UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
E & R ERECTORS, INC.
Respondent.

OSHRC DOCKET
NO. 93-1367

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 November 28, 1994. The decision of the Judge will become a final order of the Commission on December 28, 1994 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 December 19, 1994 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
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Petitioning parties shall also mail a copy to:

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Counsel for Regional Trial Litigation
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Room S4004
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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.

Date: November 28, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1367

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR,	:	
Complainant	:	
v.	:	Docket 93-1367
E & R ERECTORS, INC.,	:	
Respondent	:	

Appearances:

Richard T. Buchanan, Esq.
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

James W. Scott, Jr.
Assistant Director of Operations
Samuel Grossi & Sons, Inc.
Bensalem, Pennsylvania
For Respondent

BEFORE: ADMINSTRATIVE LAW JUDGE JOHN H FRYE, III

DECISION AND ORDER

INTRODUCTION

As a result of an accident at Respondent's work site in which an employee was severely injured in a fall, the Secretary conducted an inspection which resulted in the issuance of a single citation alleging one violation of 29 CFR § 1926.105(a) and a proposed penalty of $3000. Following Respondent's notice of contest, the Secretary filed a complaint with the Commission which Respondent answered. Trial took place before me in

Philadelphia on February 1, 1994. In this decision, I affirm the violation and assess a civil penalty of $1500.

FINDINGS OF FACT

1. Respondent, E & R Erectors, Inc., was the structural steel erector subcontractor of Samuel Grossi & Sons, Inc., at a construction site located at 1801 North 5th Street, Philadelphia, PA 19122. Tr. 7, 37-41. Samuel Grossi & Sons, Inc., was subcontracted to C.H. Schwertner & Son, Inc. GX 5 (Responses to Interrogatory Nos. 1, 2, 4.)

2. Respondent was engaged in the construction of a single story, meat storage warehouse at the site (Tr. 8, 30, 41, 47), where it employed approximately seven persons. Tr. 9, 10. Jerry Brown was Respondent's foreman and supervisor at the site. Tr. 9, 84.

3. Raymond Connors was employed by Respondent as a journeyman ironworker at the workplace on February 24, 1993, and for approximately one week prior thereto. Tr. 7, 9. In the course of his employment at the workplace, Mr. Connors was required to perform tasks on the skeletal steel roof structure of the warehouse, including laying decking. Tr. 8-9. Other individuals employed by Respondent at the workplace, including Phillip Gehringer, were required to perform tasks on the skeletal steel roof structure of the warehouse. Tr. 10, 83-84.

4. Mr. Connors, Mr. Gehringer, and at least two other employees of Respondent, including Respondent's supervisor foreman, laid decking on the skeletal steel

roof structure at locations where the height from the roof to the ground was approximately 30 feet. These employees were not using safety belts at the time. Tr. 16, 27-30, 31-32, 43, 55, 92. Respondent did not provide and none of Respondent's employees used safety belts while working on the skeletal steel roof structure at the site. Tr. 10, 11, 38-39, 58, 84.

5. On February 24, 1993, Mr. Connors fell from the skeletal steel roof structure to the ground while laying decking, and suffered serious injuries. Tr. 13-16, 17-20.

6. There was no safety net in use at the site until after Mr. Connors' accident. Tr. 11, 84, 87.

7. From March 3 through 8, 1993, Robert J. McDonough, a Compliance Officer with the Occupational Safety and Health Administration, conducted an inspection of the workplace. Tr. 37-38.

8. As a result of the inspection, Respondent was issued one serious Citation alleging a violation of 29 C.F.R. § 1926.105(a) together with Notice of a Proposed Penalty totalling $3,000.00 pursuant to Sections 9 and 10 of Occupational Safety and Health Act of 1970, as amended (the Act), 29 U.S.C. §§ 658 and 659. GX 4; Tr. 48.

9. The $3,000.00 penalty was calculated by taking into consideration the probability and severity of injury, and Respondent's size, good faith, and prior history of OSHA violations. Tr. 50-51, 61, 65-66, 69, 73, 76, 78, 79.

DISCUSSION

A. The Alleged Violation

To establish a violation of a standard or regulation promulgated under the Act, the Secretary must show that "(1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) its employees were exposed or had access to the violative conditions; and (4) the employer had actual or constructive knowledge of the violation." *Sal Masonry Contractors, Inc.*, 15 BNA OSHC 1609, 1610 (No. 87-2007, 1992). *See also Trumid Construction Co., Inc.*, 14 BNA OSHC 1784, 1788 (No. 86-1139, 1990).

The standard in question, 29 C.F.R. § 1926.105(a), states:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

In its brief, Respondent contests only that part of the Secretary's *prima facie* case which concerns the height of the steel from which Mr. Connors fell.[1] Respondent points out that the burden of proof falls squarely on the Secretary to show that E & R Erectors violated 29 C.F.R. § 1926.105(a) by failing to provide appropriate fall protection where employees were exposed to a fall hazard in excess of 25 feet. Respondent has not offered any direct evidence of the height of the steel, but rather asserts that the Secretary failed to introduce reliable evidence that the height exceeded 25 feet.

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[1]Respondent set forth two affirmative defenses in its Answer. The first affirmative defense stated that "the use of safety belts was impractical and the use of nets was infeasible." The second that "the use of safety belts was practical and [they] were in use for a substantial portion of the workday," precluding the requirement of safety nets. Respondent did not pursue either defense in its brief, thus abandoning them. In any event, the Secretary correctly points out in his brief (pp. 10-12) that they are meritless.

Respondent notes that the Secretary did not offer any evidence of actual measurements of the height of the steel, but instead relied on a representation made to Mr. McDonough by Mr. Gehringer. Respondent attacks the Secretary's reliance on Mr. Gehringer's representation. First, as reflected in the above findings, Mr. Gehringer obtained this figure from a plan in the possession of the general contractor, C.H. Schwertner, not E & R Erectors, and Mr. McDonough did not personally inspect the plan.[2] Respondent argues that, as a consequence, he cannot identify the plan as one which was approved and cannot be sure that height was taken of the section of the building where the accident took place.

Second, Respondent points out that the plan gave the height of the building as 30 feet, two inches, from the top of steel to the finished floor. At the time of the accident, however, there was no finished floor in place, so the actual fall distance could have been a greater or lesser distance.

Respondent also points out that Mr. Gehringer stated that neither he nor anyone on the job thought the building was over 25 feet high, and consequently no one believed that there was any need for fall protection. Gehringer also stated that, because E & R Erectors

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[2]On cross-examination, Mr. McDonough acknowledged that there was some question concerning the actual height of the building, and he conceded that it was ultimately determined by others who looked at a plan:

Q All right. Let me rephrase that. You verified it by looking at a plan, is that what you said?

A I verified it by the verbal verification from Corky [Philip Gehringer] of E & R and also from the superintendent of Schwertner from the prints.

Q You said you discussed the height of the building with Corky, correct?

A Correct.

Q When you asked Corky how high the building was, what did he -- did he tell you right away or did he go --

A No it was not known right away. What we did is, I believe, they went back to the trailer and they went through the prints, him and Schwertner and they came up with 30 - 2. Tr. 55.

was undergoing a slow period, most of the men on the site were foremen and were very experienced as ironworkers.[3] Tr. 91-92. Respondent argues that, given the extensive experience of the men on the site and their belief that the building was less than 25 feet high, evidence that this belief was not only mistaken, but mistaken by more than five feet, should be viewed with some skepticism.

In contrast to Mr. Gehringer's testimony that no one on the site believed that the building was over 25 feet high, Mr. Connors testified that he learned that the height of the building was 30 feet, two inches, prior to his accident by looking at a print that the foreman, Jerry Brown, was using. Tr. 27. Respondent maintains that this testimony should also be viewed with some skepticism, however, pointing out that while Mr. Connors seems to remember quite clearly the height of the top of steel for the section of the building from which he fell, he was far less clear about the height of the other half of the building, and could not say for sure whether the other half of the building was higher or lower than the section from which he fell. Tr. 27. Mr. Connors gave no explanation of why he alone chose to ascertain the height of the building, why he chose to determine the height only at the part of the building where he subsequently fell, and why he subsequently chose not to tell anyone else on the site despite his admitted knowledge of the OSHA fall protection standards of 29 C.F.R. § 1926.105(a).[4]

Respondent's position may be summed up as follows:

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[3]Mr. Gehringer testified that he had 28 years experience.

[4]Respondent also argues that the Secretary made a point of stressing that Mr. Connors, despite prior employment as a foreman by E & R, had no supervisory responsibilities on this job. Presumably, Respondent does not wish Mr. Connors' knowledge attributed to it. However, Respondent's responsibility for erecting the steel framework of the building clearly put it on notice of the height of the steel.

> Mr. McDonough could have very easily resolved the issue by physically measuring the height of the building at the point where Mr. Connors fell, but he chose not to. As an imperfect alternative (since a plan would only show the height from the finished floor), he could have looked at the plan himself to insure that he was looking at an approved drawing at the proper part of the building, but he chose not to. Instead he chose to rely solely on the uncorroborated representation of Mr. Gehringer. While such representations are certainly admissible as evidence, they should not be accorded the same level of credibility by the factfinder that would be accorded a direct measurement or a personal inspection of the plan by Mr. McDonough.
>
> The Secretary has therefore not met his burden of proof in establishing that ironworkers on the job were exposed to falls of more than 25 feet, and is consequently unable to prove a violation of 29 C.F.R. § 1926.105(a).

Respondent's brief, p. 23.

Respondent's position is essentially correct. However, Respondent overlooks the fact that Mr. Gehringer was acting as Respondent's representative at the opening conference when Mr. McDonough enquired about the height from which Mr. Connors fell. Tr. 41. As such, Mr. McDonough was entitled to rely on his representations regarding the height of the steel. Moreover, those representations were corroborated by Mr. Connors, who, whatever his reason for checking the height prior to his fall, had a powerful reason to remember it afterwards. While clearly it would have been preferable if the Compliance Officer had taken steps to pin down the height of the steel more definitively, Respondent has advanced insufficient reasons to discount the testimony introduced on this point. Particularly in view of Respondent's failure to demonstrate by direct, contradictory evidence that its representative, Mr. Gehringer, was mistaken in his representation,[5] I find that the Secretary has introduced substantial evidence that the height from which Mr. Connors fell exceeded

[5]Clearly, Respondent would have possessed drawings showing the height.

25 feet. *Astra Pharmaceutical Products, Inc. v. OSHRC & Donovan*, 681 F.2d 69, 10 BNA OSHC 1697 (1st Cir. 1982); *Secretary v. CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2198 (Rev. Com. 1993).

Respondent failed to provide any form of fall protection to employees working on the structure at heights in excess of 25 feet above the ground.[6] Mr. Connors, Mr. Gehringer, Gary Moore, and foreman Jerry Brown all worked on the roof without any fall protection. There were no safety nets in use at the workplace until after Mr. Connors' accident. In addition, none of Respondent's employees who were required to work on the roof structure wore any fall protection device, none was told to use a safety belt while working on the roof, and Respondent provided no safety belts at the workplace to these employees. Mr. Connors and Mr. Gehringer testified, unrebutted, that there was no fall protection in use at the site prior to Mr. Connors' accident. Mr. McDonough also testified that he observed no fall protection in use when he first arrived at the site on March 3, 1993. He also stated that Mr. Gehringer checked the gang boxes during the course of the inspection and found no safety

[6]Respondent's supervisor foreman at the workplace, Jerry Brown, worked on the roof structure at a height in excess of 25 feet without any fall protection. Tr. 16. He therefore had first-hand knowledge of the condition constituting the violation and, if he did not have actual knowledge of the height, the exercise of reasonable diligence would have revealed it to him. Under these circumstances, Respondent must be deemed to have had knowledge of the condition. *See MCC of Florida, Inc.*, 1981 CCH OSHD ¶ 25,420 at 31,682 (No. 15757, 1981) (employer had knowledge where unapproved gasoline container, when foremen were in area, was detectable through reasonable diligence); *Chapman Construction Co., Inc.*, 9 BNA OSHC 1175, 1176-77 (No. 76-2677, 1980) (employer had knowledge where ungrounded circular saw could have been discovered with exercise of reasonable diligence by employer); *Pecosteel-Arizona*, 2 BNA OSHC 1506 (No. 1930, 1975) (foreman's knowledge must be imputed to his employer); *Skyline Roofing & Sheet Metal, Inc.*, 13 BNA OSHC 1297 (ALJ, Nos. 85-339 and 85-518, 1987) (employer had knowledge where ground pin missing on extension cord was obviously defective).

belts. Respondent proffered no evidence at the hearing that any fall protection was provided or used prior to Mr. Gehringer's erecting safety nets.

> In cases where an employer has used none of the fall protection measures listed in section .105(a) and is cited for failure to provide safety nets, the Secretary will establish a prima facie case upon showing that the employees were exposed to a fall in excess of twenty-five feet and that none of the protective measures was used.

Century Steel Erectors, Inc. v. Dole, 888 F.2d 1399, 1402 (D.C. Cir. 1989), citing Brock v. L.R. Willson & Sons, Inc., 773 F.2d 1377, 1383 (D.C. Cir. 1985). The Secretary has established a violation of § 1926.105(a).

B. The Proposed Penalty

Section 17(j) of the Act states:

> The Commission shall have authority to assess all civil penalties provided in this section, 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). Mr. McDonough explained how he calculated the $3,000.00 proposed penalty. He testified that the high probability -- "it happened, somebody fell" -- and high severity -- possible "broken bones, lacerations, internal injuries and death" -- resulted in a $5,000.00 gravity-based penalty. Tr. 50, 61. He further explained that no adjustments were made for history, because Respondent had been previously cited for a violation of the Act, (Tr. 51) and for good faith, because only adjustments for size and history are permitted for high gravity serious violations. Tr. 73, 76. The Secretary argues that this is sound reasoning: Respondent permitted a dangerous condition, open and obvious, to exist for at least one

week at its work site with the result that a worker was severely injured. This conduct does not reflect good faith.

Respondent challenges the Secretary's penalty recommendation. It points out that under Chapter VI B.6 of the Field Operations Manual, the severity assessment is made by determining "the type of injury or illness which could reasonably be expected to result from an employee's exposure to the safety or health hazard." Respondent argues that in the instant case, the appropriate choices appear to be between high and medium severity. It points out that under Chapter VI B.6.a, high severity includes "Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illness," and under B.6.b, medium severity includes "Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability." Respondent argues that because Mr. Connors survived his fall, the distinction between high and medium severity hinges upon whether his disabilities are permanent.

Respondent misapplies the FOM. The question of whether a violation should be deemed to be one of high severity does not depend on the outcome of an accident, but rather on whether a serious injury is likely to result if an accident occurs. An accident is not a prerequisite to the finding of a violation. *Secretary v. Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317 (Rev. Com. 1991). Thus the nature and extent of Mr. Connors' injuries, while relevant to the question of gravity, are not controlling.[7] Mr. McDonough's conclusion that a fall of more than 25 feet could result in death or permanent disability is consistent

[7]In any event, Mr. Connors' description of his injuries and treatment (Tr. 17-20) is clearly consistent with the conclusion that he is permanently disabled.

with both OSHA's and the Commission's assessment of similar hazards. I find that this is a high gravity violation.[8]

Respondent also argues that Mr. McDonough did not afford it a proper credit for size. Under Chapter VI B.10.e(1) of the FOM, the size of an employer's business is to be "measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months." Mr. McDonough, relying on information furnished by Respondent's vice president, Eugene Grossi, Sr., that Respondent had 80 employees (Tr. 50), accorded Respondent a 40% reduction in penalty. Respondent introduced evidence that the maximum number of employees it had was 19. On that basis, it argues that it is entitled to a 60% reduction.

The evidence which Respondent introduced consists of its Weekly Payroll Summaries for the twelve months preceding the date of the accident. On direct examination, the controller for E & R Erectors, Inc., Edward J. Scheetz, Jr., testified that these weekly reports were the documents that he used to prepare the weekly payroll. As such, they bore the names of every employee of E & R Erectors during a particular week. These documents showed that the greatest number of persons employed by E & R Erectors, Inc. at any one time during the twelve months preceding the date of the accident was nineteen. Tr. 99-101.

While the Secretary points out that the payroll summaries are inconsistent with the oral responses of Mr. Grossi and, to some extent, with the responses of Mr. Scheetz on cross

[8]On the assumption that it would prevail on this point, Respondent also argues that, because the violation is not properly categorized as high severity, it is entitled to a 25% credit for good faith. This argument is made moot by the this finding.

examination, he has not demonstrated that they are unreliable.[9] Because the payroll summaries are records kept in the ordinary course of business, I find that they accurately reflect the number of Respondent's employees for the period preceding Mr. Connors' fall.

The Secretary points out that the most likely explanation for Mr. Grossi's higher figures is that Mr. Grossi considers E & R Erectors, Inc. to be part and parcel of Samuel Grossi & Sons, Inc., and points out that this is borne out by the following evidence. Mr. Grossi and his brother, Robert, are the exclusive stockholders of both companies. Although Mr. Grossi's son, Eugene, Jr., is not technically employed by Respondent (Tr. 110), he is an engineer for Samuel Grossi & Sons, Inc. (Tr. 108), and met with Mr. McDonough on Respondent's behalf, with his father, during the closing conference. Tr. 42; RX 1 (Form OSHA 1-A, block 8). Respondent's representative at the hearing, James Scott, is the Assistant Director of Operations for Samuel Grossi & Sons, Inc. Tr. 3. As stated previously, Mr. Scheetz is the controller for both companies and Kim Michaud performs clerical work for both. Correspondence and filings on behalf of Respondent were sent under Samuel Grossi & Sons, Inc.'s letterhead.

The Secretary argues that the Commission has held that it is proper, under certain circumstances, to consider the assets of the parent of a wholly-owned subsidiary in assessing

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[9]The Secretary also urges that the accuracy of Mr. Scheetz's testimony is further undercut by the omission from payroll summaries of several individuals who, although they may not have been compensated by E & R Erectors, Inc. for their services, performed work for Respondent at the Grossis' direction. In the Secretary's view, they should be considered employees. They are: Robert and Eugene Grossi, the sole stockholders and president and vice president, respectively, of Respondent (Tr. 106); Mr. Scheetz himself (Tr. 111); and Kim Michaud (Tr. 107). However, even if they are included, their numbers would not place Respondent in the category of 26 - 100 employees.

the subsidiary's size for purposes of determining financial eligibility under the Equal Access to Justice Act, 5 U.S.C. § 504. *See Nitro Electric Co.*, 16 BNA OSHC 1596 (No. 91-3090, 1994). The Secretary urges that the same logic should apply here.

In *Nitro*, the Commission interpreted Congress' intent in enacting the EAJA to be to benefit small concerns which lacked access to sufficient funds to mount a defense to charges brought by the government. Because the respondent's parent corporation in that case had the necessary resources to mount a defense (which it made available to the respondent), the Commission found that an award under the EAJA would not effectuate the intent of the EAJA.

Here, the Secretary has not made a sufficient showing that it would effectuate the intent of Congress to interpret the definition of "employer" in § 3(5) of the Act so as to ignore Respondent's corporate status and compute the penalty based on the fact that Respondent's stockholders also own another business entity. The fact that at the owners' direction, certain employees of the other entity perform services for Respondent is not unusual and, standing alone, does not dictate such a result. For instance, it is entirely possible that the Respondent may reimburse the other entity for these services.

Relying on Chapter VI B.10.e(3) of the FOM, Respondent argues that it should receive a reduction of 10 percent because it has not been cited by OSHA for any serious, willful, or repeated violations in the past three years. It points out that, unlike the information concerning an employer's size, information concerning a past history of OSHA citations is within the possession of the Secretary, and that, as a result, the burden of proof must fall to the Secretary to show that the employer is not entitled to a reduction for history.

The entirety of evidence presented by the Secretary on the issue of OSHA history consisted of Mr. McDonough's equivocal response to a question on direct:

> Q Okay. Did you give them any reduction for history?
> A Ah, I believe not because there was previous OSHA citations issued.

Tr. 51. Mr. McDonough was equally vague on cross-examination. See Tr. 73.

In addition, Respondent points out that there is no evidence concerning the nature of any past violations. The FOM precludes the 10% reduction for those employers who have been cited within the past three years for serious, willful, or repeated violations. Mr. McDonough's vague allusions to past citations contain no indication whether any of those alleged citations were for serious, willful, or repeated violations.

Respondent maintains that its inability to obtain its past history with OSHA through discovery[10] and the Secretary's failure to present any evidence indicating a prior history of serious, willful, or repeated violations within the past three years requires that it be accorded the 10% reduction for history mandated by the FOM. Respondent is correct. *Secretary v.Mosser Construction Co.*, 15 BNA OSHC 1408, 1416 (Rev. Com. 1991).

Based on the foregoing, I conclude that Respondent is entitled to a 70% reduction of a $5000 gravity based penalty and assess a total penalty of $1500.

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[10]In response to its request, the Secretary sent the OSHA Philadelphia Area Office Inspection History for E & R Erectors covering the dates from January 1, 1972 through March 11, 1988.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). [Answer, ¶ V.]

2. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c). [Answer, ¶ I.]

3. 29 C.F.R. § 1926.105(a) applies to the conditions relating to the laying of decking by Respondent's employees on the skeletal steel roof structure at the workplace.

4. Respondent violated 29 C.F.R. § 1926.105(a) by failing to provide any form of fall protection for employees working on the skeletal steel roof structure at the workplace, at heights in excess of 25 feet, until after Ray Connors' accident on February 24, 1993. A penalty of $1500 is appropriate.

ORDER

Citation 1, Item 1, is affirmed as a serious violation of the Act. A total penalty of $1500.00 is assessed.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated: [illegible]
Washington, D.C.

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SECRETARY OF LABOR
Complainant,
v.
HUMBLE CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 93-2489

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 25, 1994. The decision of the Judge will become a final order of the Commission on November 25, 1994 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 14, 1994 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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr./SHA

Date: October 25, 1994

Ray H. Darling, Jr.
Executive Secretary

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-2489
HUMBLE CONSTRUCTION COMPANY,	:	
Respondent.	:	

Appearances:

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Office of the Solicitor
U.S. Department of Labor
For Complainant

Roger L. Sabo, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

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 ("CO"), Humble Construction Company ("Respondent") was issued one citation alleging two serious violations of the Act and one citation alleging one other-than-serious violation of the Act. Penalties of $1,250 for each of the alleged serious violations were proposed and no penalty was proposed for the single alleged other-than-serious violation. Respondent timely contested. Following the filing of a complaint and

answer and pursuant to a notice of hearing, the case came on to be heard on May 31, 1994, in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

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 performing a demolition project on the grounds of a paper manufacturing plant. 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 is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

As a matter of background, the factual circumstances leading up to the issuance of these citations is basically undisputed.[2]

Respondent, Humble Construction, had men working at a plant in Urbana, Ohio, owned by Howard Paper Mill, a manufacturer of papers. The plant owner was in the process of putting in new equipment and machinery throughout the plant. Respondent's employees were to work in one area of the property removing an old drying hood over a paper making machine. The paper making machine, known as a paper mill, was approximately 200' long, 15' to 20' wide, and 8' to 12' high. The drying hood, somewhat akin to the hood over a stove, was suspended from the ceiling directly above a portion of the paper mill. It had been fashioned out of wood. As described by Respondent, the hood

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[1] Title 29 U.S.C. § 652(5).

[2] To the extent that there are any factual disputes the Secretary, having declined to order a copy of the transcript due to "budgetary restraints," is severly hampered.

consisted of an uppermost series of horizontal six inch by six inch timbers running through the ceiling joists. Attached vertically by nailing were posts of four inch by four inch timbers spaced every twelve feet. Two horizontal four inch by four inch timbers were nailed to the vertical posts. One inch by six inch wooden planks were nailed to the framework as the outer covering of the hood (Resp. Brief, p. 5; Tr. 56, 116, 137-183.)

On two separate occasions prior to starting the job, two Humble supervisory employees, Vice President and General Superintendent David Link, and Project Superintendent Richard Dyer, walked through the site. On one of their visits they were accompanied by Howard's head engineer. They explained that as with prior demolition jobs, they did the two walk throughs to ascertain the nature of the hood and the best method to remove it. Photographs were taken on one of those two days and between the group they decided that the way to remove the hood was "one board at a time" or to "unbuild" it. In essence, Humble decided to remove the wooden boards and then their supports one piece at a time. They set up a scaffold and began work. After only a few hours of working time, during the first "break," one of the employees (Mr. Francis) who had been working on the scaffold, got off, and for some unknown reason went around to the front of the scaffold to a confined area between the scaffold and the paper making machine. While there he was struck by a falling section of four inch by four inch timber which had been a piece of one of the vertical supports. The employee died of his injuries. The OSHA inspection occurred upon reporting of the fatality.

Citation No. 1, Item 1
Alleged serious violation of 29 C.F.R. § 1926.21(b)(2)

Respondent is charged with inadequately instructing the employees on this project of the particular hazards involved in the removal of the wooden paper mill hood. The cited standard requires, in pertinent part that "each employer. . .instruct each employee in the recognition and avoidance of unsafe conditions. . . applicable to his work environment." While general safety training is both laudatory and required under the more general

standard, employees must be trained in the specific hazards of their work assignment to meet the requirements of this standard.

The CO described the basis of this alleged violation as follows;

> I found the employees had not been instruction and the - - instructed and the recognition of the fact that the hood could become unstable and that there had been no instructions or training in how to recognize when it became unstable or if, indeed, when -- if and when it became unstable, as to how to handle that and prevent it from an unplanned collapse and possibly injure someone.

(Tr. 21-22). At times the CO insisted that the only instructions given the employees by Supervisor Dyer was to "unbuild" the hood (Tr. 45, 54). On cross-examination, however, the CO conceded that written statements taken from the supervisor stated that the employees were instructed to dismantle the hood in a specific sequence (Tr. 38). Significantly, the CO didn't know if any of the three employees removing the hood had participated in other demolition projects (Tr. 55).

Respondent has an overall safety program and holds weekly safety meetings with its personnel (RX F). The CO stated that he had expected Respondent "to write down a step-by-step hazard recognition program of dismantling the dryer hood." (Tr. 62). The CO, at a later point, maintained that two of Respondent's management had advised him that the deceased employee had not received any specific instructions in regard to the demolition plan. (Tr. 80.) The CO also knew that it had been the deceased's first day on the job (Id.).

The nature of the instructions given employees on the job is clarified by one of the carpenters who testified that they were given no written instructions about the job or its environs (Tr. 111-112). On cross examination he agreed that employees had been told how to do the required cutting or sawing (Tr. 114).

Respondent's Superintendent insisted that he gave the employees instructions to constantly be on the look-out as to the stability of the hood and that it was, in fact, stable up until its collapse (Tr. 121). Respondent's superintendents planned to "unbuild" the hood in a specific sequence. They decided;

> to start with the sheeting, the 1x6 sheeting on the sides, using only pry bars. It was discussed before we started there'd be no

> hammering or beating or pounding on this thing. I had a dozen or more different size pry bars that we would use to take this apart to alleviate any stress. And then go from there to the 4x4's and than on up to the roof and down.

(Tr. 1256-127). "I gave instructions to every employee." (Tr. 128). "I told them that we were going to unbuild this." (Tr. 129). He claims that he told workers to remove the 1 x 6 slats one at a time without beating or hammering (Tr. 132) and that if they "come off hard" they were to be cut up into smaller pieces (before removal) (Tr. 133).

Respondent's safety director testified that as far as he knew, the only training the deceased employee had was a 10 minute conversation on the first day of work dealing with personal safety equipment (Tr. 143, 147).

Respondent's Vice-President and general Superintendent, one of the two people who conducted the walk-through prior to beginning actual work, stated that his walk through and participation in developing a dismantling scheme was "typical" (Tr. 153). He described the process and reasons they decided to "unbuild" it (Tr. 153 - 154). Although no plans of the hood were available, he looked at the hood, touched it, and hit it with a hammer and shook it to see how stable it was (Tr. 161- 162). He discussed the instructions given the employees (Tr. 155).

Another employee described other training received by the deceased employee (Tr. 166-168).

Complainant's case relies on the Compliance Officer's assumption that the employees were told simply to "unbuild" the hood and nothing further. Were that the case, it might be found that such minimal instructions were inadequate. The standard, however, refers to the requirement that employees be instructed regarding the "unsafe conditions" in the particular "work environment." If it were true that the employees received virtually no training what so ever, it would perforce follow that they received no instructions regarding the particular conditions at that specific work site. Here, however, they did receive some guidance as to the specific conditions present. It is undisputed on this record that employees were told that the hood was to be dismantled one board at a time, with pry bars only. There was to be no hammering or banging. If needed, each section was to be cut into smaller pieces with

a saw. It is further undisputed that all three employees actually engaged in the demolition job had had prior experience on other demolition jobs (Tr.52 - 3, 57, 115, 166).

Having received at least some relevant training, it is up to the Secretary to show that the instructions actually given to employees were inadequate, incomplete or somehow deficient. He has not done so here. The Compliance Officer's statement that the employees received no training will not suffice where, as here, there is credible evidence that some training was afforded. Under these circumstances, the Secretary has not, by a preponderance of the evidence, shown that the requirements of the cited standard were not met. Accordingly, item 1 of Citation 1 is VACATED.

Citation No. 1, Item 2
Alleged serious violation of 29 C.F.R. § 1926.850(a)[3]

The issue in regard to this item is whether a violation of the cited standard exists where neither the pre-demolition survey itself nor any evidence of the existence of the survey had been reduced to writing.

The Secretary argues that the standard requires more than just written evidence that a survey was done. He takes the position that the standard requires any pre-demolition

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[3] The cited safety standard, 29 C.F.R. § 1926.850(a), states:

> Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

survey itself be in writing and that such a survey must be conducted in a particular manner and must meet certain "minimum criteria" (Sec. Brief, p. 11).[4]

I am here called upon to resolve an issue which the Commission spoke to over twenty years ago. *Ark Wrecking Company, Inc.*, 1 BNA OSHC 1386 (No. 388, 1973); *Ed Miller & Sons*, 2 BNA OSHC 1132 (No. 934, 1974). See *L.E.B., Inc.*, 7 BNA OSHC 1418 (No. 78-3568, 1979) (ALJ)(Digest)[5] in which Judge Chalk carefully analyzed the requirements of the standard. He concluded that;

> [T]he writing required by the standard. . .is that prescribed by the last sentence of the standard wherein it provides that the 'employer shall have in writing evidence that such a survey has been performed.'

In a footnote, Judge Chalk observed "[I]f the standard required the survey [itself] to be in writing, there would be no apparent need for the writing prescribed in the last (quoted above) sentence." See also, *Abdo S. Allen Co.*, 2 BNA OSHC 1460, 1462 (No. 1741, 1974) (ALJ Cronin) (Digest). The Compliance Officer apparently agreed with Judge Chalk's analysis (Tr. 49, 84-85). The Secretary has neither cited these cases nor presented any argument as to why such well settled precedent should now be overturned.

In this case it is irrelevant that there was an orally discussed plan of demolition arrived at by the general superintendent and job superintendent, both of whom are highly experienced. They based their plan on two visual inspections of the demolition project prior to its commencement. There was concededly no documentation that the survey had been done. The latter alone constitutes non-compliance with the cited construction safety standard.

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[4] The lack of any writing documenting that a survey had been done was, however, the gravamen of the violation as it was alleged in the citation. The citation set forth the alleged violation, in pertinent part, as "[t]here was no written record of an engineering survey." Neither the citation nor the complaint specify any other deficiency in the nature or content of the survey.

[5] A Digest of Judge Chalk's decision is published at 7 BNA OSHC 1418. The full text is available on Commission microfiche, 78/18/E12, or through Westlaw, 1979 W.L. 8561 (O.S.H.R.C.).

Accordingly, I conclude that because Respondent admittedly had no written evidence that a survey had been performed, it failed to comply with the cited standard.[6]

As has the Commission on prior occasions, *Ark Wrecking Company, Inc.*, supra; *Ed Miller & Sons*, supra., I conclude that the failure to have written evidence that a pre-demolition survery was conducted is an other-than-serious violation of the Act. Any hazard raised by the failure to have written evidence of an inspection is wholly separate and distinguishable from hazards which arise as the result of an incompetent, incomplete or inadequate demolition plan. The fact that there was a death during this demolition, while lamentable, is in no way related to the lack of written evidence that a plan existed. Considering the exceptionally low gravity of the violation as well as Respondent's size, good faith and history, I find that no penalty is appropriate.

Accordingly, Item 2 of Citation No. 1 is MODIFIED to an other-than-serious violation for which assessment of a monetary penalty of $ 0 is appropriate.

Citation 2, Item 1
Alleged other-than-serious violation of 29 C.F.R. § 1904.7

The cited standard requires that within 6 working days following receipt of information that a recordable injury has occurred, an employer must have available for inspection a "supplementary record" regarding the incident.

There is no dispute here that such a record did not exist within the time frame allowed by the standard. Respondent notes that its safety director was on vacation during

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[6] It is not necessary to determine what an "engineering survey" must or should contain or to decide how to test whether those conducting the survey are "competent persons." First, the meanings of these terms are not necessary to resolve the issue before me. Second, in order to do so would also require a resolution of whether, as asserted by Respondent, the standard gives proper notice of its proscriptions. See, *L.E.B., Inc.*, supra.; *Georgia Pacific Corp. v. OSHRC*, ____ F2d ____ (United States Court of Appeals for the Third Circuit, No. 93-6503, July 13, 1994), 16 BNA OSHC 1895, 1899. Moreover, I also decline to make any determination as to whether, as Respondent argued for the first time in its post-hearing brief (Pp. 16 -17), the cited standard is invalid because substantive changes were made in the underlying national consensus standard.

the relevant period and that the report was prepared within six working days of his return to work.

These facts to not constitute a defense to non-compliance. The six day allowance begins to run from Respondent's receipt of the information regarding the recordable injury. The fact that one particular employee was on vacation is irrelevant. Surely, Respondent conducted its other normal business operations during the absence of the safety director. Accordingly, item 1 of Citation 2 is AFFIRMED. Given the negligible relationship between the failure to timely produce the report and employee safety and health, assessing no monetary penalty is appropriate.

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. Respondent was in not violation of 29 C.F.R. § 1926.21(b)(2), as alleged in Item 1 of Citation 1.

4. Respondent was in violation of 29 C.F.R. § 1926.850(a).

5. Respondent's violation of 29 C.F.R. § 1926.850(a) was other than serious. A civil penalty of $ 0 therefor is appropriate.

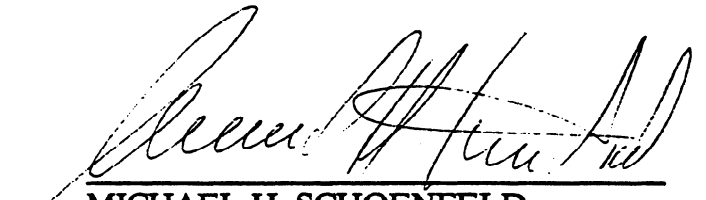
6. Respondent was in violation of 29 C.F.R. § 1904.7 (1992) as alleged. A civil penalty of $ 0 therefor is appropriate.

ORDER

1. Item 1 of Citation 1 issued to Respondent on or about August 13, 1993, is VACATED.

2. Item 2 of Citation 1 issued to Respondent on or about August 13, 1993, is MODIFIED to an other-than serious violation of the Act. A civil penalty of $ 0 is assessed therefor.

3. Item 1 of Citation 2 issued to Respondent on or about August 13, 1994, is AFFIRMED. A civil penalty of $ 0 is assessed therefor.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: OCT 21 1994
Washington, D.C.