UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
TRIANGLE ENGINEERING CORPORATION,
Respondent.

OSHRC DOCKET
NOS. 90-3417
91-0070

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 20, 1993. The decision of the Judge will become a final order of the Commission on November 19, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before November 9, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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Washington, D.C. 20210

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./jw

Date: October 20, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NOS. 90-3417 & 91-0070

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. TRIANGLE ENGINEERING CORPORATION, Respondent.	OSHRC Docket Numbers 90-3417 and 91-0070

Appearances:

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

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

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

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

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, Triangle Engineering Corporation ("Respondent") was issued three citations. Citations number 1 and 2 alleged seven serious and four other-than-serious

violations of the Act, respectively. Citation number 3 alleged one serious violation of the Act.[1] Penalties totalling $ 5760 were proposed.

Respondent timely contested all citations. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on April 6 and 7, 1992 in Hato Rey, Puerto Rico. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.[2]

Jurisdiction

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

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

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[1] The inspection took place on September 11 and 12, 1990. The first two citations were issued on October 2, 1990. A third citation, containing the last alleged serious violation (Item #8) was not issued until December 5, 1990. The citations, having been issued several months apart were contested separately and were assigned two different docket numbers. The cases were consolidated by order dated February 21, 1991. For ease of identification, the final alleged violation, which initially was item 8 of citation 1 issued on December 5, 1990, will be referred to as item 8.

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

[3] Title 29 U.S.C. § 652(5).

Background

At the time of the inspection construction of the prison complex had barely begun. A single one story concrete building ("Building B") was under construction. In addition to employees of Respondent, other workmen employed by the construction manager and those of two sub-contractors were on the site.

Complainant's sole witness, Radames Santisteban, was a highly experienced compliance officer ("CO") who conducted the two-day inspection (Tr. I, 5-8)[4]. The CO was accompanied by Respondent's project engineer, Rigoberto Rosado (Tr. I, 11). Mr. Rosado was Respondent's only witness.

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

The cited standards, which cover construction activities, are applicable. Each of the remaining contested alleged violations is discussed serially.[5]

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[4] References to the official record of the case are as follows: "Tr. I" refers to the transcript of proceedings of April 6, 1992. "Tr. II" refers to the transcript of proceedings of April 7, 1992. "C-" and "R-" refer to Complainant's exhibits and Respondent's exhibits, respectively. Post hearing briefs filed by the parties are referred to as "Sec. Brief" and "Resp. Brief."

[5] The Secretary, in his post-hearing brief, vacates serious Items 1 and 3 and the penalties proposed therefor. (Sec. Brief, 4). Serious Item 8 was vacated at the hearing (Tr. I, 67-8). Respondent withdrew its notice of contest as to Citation 2, Item 2, at the hearing (Tr. I, 73).

Serious Item 2
29 C.F.R. § 1926.21(b)(2)[6]

Item 2 alleged that Respondent failed to instruct "each employee in the recognition and avoidance of unsafe conditions...particular to this work environment." A penalty of $720 was proposed.

The compliance officer formed the opinion during the walk around that Respondent's safety program was not being implemented (Tr. I, 12). Aware that Respondent had a written safety program, the CO felt it "evident" that it was not being implemented because of the hazards present at the site (Tr. I, 13). He stated that he interviewed carpenters who told him that they had received no specific training as to fall hazards (Tr. I, 18). The CO opined that the once a month safety training conducted by Respondent was not geared to the specific hazards he encountered at the site (*Id.*). He testified that the failure to train employees as to the specific hazards at the site could result in falls leading to broken bones and other serious bodily harm (Tr. I, 19).

On cross examination, the CO conceded that the employee interviewed stated that he didn't see a fall hazard nearby (as had the CO). The CO also claimed that Rosado had said that monthly safety training was not enough, even though conceding that the cited standard sets no particular required frequency of training.

Engineer Rosado testified that monthly safety training was sufficient because most of the employees on the job had received prior training (Tr. II, 8). He switched to weekly training because the CO recommended it (*Id.*) He conceded, however, that some new employees arrived each week (*Id.*).

Complainant argues that Rosado's testimony makes it clear that at least some new employees arrived on the job and started working with virtually no training whatsoever as to the hazards at the site. Complainant correctly reasons that even if the monthly training

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[6] The cited standard, 29 CFR § 1926.21(b)(2), provides;

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

had adequate content, "it was not provided to all new employees prior to the beginning of their work."

Respondent argues that there is unrebutted testimony that Respondent had a safety program in place, that regular safety meetings were held with employees and that disciplinary action had been taken against violators of the rule. Respondent also relies on the fact that Rosado conducted regular and frequent inspections of the workplace.

Respondent's defense goes to Item 1 of the citation which was withdrawn by the Secretary at the hearing.[7] While Item 1 challenged the sufficiency of the safety program as a whole, Item 2 more specifically is aimed at the lack of training employees received regarding the specific hazards at this particular work site. An employer complies with section 1926.21(b)(2) when it instructs its employees about the hazards they may encounter on the job and the regulations applicable to those hazards. *Archer-Western Contracting., Ltd.*, 15 BNA OSHC 1013, 1020 (No. 87-1067, 1991), *petition for review filed*, No. 91-1311 (D.C. Cir. July 1, 1991); *H.H. Hall Construction Co.*, 10 BNA OSHC 1042, 1044 (No. 76-4765, 1981). Respondent's position that many of the employees had worked for Respondent before raises the reasonable inference that those employees might well have had training as to hazards usually found on construction sites. Respondent's concession that new employees were regularly hired and that they worked for some period of time (up to a month) before receiving any safety training demonstrates that at least as to those employees Respondent failed to comply with the requirements of the cited standard's requirements. As pointed out by the CO, the hazard of having employees working on a construction site without any safety training would make their exposure to hazardous conditions more likely. They would be less able to recognize dangerous situations or even what hazards to look for. The CO referred to one of the most obvious hazards on the site, the possibility of falls (Tr. I, 19), as an example of the danger of employees entering the environment existing on a construction project. It can be a dangerous place to be, especially without any training as to possible

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[7] There is undisputed testimony that Respondent had a safety program in place. The Secretary, however, withdrew that item of the citation which alleged that a safety program, in general, was absent. (Sec. Brief, p. 4).

hazards. Rosado's knowledge, as that of a supervisor, that newly hired employees worked for some time until receiving their first safety training is imputable to Respondent. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1966).

The Secretary alleges this to be a serious violation, within the meaning of § 17(k) of the Act. Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.*, 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3d Cir. 1980). It is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980). The Commission has held serious violations to have been demonstrated under circumstances where the hazard was a fall of ten to fifteen feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977). The hazards faced by untrained employees at a construction site could result in serious bodily harm. The violation is thus properly categorized as serious.

A penalty of $720 was proposed by the Secretary (Tr. I, 20). Under § § 17(b) and 17(j) of the Act, 29 U.S.C. § § 661 (b) & (i), a penalty of up to $1,000 may be assessed for each serious violation[8] upon consideration of the size of Respondent, the gravity of the violation, the good faith and the history of Respondent. In this case Respondent is a large employer, having over 100 employees. The gravity of the violation is speculative because while the lack of training can expose employees to significant hazards there is no record evidence as the number of new employees who worked without any training. The CO identified only two specific employees who were "exposed" to the lack of training.

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[8] Amendments to the Act contained in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (Nov. 5, 1990), which increased the penalties seven-fold, are not applicable here.

Respondent had no prior OSHA inspections (Tr. I, 17) and, even considering the CO's testimony (Tr. I, 21), there is no evidence that Respondent lacked good faith. Indeed, the evidence as to the extent of its safety program (See, n. 4, *Supra.*), is indicative of Respondent's positive attitude towards employee safety. Considering the above factors, especially the evidence that Respondent had a good training program but didn't require new employees to have initial training, I find that a penalty of $250 is appropriate.

Serious Item 4
29 C.F.R. § 1926.451(m)(6)[9]

In this item, the Secretary alleged that standard guardrails (including toeboards) had not been installed on bracket scaffolds. Specifically, it was alleged that on the 1st. level, south side, of building "B," a carpenters bracket scaffold had an intermediate but no top railing. The rail height was 21½" located on the scaffold which was 14' above adjacent ground. A penalty of $720 was proposed.

It is undisputed that Respondent's employees were working from the platform of a carpenters' bracket scaffold where there was no top rail. The highest rail in the scaffold in the area where the men were working was 22½" high (Tr. I, 32). The scaffold was 14' above the ground level. Access to approximately 30' of the scaffolding without a top rail was prevented by a 2" x 4" piece of wood (Tr. I, 101-03, EX. C-10, 11, 13 & 13). In his post-hearing brief, the Secretary relies on the undisputed existence of at least 10' of partially guarded scaffolding (Sec. Brief, p. 11) for proof of the violative condition. In addition, even though the CO did not see any employee actually working on an unguarded scaffold (Tr. I, 103), the Secretary points to testimony that employees could get to the unguarded area (Id.,

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[9] The standard, 29 CFR § 1926.451(m)(6) states,

> Guardrails made of lumber, not less than 2 x 4 inches....approximately 42 inches high....shall be installed at all open sides and ends on all scaffolds more that 10 feet above the ground or floor.

Tr. I, 150). Respondent argues (Resp. Brief, p. 5) that the Secretary failed to demonstrate employee exposure to the violative condition.

I find that the Secretary failed to show, by a preponderance of the evidence, that Respondent's employees were exposed to the hazard of the 40' section of scaffolding which lacked a guardrail.

The Secretary does not have to prove actual exposure to a hazard, but need show only that employees had access to an area of potential danger based on reasonable predictability. The question of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-egress, and their comfort activities." The question is whether, the employees, within reasonable predictability, were within the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263 (4th Cir. 1974), *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 14909 (No. 3042, 1976); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). In this case, the section of scaffolding lacking a top rail was about 40' in length. It is undisputed that access to about 30' of the improperly guarded scaffold was blocked by 2" x 4" lumber. There is no evidence at all that employees were or could reasonably be predicted to be exposed to the remaining 10' of unguarded scaffold. The Secretary presented no evidence that employee work activities or routes of travel would take employees on to the unguarded section of scaffolding. Testimony merely that employees "could" get to a zone of danger does not fulfill the Secretary's obligation to demonstrate exposure. This item is vacated.

Serious Item 5
1926.500(d)(1)

The standard cited requires that opensided floors be protected.[10]

The citation alleged that an area of an opensided floor, 14' feet above the adjacent level on both the east and west sides of Building B, 1st level, was not protected by standard railings. A penalty of $810 was proposed.

There is virtually no dispute that both the east and west sides of the open sided floor of the building were without standard guardrails for a length of some 40' at the time of the inspection. The CO testified that Respondent's representative explained that the railings, which had been in place, were removed to erect a platform. The platform extended almost the full width of the building, leaving a 4-foot wide area of floor between each outside edge of the platform and the edge of the floor on which it was built (Tr. I, 40-41, Ex. C-4, 5, 6, 7, 8 and 9). Complainant maintains that upon completion of the platform two days prior to the inspection, the railings at the edge of the floor were not replaced. The CO witnessed employees walking within 18" of the unguarded edge (Tr. I. 113).

Respondent's project manager disagreed with the CO's testimony as to the timing of the rail removal. He stated that the guardrail removal had been completed on the morning of the inspection (Tr. II, 9). While asserting that the forms could not have been built with the guardrails remaining in place, Respondent's project engineer conceded that at least one photograph showed two of Respondent's carpenters working on building a form, work which he agreed could have been done with the railing in place (Tr. II, 50-51, Ex. C-7). He even agreed that the carpenters shown in the photograph were in a hazardous location (*Id.*) Respondent, on the other hand, emphasizes that the rails had to be removed to get the platforms in place. It also notes that there was rebar (which might afford some fall protection) in the areas where the standard guardrails had been removed (Tr. I, 111, Ex. C-12 - 17).

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[10] The standard, 29 CFR § 1926.500(d)(1), states;

> 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.....

The Secretary made a *prima facie* case which is undisputed by Respondent. Respondent does, however, argue that the platforms could not have been built with the rails in place. Respondent relies on the defense which has become known as the "infeasibility defense." The defense is inapplicable to the facts of this case simply because the rails remained down even after the platforms were in place and, according to the Project Manager, work was being done which would not have been precluded had the rails been promptly replaced. Respondent failed to show that compliance with the standard's requirements (at least as to some employee work activities and exposure to the hazard) was "not practical or reasonable in the circumstances" as required by Commission precedent. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1966 (No. 82-0928, 1986). Thus, even if as argued by Respondent, the Secretary presented no evidence as to feasible alternative methods of abatement (Resp. Brief, p. 6) a violation has been shown.

The violation is properly categorized as serious. The consequences of a fall from a height of 14' may reasonably be expected to be serious injury or death. See, *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977).[11] As to penalty, the same size, history and good faith considerations are applicable. Employees worked in the zone of danger as well as travelled through it to gain access to a stairway (Tr. II, 29). Gravity was thus moderate. In sum, a penalty of $500 is appropriate.

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[11] The existence of a plywood ledge with a width of 12" to 14" just below the level of the open floor might mitigate the chances of a fall to the ground. It would not, however, reduce the likelihood of serious injury should there be such an occurrence.

Serious Item 6
1926.550(a)(9)

Claiming that two cranes were used on the site without barricading the accessible areas within the swing radius, the Secretary alleged two instances of violation of 20 C.F.R. § 1926.550(a).[12] A penalty of $720 was proposed.

The CO testified that there were two cranes on the site. Testimony as to the use of these cranes which was not particularly clear on direct examination (Tr. I, 55), was clarified on cross-examination (Tr. I, 112, 145-147). From a reading of the testimony as a whole, I find that one crane was moving back and forth transporting materials into a position where the other crane would lift the materials into place. The CO conceded that the "moving" crane would be impossible to barricade while it was moving. It would, he said, have to be barricaded once it was in a fixed position (Tr. I, 55). On this testimony, the alleged violation as to the "moving crane" is vacated.

The other crane at the site was in a fixed position while being used to lift forms to the first level. It is undisputed that there were no barricades in the area of the swing radius of the crane. In order to do this the crane, according to the Compliance Officer, "had to rotate to bring it (the load) to the right place where it was going to be located" (Tr. I, 147). Although Respondent argues, in essence, that the crane doing the lifting did not have a swing radius because it did not rotate (Resp. Brief, p. 7), the testimony of Mr. Rosado on which it relies was referring to the "moving" crane not rotating (Tr. II, 11). To the degree that Mr. Rosado's testimony might be read to suggest that the "stationary" crane was not operating at all, the suggestion is rejected because the Compliance Officer's testimony that the "stationary" crane was being used is direct and specific (*e.g.*, Tr. I, 113, 115). I credit the Compliance Officer's testimony.

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[12] The cited standard, 29 CFR § 1926.550(a)(9), provides;

> Accessible areas within the swing radius of the rear of the rotating superstructure of the crane....shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

Respondent argues however, that the Secretary failed to present evidence of employee exposure to the unbarricaded areas of the crane (Resp. Brief, 7). Despite several citations to the transcript in Complaint's brief (Sec. Brief, 7) the only evidence of employee exposure to the hazard which was created by the unbarricaded swing radius of the "stationary" crane appears to be the CO's statement that employees,

> were moving around doing regular work in the construction because they were close by the wall. And people were working inside and people were working outside the building doing several kinds of work.

(Tr. I. 113).[13] Such testimony is, indeed, uncertain. The element of employee exposure is not the only applicable test in this case though. The cited standard itself addresses "[a]ccessible areas within the swing radius of the rear of the rotating superstructure of the crane." The standard itself, which is a performance standard, in that it states a goal to be accomplished rather than the specific steps which must be taken, contains an employee exposure test which encompasses more than the " 'reasonable predictability' " of employee exposure to the zone of danger created by the violative condition established by ***Brennan v. Gilles & Cotting, Inc., supra***. The testimony that employees were in the general area engaged in their construction activities is sufficient to show that the unbarricaded area of the swing radius of the "stationary" crane were "accessible" to employees. That is sufficient to fulfil the Secretary's obligation to present a *prima facie* showing of employee exposure. Respondent has not gone forward with any evidence which might show or reasonably raise an inference that employees did not have access to the swing radius of the "stationary" crane. Accordingly, I find that the Secretary has proven the violation.

There is only conclusory testimony by the CO as to the probable consequences should an employee be injured in the manner contemplated by this standard (Tr. I. 54). Based on

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[13] The CO's statement describing the cranes as "once they were steady" is speculative as to the "moving" crane when read in the context of the rest of his testimony that only one crane rotated. Moreover, his testimony as to employees "exposed" when "placing wooden planks because the ground was soft" (Tr. I, 113) clearly refers only to the "moving" crane which never presented any hazard of a rotating superstructure. Employees placing wooden planks under the tracks of a moving crane may well have been exposed to other hazards. Those hazards are not, however, encompassed by the cited standard.

the obvious weight and size of a crane's rotating superstructure, the rather extensive experience of the CO, and the lack of any challenge or rebuttal, I find that such testimony is sufficient to categorize the violation as serious within the meaning of the Act. Considering all of the penalty assessment factors discussed previously and noting specifically that only one of the two alleged instances is being affirmed as well as the lack of any specific evidence as to the gravity of the violation, I find that a penalty of $100 is appropriate for this item.

Serious Item 7
29 C.F.R. § 1926.652(a)(1)

The standard at 29 C.F.R. § 1926.652(a)(1)[14] was alleged to have been violated by Respondent in that at the west side of Building D there was an excavation for a foundation which was 100 feet long, 7 feet wide, and 8 feet deep which was not sloped or otherwise protected. The Secretary proposed a penalty of $720.

The CO testified about an excavation which had been prepared for the pouring of the foundation of Building D. He described the trench as 100 feet long, 7 feet wide and 8 feet deep (Tr. I, 56). The walls, he said, were vertical and without protection against cave-ins (Tr. I, 56-6, 60). He took several photographs, one of which showed an employee in the trench area (Tr. I, 57, 59; Exs. C-15, C-16) but not in a zone of danger (Tr. I, 118). He described the soil as mostly sand and silt with little clay (Tr. I, 60). The CO grudgingly admitted that during the course of his inspection he had not seen any employees in the trench (Tr. I, 118-119). Through interviewing other employees, the CO concluded that men had been working in the trench both the day before the inspection and on the morning of the inspection (Tr. I, 58).

Respondent defends solely by arguing that the above evidence is insufficient to show employee exposure. Respondent's argument is rejected. Even if the employee photographed

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[14] The cited standard, 29 CFR § 1926.652(a)(1), provides;

> Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section....

is in a protected area and entered and left that area by means other than walking in the trench, the CO's testimony as to the statements of employees of Respondent that they had worked in the trench is, by itself, sufficient to show employee exposure. This is especially so where, as here, there has been no denial, rebuttal or contrary evidence. The violation is affirmed.

The dangers of trench collapse, even where one wall of the trench is actually the poured concrete wall which will become the foundation, are universally recognized to be serious. Considering the penalty factors, with special emphasis on the known dangers of trench collapse and the evidence of weakened conditions due to water, I find that a penalty of $500 is appropriate.

Non-Serious Item 1
29 C.F.R. § 1926.25(a)

The cited standard requires that;

> [d]uring the course of construction....form and scrap lumber with protruding nails and all other debris, shall be kept cleared from work areas, passageways and stairs, in and around buildings and other structures.

The citation described an area of the South side and Ground Level on the North side in which debris was not cleared of work areas.

The CO described collected debris, including lumber with protruding nails on the floors (Tr. I, 69-71; Ex. C-20). He claimed that upon pointing the situation out to Mr. Rosado he was told that it was about to be collected and, in his presence, Mr. Rosado "got some laborers to start picking up the debris and put it in a specific area...." (Tr. I, 69-70). Respondent argues that it is unrebutted that it has a policy of removing wood and debris on a regular basis, that the debris in this case was stacked in preparation for removal and that the CO's evidence generally that employees worked in the area was insufficient to show exposure.

The CO's testimony as to exposure is more specific. He not only stated that Respondent had employees working "in the neighborhood" but also indicated that employees had to transverse the area to move from one side of the building to the other (Tr. I, 72).

Moreover, I reject Respondent's characterization of the photograph, Ex. C-20, as showing "pieces of wood stacked" (Resp. Brief, 10). The violation is affirmed. The CO's testimony as to lacerations supports an other-than serious classification. The penalty is appropriate.

Non Serious Item 3
29 C.F.R. § 1926.152(e)(4)

The Secretary alleged that a tank of 420 gallons or more, used for the dispensing of flammables (diesel fuel) was not protected against collision as required by the cited standard.[15]

The Secretary's failure to brief this alleged violation and his proposed conclusion of law that the item is "VACATED pursuant to notification by the Secretary in its post-hearing memorandum" (Sec. Brief, 17) constitute abandonment of his alleged violation. The item is vacated.

Non-Serious Item 4
29 C.F.R. § 1926.500(b)(1)

Unguarded floor openings located in Building B on the 1st level, east side, were alleged to have been present and in violation of the cited standard.[16] The CO described a location where an opening in a floor which was partially covered with a 4' x 8' plywood sheet. The sheet failed to cover the entire opening leaving smaller openings on each side of the plywood. Those openings measured from 14" to 22" on a side (Tr. I, 78-79, Ex. C-19). The CO described the location of the openings as "right in the middle of the path" which was used by employees (Tr. I, 123). Respondent's argument that the hazardous condition

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[15] The standard, 29 CFR § 1926.152(e)(4), requires that;

> [t]he dispensing units [for flammable, or combustible liquids] shall be protected against collision damage.

[16] The standard, 29 CFR § 1926.500(b)(1), provides,

> Floor openings shall be guarded by a standard railing and toeboards or cover....

was in plain view and not hidden is simply no defense to the item. That employees could easily see the hazard might reduce the likelihood of an accident occurring, it does not vitiate the existence of an other than serious violation. The standard is unequivocal, it requires such holes to be covered or guarded. The item is affirmed as is the proposed penalty.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

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

3. The alleged violation of 29 C.F.R. 1926.20(b)(1), Serious Item 1, is VACATED by virtue of the Secretary's withdrawal of the alleged violation at the hearing.

4. The alleged violation of 29 C.F.R. § 1926.21(b)(2), Serious Item 2, is AFFIRMED as a serious violation of the Act. A penalty of $250 is assessed therefor.

5. The alleged violation of 29 C.F.R. § 1926.432(a)(1)(i), Serious Item 3, is VACATED by virtue of the Secretary's withdrawal of the allegation in his post-hearing brief.

6. The violation of 29 C.F.R. § 1926.451(m)(6), Serious Item 4, is VACATED.

7. The alleged violation of 29 C.F.R. § 1926.500(d)(1), Serious Item 5, is AFFIRMED as a serious violation of the Act. A penalty of $500 is assessed therefor.

8. The alleged violation of 29 C.F.R. § 1926.550(a)(9), Serious Item 6, is AFFIRMED as to one of two alleged instances, as a serious violation of the Act. A penalty of $100 is assessed therefor.

9. The alleged violation of 29 C.F.R. § 1926.652(a)(1), Serious Item 7, is AFFIRMED as a serious violation of the Act. A penalty of $500 is assessed therefor.

10. In Docket No. 91-0070, the alleged violation of 29 C.F.R. § 1926.405(e)(1), Serious Item 8, is vacated by virtue of the Secretary's withdrawal of the item at the hearing.

11. The alleged violation of 29 C.F.R. § 1926.25(a), other than serious item 1, is AFFIRMED as an other than serious violation of the Act. No penalty is assessed therefor.

12. The alleged violation of 29 C.F.R. § 1926.59(e)(1), other than serious item 2, is AFFIRMED as an other than serious violation of the Act, by virtue of Respondent's withdrawal of its notice of contest at the hearing.

13. The alleged violation of 29 C.F.R. § 1926.152(e)(4), other than serious item 3, is VACATED by virtue of the Secretary's withdrawal on the alleged violation in his post-hearing memorandum.

14. The alleged violation of 29 C.F.R. § 1926.500(b)(1), other than serious item 4, is AFFIRMED as an other than serious violation of the Act. No penalty is assessed therefor.

ORDER

The citations issued to Respondent, Triangle Engineering Corporation, on or about October 2, 1990 and December 5, 1990, are AFFIRMED, MODIFIED or VACATED and penalties are assessed as indicated in the above Conclusions of Law.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: OCT 20 1993
Washington, D.C.