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SECRETARY OF LABOR, Complainant, v. DREAM SET FASHION, INC., Respondent.	OSHRC Docket No. 92-2962

DECISION

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

BY THE COMMISSION:

The sole issue in this case is whether Chief Administrative Law Judge Irving Sommer's assessment of $5,500 in penalties for a six-item serious citation is appropriate. The Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor, initially proposed the amount. Dream Set Fashion, Inc., a manufacturer of women's apparel in New York City, argues for a reduction, mainly because relatively few employees were exposed to the hazardous conditions involved in this case and because the company suffered a loss in fiscal year 1992, the year that the inspection took place. For the following reasons, based upon the evidence presented by the Secretary of Labor and the employer, we affirm the $5,500 assessment.

If the Secretary of Labor ("the Secretary") issues a citation under section 9(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), section 10(a) requires the Secretary to "notify the employer, by certified mail of the penalty, if any, proposed to be assessed under section 17." Once the employer notifies the Secretary of an intention to contest the citation or the proposed assessment of penalty, the Commission is required by section 10(c) to "issue an order, based on findings of fact, affirming, modifying

or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief." In assessing a penalty under the Act, the Commission must consider whether it is supported by factual findings that bear on the specific criteria of section 17(j) of the Act, 29 U.S.C. § 666(j). *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). The Commission may not assess a penalty that is not supported by appropriate evidence.[1] Section 17(j) requires the Commission to give "due consideration" to four criteria in assessing penalties, *i.e.*, the size of the employer's business, the gravity of the violation, any good faith shown by the employer, and the employer's prior history of violations. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161-62, 1993 CCH OSHD ¶ 30,042, p. 41,227 (No. 90-1620, 1993). These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). Gravity includes, the severity of any possible injury and the probability of an accident. *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2199, 1991-93 CCH OSHD ¶ 29,945, p. 40,939 (No. 90-329, 1993). Matters such as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result are also factored into any determination of gravity. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1991-93 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993).

The evidence as to Dream Set's size, good faith, and history of OSHA violations is straightforward in this case. At the time of the inspection, the company employed thirty-five

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[1]Commission judges occasionally omit from their decisions full discussion of the underpinnings of their penalty assessments. Illustratively, the judge here did not delineate which of his findings formed the basis for his penalty assessments; instead, he stated that the proposed penalties are consistent with the statutory criteria "[u]nder all the existing facts and circumstances." It is axiomatic that determination by judges of an appropriate penalty is a matter of discretion resulting from the application of the section 17(j) criteria to the relevant facts. *Angel Constr. Co.*, 1 BNA OSHC 1749, 1750, 1973-74 CCH OSHD ¶ 17,750 (No. 494, 1974). Absent a fully articulated rationale for a judge's assessments, however, it is difficult for the Commission to appropriately review the exercise of this discretion. We find, however, that the evidence of record here permits the Commission independently to make the findings necessary to assess penalties against the Respondent.

persons. At the hearing, the company's representative, asserted that the company suffered a loss of "close to sixty-thousand dollars" in fiscal year 1992 and that "[a]ny penalty assessed will jeopardize the company and the jobs of its workers."[2] As it had not previously been inspected by OSHA, the company had no prior history of OSHA violations. The company did not have a safety program, although the company's manager did testify that there had been no prior work-related injuries. He also claimed that, prior to this inspection, the company had always complied with state and local requirements, such as those of the fire department. The company's manager had never heard of OSHA until the compliance officer appeared for this inspection, despite the fact that he had been manager for ten years and the company had been in business for twelve years.

The evidence as to the gravity of the violations in this case varies with the individual facts of each violation. In Item 1, an "Exit" sign at a window giving access to a fire escape was not visible, because employees had hung a piece of fabric to block the glare of sunlight. This was contrary to orders given by the plant manager following a local fire department inspection. The compliance officer noted that other exits did exist, but his concern remained that in event of fire a delay in finding the window exit could expose some employees to respiratory and burn injuries. The Secretary proposed a penalty of $1,000, which the judge assessed.

Item 2 involved a high-velocity window fan located 4-5 feet above the floor that lacked a guard over its blades. In front was a wide steam (ironing) table, but on the wall were objects that employees might reach for, including the fan's on-off switch, located approximately 1 foot from the blades. The manager occasionally switched off the fan before changing a belt on another fan higher up the wall, and a maintenance employee had occa-

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[2]The copy of the corporate tax return which the manufacturer's representative showed to the judge is not in evidence. The judge did not place the document in evidence when the representative said, "Judge, I want to submit to you a copy of Dream Set's Corporate Tax Return for fiscal year ended September 30, 1992." The judge replied, "I see it[;] you have brought it to my attention." Given the *pro se* status of the representative, the judge should have considered his submission of the document as a request to place it in evidence. However, the judge's failure to place the document in evidence was essentially harmless error.

sion to use other objects hung on the wall. Contact with the fan's blades could result in severe lacerations to fingers or hands. For this item, the judge assessed $750.

In Item 3, a small (4 inches by 2-3 inches) portion of a high-revolution shaft on a steam condenser motor was unguarded. The unguarded portion was approximately 12-15 inches above the floor. Nearby were some movable carts or hampers. The compliance officer believed there was a risk of lacerations or fractures. The manager testified that, although one employee did enter the area to start the boiler, the boiler and all other equipment in the area were hot, so employees did not walk nearby. He also testified that employees were always separated from the unguarded shaft by a workhorse and a cart for paper boxes, which was never moved. For this item, the judge assessed $1,000.

Item 4a involved a missing guard on a metal pulley on a sewing machine motor below the sewing table. Although the manager testified that contact with the unguarded pulley during normal operations would be unlikely, a garment could get caught in the unguarded pulley. The compliance officer, who observed the sewing machine in use during the inspection, believed that the operator could contact the pulley because "the motor is mounted probably only approximately a foot behind the front of the table where the employee [sits], which puts the motor right over [the] knee." The operator could suffer sprained fingers or lacerated legs. The probability of an accident was low, in the compliance officer's opinion, because "employees . . . usually use their hands to operate the machine above the table." The penalty proposed and assessed for this item was $750.

Item 5 involved missing ground pins on the electrical plugs on three sewing machines. The manager had not inspected the machines' electrical cords for about six months prior to the OSHA inspection. The operators had not told him that any ground pins were broken off because the machines still operated and many of the machines in the factory only had two- prong plugs. But the compliance officer testified that an employee could suffer up to a moderate electric shock. "If the motor has a ground fault in it, the outside casing of the motor will be a shock hazard if you touch that," because "[y]ou become a ground to the ground." But the compliance officer rated the probability of an accident as low, for "there would have to be a ground fault for that hazard to hurt someone." The Secretary proposed and the judge assessed a penalty of $1,000 for this item.

Item 6 involved an open electrical panel box without dummy circuit breakers (plastic covers) over the unused openings in the box. The box was in a basement storage room mounted over a work table, approximately 5 feet from the floor. The manager, sometimes accompanied by an employee, occasionally brought boxes or hampers or garments down to the basement room. The compliance officer was concerned that, even though the openings were not large, a hanger might contact electrical parts and give a moderate electric shock. The Secretary proposed a penalty of $1,000, which the judge assessed.

Upon review of the entire record we conclude that the penalties which the judge assessed in this case are well supported by the evidentiary record.[3] Even considering the manufacturer's asserted operating loss in fiscal year 1992, we find that other factors discussed below are a sufficient basis for retaining the judge's assessment.[4] The gravity of the six items was low or medium/low considering the nature of the possible injuries; the covered exit sign, the missing ground pins, and the lack of dummy circuit breakers could all have presented risks of death or severe physical harm, and the other three violative conditions presented risks of lacerations ranging from relatively minor to severe. Moreover, as to each of the six items, there was a recurring exposure of one or more employees,

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[3]Chairman Weisberg observes that the Commission is affirming the judge's penalty assessments which are consistent with the penalties proposed by the Secretary. Hence, as an initial matter and apart from the Commission's own analysis of the evidence, he feels it is instructive to examine the Secretary's basis for the figures proposed. In this regard, the Chairman notes that the compliance officer used $7000 as a starting point for each violation (under the Omnibus Budget Reconciliation Act of 1990, Pub.L.No. 101-508, § 3101 (1990)) but arrived at a lesser figure based, in part, on each item's gravity. He rated the gravity of the six items in this case as low or medium/low, to which he assigned a figure of $1,500 or $2,000, respectively. He then set a percentage reduction for size (40%) and for prior history (10%). Chairman Weisberg notes additionally that the compliance officer's reduction of 40% for size was comparatively generous and may well have encompassed consideration of the company's financial condition.

[4]Commissioner Montoya notes that while the Commission provides a forum for affected parties to raise their concerns about OSHA citations, generally she is not amenable to a company's argument that financial circumstances make it unable to afford the minimum level of safety and health. *Cf. AFL-CIO v. Brennan*, 530 F.2d 109, 123 (3d Cir. 1975) (Congress has recognized and accepted the proposition that certain marginally efficient or productive employers could only abate by ceasing operation).

counting the manager. Credit is given because of the company's small size, based on its employment of only 35 persons. The company's lack of a history of prior violations also deserves credit. As for good faith, we find that no credit for it is warranted because of the lack of any safety program, regardless of the manager's efforts to comply with local fire standards and other local or state requirements. Accordingly, we affirm the judge in assessing penalties totalling $5,500.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: July 11, 1994

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-2962
DREAM SET FASHION, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on July 11, 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

July 11, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-2962

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR
Complainant,
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DREAM SET FASHION, INC.
Respondent.

OSHRC DOCKET
NO. 92-2962

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 September 16, 1993. The decision of the Judge will become a final order of the Commission on October 18, 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 October 6, 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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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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.

Date: September 16, 1993

Ray H. Darling, Jr.
Executive Secretary

ES.20

DOCKET NO. 92-2962

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Complainant,	:	
v.	:	Docket No. 92-2962
DREAM SET FASHION, INC.,	:	
Respondent.	:	

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New York, New York

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New York, New York

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (``the Act''), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Respondent is a corporation which was engaged in apparel manufacturing and related activities. On May 14, 1992, Dream Set Fashion's worksite at 202-204 Centre Street New York, New York was inspected by an OSHA compliance officer. Subsequently, on August 13, 1992, the company received two citations resulting from this inspection. Respondent by letter dated September 1, 1992, did not contest the citations themselves but contested only the penalties proposed for items 1, 2, 3, 4a, 5, and 6 of serious citation number 1, which totaled $5,500. A hearing was held on April 22, 1993, in New York, New York. Both parties were represented at the hearing. The Respondent filed a post-hearing brief. The Secretary did not file a post-hearing brief but relied upon the arguments and evidence presented at the hearing. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision.

DISCUSSION

Serious Citation 1, item 1

Alleged serious violation of 29 C.F.R. section 1910.37(q)(1)

The standard at 1910.37(q)(1) states:

> (q) Exit marking. (1) Exits shall be marked by a readily visible sign. Access to exits shall be marked by readily visible signs in all cases where the exit or way to reach it is not immediately visible to the occupants.

The Secretary alleges that the exit sign was not readily visible, as it was covered by fabric. At the hearing on April 22, 1993, the compliance officer, Peter Steinke, testified that he observed that one of the fire exits was a window exit to a fire escape, which had an exit sign above the window. However, this particular window and the sign above it were not readily

visible as they were covered over by a fabric. Dream Set Fashion's employees could have received burns, smoke inhalation or died as a result of the violation (transcript, p. 10-15). The compliance officer's testimony was clearly supported by photographic evidence (exhibit C-1). Michael Hong, Respondent's jobsite manager, testified that some employees had merely put the fabric over the window and the sign to block the sun from coming into the shop as the glare from the sun impeded the workers from performing their duties (transcript, p. 49-50).

The totality of the evidence concerning this citation item establishes a violation of the standard as cited. The Secretary proposed a penalty of $1,000 for this citation item. Having considered the statutory criteria, I conclude that the penalty proposed by the Secretary is appropriate.

Serious Citation 1, item 2

Alleged serious violation of 29 C.F.R. section 1910.212(a)(5)

The standard at 1910.212(a)(5) provides:

> (5) Exposure of blades. When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half inch.

The Secretary alleges that a 15 inch fan mounted in a window next to a steam table, within seven feet of the floor, was not guarded with a screen. At the hearing, the compliance officer testified that he noted a fan mounted in a window above a steam table where employees worked. The height of the fan was about four to five feet above the floor. The placement of the fan was such that an employee could be injured by reaching to hang something on the wall or reaching for tools in that area.

Dream Set Fashion's employees could have received lacerations as a result of the violation (transcript, p. 16-20). The compliance officer's testimony was supported by photographic evidence (exhibit C-2). Respondent's manager, Mr. Hong, countered that he was not aware that the fan was not guarded and did not perceive any danger to any of the employees because ``They don't go there. They don't walk into that area'' (transcript, p. 51-53).

The record concerning this citation item fully demonstrates a violation of the standard cited. The Secretary proposed a $750 penalty for this citation item. Under all the existing facts and circumstances herein, a penalty of $750 for said violation is consistent with the criteria set forth in section 17(j) of the Act.

Serious Citation 1, item 3

Alleged serious violation of 29 C.F.R. section 1910. 219(c)(2)(i)

The standard at 1910.219(c)(2)(i) states:

> (2) Guarding horizontal shafting. (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exclusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

The Secretary alleges that there was a rotating horizontal shaft on a motor near the boiler at the front of the shop, which was not guarded to prevent contact with Respondent's employees. At the hearing, the compliance officer testified that he observed an unguarded high-revolution shaft. If any of

Respondent's employees were standing next to the machine and the machine suddenly started, the employees could sustain lacerations from the machine, severe abrasions to their feet, or if their clothing or a piece of fabric that they were working on got caught in the machine they could receive an injury to an arm or leg (transcript, p. 20-25). The compliance officer's testimony was clearly supported by photographic evidence (exhibit C-3). Mr. Hong, Dream Set Fashion's manager, noted that his employees did not walk into that area and,in addition, there was a hamper in front of the rotating shaft to keep employees from going into that area (transcript, p. 53-55).

The preponderance of the credible evidence upholds a violation of the standard cited. The Secretary proposed a $1,000 penalty for this citation item. Having considered the statutory criteria, I assess a $1,000 penalty as proposed.

Serious Citation 1, item 4a

Alleged serious violation of 29 C.F.R. section 1910. 219(d)(1)

The standard at 1910.219(d)(1) provides:

> (d) Pulleys - (1) Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g. punch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

The Secretary alleges that a Juki button machine motor pulley, 18 inches above the floor, was not provided with a guard in accordance with the standard. At the hearing, the compliance officer testified that he noted an unguarded pulley on a sewing machine which could cause lacerations to the leg of the operator or an operator's fingers could get caught in the pinch- point between the belt and the pulley and get drawn into it (transcript, p. 25-29). The compliance officer's testimony was supported by photographic evidence (exhibit C-4). Mr. Hong, Dream Set Fashion's manager, countered that his employees could not be injured by this machine unless they did something which could be characterized as ``abnormal'' to their usual work practices (transcript, p. 55-60).

It is clearly established here that a violation of the standard has been proven. The Secretary proposed a $750 penalty for this citation item. Taking into consideration all relevant factors and the gravity of the offense, a penalty of $750 is assessed.

Serious Citation 1, item 5

Alleged serious violation of 29 C.F.R. section 1910.304(f)(4)

The standard at 1910.304(f)(4) states:

(4) Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

The Secretary alleges that the path to ground was not permanent and continuous due to a missing ground pin on cords for a Singer button machine, a Juki button hole machine, and a Juki merrow machine. Dream Set Fashion's employees could have received an electric shock as a result of the violation. At the

hearing, the compliance officer testified that he observed the three machines being operated without grounding pins by Respondent's employees (transcript, p. 29-33). The compliance officer's testimony was supported by photographic evidence (exhibit C-5). Respondent's manager, Mr. Hong, testified that he did not know that the three machines in question were being operated without grounding pins (transcript, p. 61-63).

The Secretary has established a violation of the standard by a preponderance of the evidence for this citation item. The Secretary proposed a $1,000 penalty for this citation item. A review of all the relevant factors, the hearing transcript, and the official case record reveals that the proposed penalty is appropriate.

Serious Citation 1, item 6

Alleged serious violation of 29 C.F.R. section 1910.305(b)(1)

The standard at 1910.305(b)(1) provides:

> (b) Cabinets, boxes, and fittings - (1) Conductors entering boxes, cabinets, or fittings. Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

The Secretary alleges that a panel box had dummy circuit breakers missing, exposing employees to uncovered live electrical parts over 50 volts. Respondent's employees could have received an electric shock as a result of the violation. At the hearing, the compliance officer testified that he had observed the panel box located in a store room in the basement

during his inspection. The panel box was located over a work table (transcript, p. 33-37). The compliance officer's testimony was clearly supported by photographic evidence (exhibit C-6). Dream Set Fashion's manager, Michael Hong, countered that he was the only person who had access to the basement area where the panel box was located, since the area was always kept locked. The only exception to this was when he would take a single employee down with him on occasion to help him carry some boxes (transcript, p. 64).

I find that the Respondent violated the standard cited for this citation item and that the violation was serious. The Secretary proposed a $1,000 penalty for this citation item. Under all the existing facts and circumstances, a penalty of $1,000 for the violation is consistent with the criteria set forth in section 17(j) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. section 1910.37(q)(1), is affirmed and a penalty of $1,000 is assessed.
2. Citation 1, item 2, alleging a serious violation of 29 C.F.R. section 1910.212(a)(5), is affirmed and a penalty of $750 is assessed.
3. Citation 1, item 3, alleging a serious violation of 29 C.F.R. section 1910.219(c)(2)(i), is affirmed and a penalty of $1,000 is assessed.
4. Citation 1, item 4a, alleging a serious violation of 29 C.F.R. section 1910.219(d)(1), is affirmed and a penalty of $750 is assessed.
5. Citation 1, item 5, alleging a serious violation of 29 C.F.R. section 1910.304(f)(4), is affirmed and a penalty of $1,000 is assessed.
6. Citation 1, item 6, alleging a serious violation of 29 C.F.R. section 1910.305(b)(1), is affirmed and a penalty of $1,000 is assessed.

IRVING SOMMER
Judge, OSHRC

DATED: SEP -9 1993
Washington, D.C.