UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-1396
FLINTCO, INC.,	:	
Respondent.	:	

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

Flintco, Inc. was the general contractor at a construction site in Norman, Oklahoma. When a compliance officer from the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") inspected the site, Flintco's employees had finished laying concrete on the front half of the second floor of the hospital addition under construction. The compliance officer observed that reinforcing steel rebar that protruded 12 inches above that floor was not guarded. This rebar, which had been installed by another contractor, was 4 to 8 inches from the wall of an elevator shaft, which Flintco had previously erected. Flintco had placed caps on most of the taller rebar in the area. To address the unguarded 12-inch high rebar, OSHA issued to Flintco a citation alleging a serious violation of 29 C.F.R. § 1926.701(b), which requires that "[a]ll protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement." OSHA proposed a penalty of $975.

Review Commission Administrative Law Judge Stanley M. Schwartz rejected Flintco's argument that there was no employee exposure to the rebar, and he found that Flintco had violated the standard. However, he characterized the violation as "nonserious," rather than serious, as OSHA had alleged, and he assessed a penalty of $50. At issue on review is

whether the judge erred in characterizing the violation as other-than-serious and, if so, what penalty is appropriate for the violation.[1]

I. *Seriousness*

Section 17(k) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. The judge correctly stated in his decision that "to establish a serious violation the Secretary must show there was a substantial likelihood of serious injury in the event of an accident," citing *Pack River Lumber Co.*, 2 BNA OSHC 1614, 1615, 1974-75 CCH OSHD ¶ 19,323, p. 23,097 (No. 1728, 1975). In other words, the Secretary need not establish that an accident is likely to occur in order to prove that the violation is serious. Rather, he must show that "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991); *see Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317, 1991 CCH OSHD ¶ 29,498, p. 39,804 (No. 89-2253, 1991); *Natkin & Co.*, 1 BNA OSHC 1204, 1205, 1971-73 CCH OSHD ¶ 15,679, pp. 20,967-68 (No. 401, 1973); *see also Bunge Corp. v. Secretary of Labor*, 638 F.2d 831, 834 (5th Cir. Unit A 1981); *California Stevedore and Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975).

Although the judge stated the proper test for analyzing seriousness, he did not apply it to the record in this case. Instead of discussing the testimony on whether a serious injury could result if an accident occurred, he focused on the evidence concerning the likelihood of an accident occurring. As the Secretary asserts, "the judge erroneously focused on the likelihood that a tripping accident could occur in the vicinity of the exposed vertical rebar rather than on the injuries that would likely result if a tripping employee should fall onto the rebar." Other factors that the judge considered in determining that the violation was "nonserious" were that the compliance officer acknowledged that (1) as Flintco's witnesses later testified, the wall of the elevator shaft could have prevented an employee from falling

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[1]We exercise our discretion to decide these issues based on the evidence of record, the parties' arguments before the judge, and the Secretary's petition for discretionary review.

onto the rebar, and (2) the probability of an accident was not great. The judge rejected the serious characterization by concluding that "[w]hile the Secretary has shown an employee could have fallen onto the rebar and that there was a hazard of impalement, he has not shown that the unguarded rebar represented a substantial likelihood of serious injury." He therefore characterized the violation as "nonserious."

We agree with the judge's finding in the quote above that the Secretary proved the possibility of an accident. However, we find that he improperly focused on the likelihood of an employee tripping, rather than on the evidence in the record concerning whether the injury would be serious in the event of an accident. The compliance officer testified that, if an employee were to fall onto the unguarded rebar, "substantial injury" could result, such as "impal[ing] your head on the rebar," "some serious lacerations," and the possibility of eye injury if the employee landed face first on the rebar. Based on this unrebutted testimony that, if an employee were to fall on the rebar at issue, serious injury would result, and the judge's finding that an employee could have fallen onto the rebar, we characterize the violation of section 1926.701(b) as serious.

II. *Penalty*

Section 17(j) of the Act, 29 U.S.C. § 666(j), directs the Commission, in determining what penalty to assess for a violation, to consider the gravity of the violation, the good faith of the employer, the size of the employer, and the employer's history of violations. Because the gravity of the offense is the only one of the four factors relevant to the violation under consideration in a case, it is usually the factor of greatest significance in penalty assessment. *Natkin & Co.*, 1 BNA OSHC at 1205 n. 3, 1971-73 CCH OSHD at p. 20,968 n. 3; *see Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, p. 41,011 (No. 87-922, 1993); *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1003, 1971-73 CCH OSHD ¶ 15,032, p. 20,044 (No. 4, 1972). Although not relevant to determining seriousness, the likelihood of an accident occurring *is* an appropriate factor that should be considered in evaluating the gravity of a violation. *Super Excavators*, 15 BNA OSHC at 1317, 1991 CCH OSHD at p. 39,804. We note, as the judge did, that the compliance officer testified that the

gravity of the violation was low because the probability of an employee falling onto the rebar was not great.

The compliance officer also noted that, in calculating the proposed penalty, OSHA had given Flintco a reduction for "good faith" in light of its safety programs. In addition, the record shows that Flintco immediately abated the condition by placing two-by-four boards over the unguarded rebar, as shown in the photograph in evidence. Concerning Flintco's size, it was stipulated that on the date of the inspection Flintco had a total of approximately 600 employees, including approximately 21 employees at the worksite at issue here. The Secretary did not introduce any evidence of prior violations. Based on the low gravity of the violation, which is the principal penalty assessment factor in this case, Flintco's good faith, and its relatively large size, we assess a penalty of $100 for the serious violation of section 1926.701(b).

It is so ordered.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 28, 1993

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NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 28, 1993. **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

Ray H. Darling, Jr.

September 28, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-1396

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
Administrative Law Judge
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OSHRC DOCKET
NO. 92-1396

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 17, 1993. The decision of the Judge will become a final order of the Commission on June 16, 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 7, 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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1120 20th St. N.W., Suite 980
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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

Ray H. Darling, Jr.

Date: May 17, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-1396

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SECRETARY OF LABOR,

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FLINTCO, INC.,

Respondent.

OSHRC DOCKET NO. 92-1396

APPEARANCES:

Ernest A. Burford, Esquire
Dallas, Texas
For the Complainant.

Mark Totten
Tulsa, Oklahoma
For the Respondent, *pro se*.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On March 9, 1992, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a hospital addition project in Norman, Oklahoma, in which Respondent Flintco was the general contractor. As a result of the inspection, Flintco was issued a citation alleging a serious violation of 29 C.F.R. § 1926.701(b). Flintco contested the citation, and a hearing was held on October 27, 1992.

Background

At the time of the inspection, Flintco employees had finished laying concrete on the front half of the second floor of the addition; Flintco had previously erected the elevator shaft located in that area, and another contractor, AIC Rebar, had installed rebar around the shaft. Flintco had capped most of the taller rebar, which was located at the corners of the shaft; however, the shorter rebar, which was about a foot high and located along the walls of the shaft, was not covered.[1]

Although no Flintco employees were working near the rebar when the inspection occurred, the record shows they had worked in that area to lay the concrete with a hose, spread it with a vibrator, remove the excess with a come-along and spray the concrete with sealer. Of these duties, the two resulting in the closest proximity to the rebar were laying concrete and spraying sealer; the employees performing these functions worked 5 to 6 feet and 3 to 5 feet, respectively, from the rebar. Employees could also have passed by the rebar to access the ladder on the east side of the elevator shaft, which was one of three ladders on that floor going to the ground level. Flintco placed boards over the 1-foot rebar after the inspection, and J-1, a photo taken shortly thereafter, shows the rebar, the elevator shaft, a concrete blanket used to cover the concrete, and a Flintco employee spraying sealer.

Discussion

The subject standard provides as follows:

> All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

The citation in this case was issued due to the unguarded condition of the 1-foot rebar along the elevator shaft walls at the time of the inspection. (Tr. 22). Flintco contends its employees were not exposed to the rebar, and that its unguarded condition was not hazardous in any case. Although I find that employees were, in fact, exposed to the unguarded rebar, it is concluded the violation was nonserious. My reasons follow.

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[1]The 1-foot rebar was 4 to 8 inches from the shaft walls.

In regard to employee exposure, Commission precedent has established a rule of access based on reasonable predictability rather than a rule requiring proof of actual exposure. Specifically, the Secretary's burden is to show that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1976 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). The record in this case shows employees worked 3 to 5 feet from the rebar, and that they could also have passed by the rebar in order to access the ladder on the east side of the elevator shaft. Based on the record, the Secretary has met his burden of demonstrating employee access to the cited hazard.

In regard to the classification of the violation, Commission precedent is well settled that to establish a serious violation the Secretary must show there was a substantial likelihood of serious injury in the event of an accident. *Pack River Lumber Co.*, 2 BNA OSHC 1614, 1615, 1974-75 CCH OSHD ¶ 19,323, p. 23,097 (No. 1728, 1975). The testimony of George McCown, the OSHA compliance officer who inspected the site, indicates his opinion the condition was hazardous was due in part to his belief employees had used the blanket in J-1 to cover the concrete in the area of the unguarded rebar. However, McCown admitted he could not recall if the blanket was there during the inspection, and Robert Martin and Dale Madison, Flintco's site superintendent and foreman, respectively, testified it was not and that it had not been used on the slab before the inspection. (Tr. 25-26; 31; 41-42; 51-52; 56-57; 71).

McCown also believed the condition was hazardous because employees could have tripped on the wet concrete. (Tr. 31). While the concrete would have been wet when employees were laying and spreading it and removing the excess, the record establishes that the employee nearest the rebar during these processes would have been the one laying the concrete from 5 to 6 feet away. Further, although the employee spraying the sealer worked 3 to 5 feet from the rebar, Madison testified this work was done when the concrete was dry. (Tr. 59). Finally, McCown's own testimony indicates employees would not have used the ladder on the side of the elevator shaft when the concrete was wet. (Tr. 28).

In addition to the foregoing, Martin and Madison testified the wall of the elevator shaft provided protection against the smaller rebar because a falling employee would hit the wall before the rebar. Martin also testified that in his 30 years experience he had never known of anyone being impaled on rebar situated like that at the site, and that Flintco covered the rebar because it wanted to cooperate with OSHA. McCown acknowledged the wall of the elevator shaft could have prevented a fall against the rebar, and testified he considered the gravity of the condition low because the probability of an accident was not great. (Tr. 26-27; 30; 33-34; 37-38; 51; 56; 61). While the Secretary has shown an employee could haven fallen onto the rebar and that there was a hazard of impalement, he has not shown that the unguarded rebar represented a substantial likelihood of serious injury. The citation is therefore affirmed as nonserious, and a penalty of $50.00 is assessed.

Conclusions of Law

1. Respondent, Flintco, Inc., is engaged in a business affecting commerce and has employees within the meaning of § 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On March 9, 1992, Respondent was in nonserious violation of 29 C.F.R. § 1926.701(b).

Order

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

1. Item 1 of serious citation number 1 is AFFIRMED as a nonserious violation, and a penalty of $50.00 is assessed.

Stanley M. Schwartz
Administrative Law Judge

Date: MAY 10 1993