmised (Tr. 505).

This court concludes that the Secretary has established a violation of the cited standard. However, the evidence reflects that respondent's policy was to utilize GFCI's throughout the worksite. Respondent's project safety director regularly checked these devices to insure they were functioning properly (Tr. 59, 60). The effectiveness of respondent's GFCI program is confirmed by the fact that Anderson tested approximately 100 GFCI's in the course of his inspection at this worksite and found only one that was inoperable (Tr. 251, 252). This circumstance will be considered in determining an appropriate penalty for this item.

Repeat Citation No. 2

Item 2

During his inspection, Anderson encountered floor openings in four buildings (Buildings 24, 25, 26 and 28) which were not covered or protected by standard guardrails (Exhs. C-6, C-7, C-8). These openings, referred to in the record as "pipe chase openings," were located on the second floor of each building just around the corner from the ladders that provided access to the attic (Tr. 134-135, 268-269). They measured several feet in length and were 16 inches wide (Tr. 134, 270, 458-459). In Anderson's view, employees

working in the vicinity of the openings were subject to a 10-foot fall and the possibility of serious injury should they fall or step into these openings. In fact, Chavis testified that an employee of the electrical subcontractor, prior to the Secretary's inspection, had actually fallen through one of these openings with resultant injuries (Tr. 270, 271). Based upon the foregoing, the Secretary charges respondent with a violation of 29 C.F.R. § 1926.500(b)(1).[8]

As previously noted, respondent, as the general contractor on the project, was responsible for providing fall protection with respect to all floor openings. Respondent maintains these pipe chase openings were initially covered after the concrete forms were removed from the structure but that these coverings had been removed by subcontractors in order to perform their work. Even though respondent claims the project was regularly inspected by its project safety director to discover and correct fall hazards, it asserts in its post-hearing brief that the pipe chase openings went undetected and respondent had no knowledge that the covers had been removed. This argument is without merit since this condition was in plain view, had existed for a significant period of time before the Secretary's inspection,[9] and could have been ascertained through the exercise of reasonable diligence. *Prestressed Systems, Inc., supra*.

Respondent also argues that its employees did not work in these areas and were, therefore, not exposed to the hazard. This assertion is subject to doubt based upon the testimony of two witnesses. Chavis testified he observed cement finishers employed by respondent working around these openings before the Secretary's inspection (Tr. 269-272). Bradshaw testified he saw "clean-up guys" who worked for "Rooney" working in the area immediately before the Secretary's inspection (Tr. 313).

Even if respondent has no employees of its own exposed to this hazard it would nevertheless be responsible for a violation of the cited standard under the circumstances of

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[8] 29 C.F.R. § 1926.500(b)(1) provides:

> (1) Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

[9] Chavis testified the condition was in existence well in advance of the Secretary's inspection (Tr. 268).

this case. It is undisputed respondent had the primary duty at this project to insure appropriate fall protection devices were installed and maintained. Even though respondent asserts these devices were removed by subcontractors and not replaced, this circumstance does not relieve respondent of its primary obligation as a controlling employer to provide and maintain the devices. Respondent was well aware of the fact that subcontractors routinely removed the covers when performing their work, and respondent was obligated to install and maintain appropriate guardrails around these openings once the covers had been removed whether or not its own employees were exposed. As the Commission stated in *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 1992 CCH OSHD ¶ ___ (No. 90-2873, 1992):

> ". . . [W]here . . . an employer is in control of an area, and responsible for its maintenance, to establish a violation the Secretary need only show that a hazardous condition existed and "that the area of the hazard was accessible to the employees of the cited employer *or those of other employers engaged in a common undertaking.*" *Underhill*, 513 F.2d at 1038 (Emphasis added). *Id.* at 2055

The Secretary characterizes this violation as "repeat" since respondent was previously cited in 1989 for a violation of 29 C.F.R. § 1926.500(b)(1) in connection with an inspection of its operations in Jensen Beach, Florida. This previous citation became a final order of the Commission on April 13, 1991 (Exh. C-14).

The Commission has held that a violation is repeated under section 17(a) of the Act if, at the time it is committed, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). Where the cited standard is specific in nature, as it is in this case, the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard. It is then incumbent upon the employer to rebut this showing by offering probative evidence which overcomes the Secretary's presumption of similarity. *Edward Joy Co.*, 15 BNA OSHC 2091, __ CCH OSHD ¶ __(No. 91-1710, 1993). In the case at bar, respondent failed to carry this burden and it is concluded that this item is properly characterized as repeated.

Repeat Citation No. 2

Item 3

During his inspection, Anderson observed numerous instances around the perimeters of the balconies on the second floor of the buildings under construction where open-sided floors were not guarded by standard railings or the existing railings were inadequate to prevent falls in contravention of 29 C.F.R. § 1926.500(d)(1).[10] The specifics are set forth in the citation as follows:

a) At Building 37, open sides of the attic floor had a plastic warning tape in lieu of standard railings, with a fall hazard of approximately twenty feet, on or about 08/02/91.

b) At Building 24, on the second floor, the wire rope used for guard railings was not equivalent to standard railings in that the top rope deflected to 22 inches above the floor with moderate pressure, with a fall hazard of approximately nine feet, on or about 07/25/91.

c) At Building 25, second floor, north side, the wire rope used, for guard railings was no equivalent to standard railings in that the top rope was only 36 inches above the floor, the intermediate rope was only 13 inches above the floor, posts were spaced more than eight feet apart, and the system deflected extensively with moderate pressure, on or about 07/25/91.

d) At Building 28, on the second floor, the wire rope used for guard railings was not equivalent to standard railings in that the posts were spaced 16 feet apart and the top rope deflected extensively with moderate pressure, with a fall hazard of approximately nine feet, on or about 07/25/91.

e) At Building 27, second floor, west side, a section of open-sided floor five feet, six inches wide had plastic tape utilized for a mid-rail, with a fall hazard of approximately nine feet, on or about 07/24/91.

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[10] 29 C.F.R. § 1926.500(d)(1) provides:

> (1) 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. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

The foregoing instances are detailed in Anderson's testimony (Tr. 143-168) and are verified on some occasions by photographs (Exhs. C-9 thru C-12). Suffice it to say that Anderson's testimony confirms respondent's practice of using warning tape in lieu of standard railings, allowing wire rope to sag to the point where it provided little, if any, fall protection, permitting slack in the rope which could be deflected with moderate pressure, and spacing the posts used to support the rope in excess of 8 feet in contravention of the standard.

In addition to Anderson's testimony, Chavis and Bradshaw testified these conditions were more flagrant before the Secretary's inspection. According to Chavis, during that period some buildings[11] had no fall protection around the perimeters of the balconies. In the other buildings where cable was used, this cable often sagged and this condition was readily apparent upon visual observation. All employees, including respondent's employees, regularly used these balconies as walkways to give access to work areas (Tr. 274-276, 278). Bradshaw corroborated Chavis' account of the situation confirming the absence of guardrails (Tr. 314-316), the sagging cables (Tr. 318, 319), and the exposure of employees (including those of respondent) to these conditions (Tr. 316, 317).

As was the case in the previous citation, respondent claims that the cables were removed or damaged by the subcontractors without respondent's knowledge. For the same reasons previously assigned, this argument is rejected. Respondent was well aware of the subcontractor's practices in this regard and failed to take effective steps to insure that the devices were replaced or repaired as required. These conditions were readily apparent with the exercise of reasonable diligence.

The Secretary characterizes this violation as repeated based upon the fact that respondent in 1989 had been previously cited under the same standard at a worksite in the Lake Buena Vista area (Exh. C-19), which citation had become a final order of the Review Commission. For the reasons assigned in my discussion above regarding the previous repeat citation, it is concluded that the Secretary properly characterized this citation as repeated.

[11] Chavis estimated about one-fourth of the buildings had no fall protection (Tr. 279).

Unpreventable Employee Misconduct Defense

In its posthearing brief, respondent raises the defense of "unpreventable employee misconduct" with regard to the charges relating to its failure to install and maintain fall protective devices around floor openings and perimeters. To establish this affirmative defense, an employer must show "that it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules when they were violated." *Pride Oil Well Service*, 15 BNA OSHC 1809 at 1816, 1992 CCH OSHD ¶ 29,807 at 40,585 (No. 87-692, 1992.)

Respondent maintains that it had a policy which required subcontractors to replace or repair any fall protection devices which were removed or damaged. The existence of this policy is not in serious dispute. Corless, together with other supervisors employed by respondent, described the instructions given to the subcontractors in this regard, and this testimony was not controverted by the Secretary's evidence. Exhibit R-10 is a copy of a notice posted on the worksite which clearly defines the policy and threatens any violators with severe consequences in the event of a breach. Based upon the record, this court concludes respondent had a work rule designed to prevent the violation which was adequately communicated to its employees and those of its subcontractors.

Respondent fails to meet its burden of proof, however, with respect to its apparent failure to discover the magnitude of this problem and to take effective measures to enforce its policy when the policy was violated. Thomas Canzano, respondent's safety director, visited the worksite on a regular basis (Tr. 337-338). He was aware of the fact that guardrails "were being taken down by several of the subcontractors" and that this was a persistent problem (Tr. 338-339). Canzano did not personally discipline any subcontractors for engaging in this practice but believed that Corless and Mike Ryan, respondent's assistant general superintendent, may have issued verbal reprimands to "some of the subcontractors" (Tr. 341). He further believed there may have been some written reprimands issued to subcontractors (*Id.*), but no documentation of written reprimands was offered into the record of this case. Mike Ryan acknowledged the existence of the missing or damaged fall protection devices but testified these conditions were quickly rectified by respondent's safety

crew (Tr. 442). He further testified that he had issued verbal warning to employees for "not tying off" while working in unprotected areas but had "never sent anybody home" for this infraction and did not keep a record of the verbal reprimands (Tr. 451). The absence of documentation in the record to establish that respondent took effective steps to enforce its policy constitutes a serious deficiency in respondent's burden of proof in this case.

Relying once again on the testimony of Chavis and Bradshaw, this court is persuaded that the incidences of missing and defective fall protection devices were pervasive at this project, especially during the period preceding the Secretary's inspection. It is further concluded that respondent did not take effective measures to enforce its announced policy, which required the replacement or repair of missing or damaged fall protection devices.

Penalties

The Secretary proposes penalties in this case under the provisions approved by Congress in the Budget Reconciliation Act of 1990 (29 U.S.C. § 666 effective November 5, 1990). Under this system, the Secretary can assess up to $7,000 for serious violations and a maximum of $70,000 for "repeated" infractions. The purpose of this new provision is to afford the Secretary authority to seek higher penalties which may serve as a deterrent to future violations and assist the Secretary in his overall enforcement responsibilities. The Review Commission, however, remains the final arbiter of appropriate penalties and must make a determination in this regard based upon the circumstances of each particular case. *Specialists of the South, Inc.*, 14 BNA OSHC 1910, 1990 CCH OSHD ¶ 29,140 (No. 89-2241, 1990).

As required by section 17(j) of the Act, the undersigned has considered the size, good faith and previous history of the respondent, together with the gravity of the violations, in deliberating appropriate penalties to be assessed in this case. Based upon these considerations, it is concluded the Secretary's proposals with respect to serious Citation No. 1, items 2, 3 and 4, and repeat Citation No. 2, item 2, are appropriate under the circumstances of this case. For reasons suggested in the court's discussion of serious Citation No. 1, item 1, and repeat Citation No. 2, item 1, it is concluded the penalties proposed for

these items should be reduced. It is further concluded that the penalty proposed for repeat Citation No. 2, item 3, is too harsh under the circumstances presented.

The foregoing will constitute findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

1. Serious Citation No. 1, item 1, is affirmed and a penalty of $500.00 is assessed;

2. Serious Citation No. 1, item 2, is affirmed and a penalty of $2,500.00 is assessed;

3. Serious Citation No. 1, item 3, is affirmed and a penalty of $3,500.00 is assessed;

4. Serious Citation No. 1, item 4, is affirmed and a penalty of $3,500.00 is assessed;

5. Repeat Citation No. 2, item 1, is recharacterized as serious with a penalty of $1,000.00 assessed;

6. Repeat Citation No. 2, item 2, is affirmed with a penalty of $10,000.00 assessed; and

7. Repeat Citation No. 2, item 3, is affirmed and a penalty of $15,000.00 assessed.

EDWIN G. SALYERS
Judge

Date: May 6, 1993