



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

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
G. PUGNI & SON, INC.
Respondent.

OSHR DOCKET
NO. 93-2941

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 30, 1994. The decision of the Judge will become a final order of the Commission on November 1, 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 October 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
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
Room S4004
200 Constitution Avenue, N.W.
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.
Executive Secretary

Date: September 30, 1994

DOCKET NO. 93-2941

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Paul Vincent Bonfiglio, Safety
Advisor
Vincent Safety Service Company
357 Hempstead Turnpike
P. O. box 212
West Hempstead, NY 11552

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00107355075:02



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

PHONE:
 COM (202) 606-5100
 FTS (202) 606-5100

FAX:
 COM (202) 606-5050
 FTS (202) 606-5050

SECRETARY OF LABOR,
 :
 :
 Complainant,
 :
 :
 v.
 :
 :
 G. PUGNI & SON, INC.,
 :
 :
 Respondent.
 :
 :
 :
 :
 :
 :
 :

Docket No. 93-2941

Appearances:

Rebecca R. Stern, Esq.
 U.S. Department of Labor
 New York, New York

Paul V. Bonfiglio
 Vincent Safety Service Co.
 West Hempstead, New York

For the Complainant

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

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

Respondent is a corporation which was engaged in construction and related activities. On or about August 18, 1993, the worksite at Route 110, Walt Whitman Mall, Huntington, New York was inspected by an OSHA compliance officer. Subsequently, on September 23, 1993, the company received two citations resulting from this inspection. Respondent filed a timely notice of contest to the citations and penalties. A hearing was held on May 27, 1994, in New York, New York. Both parties were represented at the hearing and both parties have filed post-hearing responses. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

SECRETARY'S CASE

At the hearing on May 27, 1994, the compliance officer, Robert Magee, testified that at the time of the inspection, he had come to this particular job site because the OSHA area office had received a referral from the local news media about an accident at the Walt Whitman Mall in Huntington, New York. The news media reported to OSHA that apparently a concrete slab had fallen and struck two employees who were working on a scaffold. Mr. Magee was accompanied by another compliance officer, Richard Mendelson, who took a videotape of the accident inspection. The compliance officer noted that when he walked into the room where the accident had occurred earlier in the day, there was total disarray. The ceiling was on the floor, with the scaffold upside down and overall a pile of rubble everywhere.

Mr. Magee noted that he then conducted an opening conference with the general contractor's representative, Mr. Fortinberry, as there was no representative of G. Pugni & Son available. They were later joined by two gentlemen from the

local labor union. Mr. Fortinberry related that he did not observe the accident but heard the workmen's screams and a loud crash. When he ran into the room where the demolition work was being done he saw the two employees underneath a pile of rubble and ran to call for help.

The compliance officer further testified that the injured employees worked for G. Pugni & Son, the subcontractor who was hired to do the rehab and demolition work. No supervisory official for the company was present at the site at the time of the accident. Mr. Magee related that the two employees had been tearing down a suspended concrete and plaster ceiling when it apparently collapsed on them.

Mr. Magee also testified that he had talked to the two employees (Richard Fassett and Salvatore Tine) a few weeks after the accident when they had recovered well enough to be sent home from the hospital. After talking to the two employees, the compliance officer recommended the issuance of a citation for a violation of 29 C.F.R. section 1926.100(a) for failing to provide the employees with head protection whenever there is an overhead hazard. Mr. Magee also recommended the issuance of a citation for a violation of 29 C.F.R. section 1926.850(a) for failing to require an engineering survey to be done by a competent person prior to the employees doing any demolition work. Finally, the compliance officer noted that he recommended the issuance of a citation for a violation of 29 C.F.R. section 1903.2(a)(1) for failing to post an OSHA poster at the job site.

Mr. Magee later conducted a closing conference with G. Pugni's superintendent, Pat O'Neil, explaining the company's OSHA rights and responsibilities. He also notified Mr. O'Neil that citations could very well be issued for the violations noted

during the inspection.

The Secretary next called one of G. Pugni's two injured employees, Mr. Richard Fassett, to testify. Mr. Fassett testified that he had only started to work for the company on the day before the accident, August 17, 1993. Mr. Fassett described being hired by the company and the work that he did there under the direction of Respondent's superintendent, Pat O'Neil. He then described what occurred on the date of the accident, August 18, 1994. Mr. Fassett noted that he was not wearing any protective equipment when he arrived for work, nor was he given any protective equipment to use. He was given tools to use to do the demolition work. Mr. Fassett related that he and Mr. Tine were told to take down the ceiling but were not given any particular guidance or instruction about how to do the job or any precautions to be aware of. In addition, Mr. Fassett noted that the lighting in the back room where the ceiling work was to be done was very dim so an electrician hooked up a spotlight and the workers also had to use a flashlight to help them see. Since Mr. O'Neil was not present to offer any guidance, the two workers began to dismantle the ceiling with a crowbar and a hammer a little at a time. However, when Mr. Fassett began to pry back the lathe from the black iron, the workers heard a snap and the ceiling came crashing down on top of them. Mr. Fassett then related that the next thing he knew he was being brought out through the mall on a stretcher (transcript, p. 7-10, p. 10-14, p. 18-39, p. 57-61, p. 67-81). The Secretary's case was also supported by exhibits C-1- C-4.

RESPONDENT'S CASE

Respondent's representative, Mr. Bonfiglio, cross-examined both the compliance officer, Mr. Magee, and the injured employee, Mr. Fassett, regarding the alleged violations of the standards for which Respondent was cited.

Mr. Bonfiglio then called Respondent's superintendent, Pat O'Neil, to testify regarding what transpired regarding the accident which had occurred. Mr. O'Neil testified that G. Pugni & Son had been contracted to do work at the Walt Whitman Mall in Huntington, New York by the general contractor, Hayman, Hogue & Ketchler. Mr. O'Neil related that he had visited the worksite prior to sending the workers to the jobsite to determine what needed to be done there. He talked to the general contractor's representative, Eric Fortinberry. Mr. Fortinberry told him that G. Pugni & Son as the subcontractor would be responsible for demolition, carpentry; and acoustic work for the new store being constructed.

Mr. O'Neil noted that initially he instructed the two employees to make a hole in the cinder block wall so that an electrician could set up temporary lighting in the back of the store so that the two men could see to do their work in that area. Once the temporary lighting was set up, Mr. O'Neil indicated that Mr. Fassett and Mr. Tine were instructed to cut out part of the back room ceiling.

Pat O'Neil related, in response to Mr. Bonfiglio's question regarding whether the men which G. Pugni & Son hired from the local union had been given any safety training, that he believed that they were given safety training. He also indicated that he gave the two employees no special safety equipment to do the required work. Mr. O'Neil further testified that the only safety equipment which he felt the two new men needed to use for

this particular job was to wear hard hats. He noted that neither employee was wearing a hard hat when they arrived for work, so he supplied them with hard hats, which he found in boxes in the back of the store where the demolition work was to be done.

Mr. O'Neil then testified that, though he inspected the jobsite with the general contractor to determine what had to be demolished and to get information to give a bid, he did not think that this particular project required an engineering survey to be done before work was started. Under cross-examination, Mr. O'Neil noted that he found two hard hats in boxes in the back room of the store. He told the two workers ``Here's your hard hats'' and laid them on a table in the front. On recross-examination, Respondent's superintendent related that he had not provided any safety training to these new workers. He also noted that he had prior experience in taking down plaster ceilings (transcript, p. 40-57, p. 62-66, p. 82-88, p. 89-98, p. 99-102). The Respondent's case was also supported by exhibit R-1.

DISCUSSION

Alleged serious violation of 29 C.F.R. section 1926.100(a)

Serious Citation 1, item 1 alleges:

Employees were not protected by protective helmets while working in areas where there was a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns.

The Secretary asserts that on the day of the accident the two workers employed by G. Pugni & Son were not wearing protective helmets while working in an area where there was a possible danger of head injury in violation of the standard.

At the hearing, the Secretary questioned one of the employees who was injured during the accident, Mr. Fassett. Mr. Fassett testified that he and his partner, Sal Tine, were not given any personal protective equipment to wear on the day of the accident. The compliance officer also noted that in previous conversations with the two injured employees they both admitted to him that they were not wearing hard hats on the day of the accident. Further, the compliance officer related that the general contractor's representative, Mr. Fortinberry, also told him that he did not think that the two employees were wearing hard hats on the date of the inspection.

Respondent strongly argues that the two workers who were injured were provided with protective helmets to wear on the date of the accident. At the hearing the Respondent questioned Respondent's superintendent, Mr. O'Neil. Mr. O'Neil testified that he felt that the only safety equipment which the two new employees needed to use for this particular job was to wear hard hats. He noted that neither man arrived for work with a hard hat, so he supplied them with hard hats, which he found in boxes in the back of the store where demolition work was to be done. He said that he told the two workers "Here's your hard hats" and laid them on a table in the front.

Despite Respondent's protestations to the contrary, it is quite evident here that Respondent had no established written safety program that required its employees to wear hard hats on all jobs and at all times to prevent injuries, such as those that occurred in this instance. Though Respondent's superintendent testified that he "supplied" hard hats to the two injured employees here, under the Occupational Safety and Health Act, an employer has the duty not only to make sure that protective gear is supplied but also to ensure that employees are instructed on their proper use and actually use the protective equipment.

Further, it is the employer's duty to monitor the workplace to ensure compliance with the work rule and to discipline those workers found violating any OSHA standard. See Secretary of Labor v. Bob Roberts Company, 14 BNA OSHC 1105 (No. 88-2131, 1989); Secretary of Labor v. Thomas Lindstrom & Co., 14 BNA OSHC 1142 (No. 88-2468, 1989); Secretary of Labor v. John B. Kelly, Inc. of Pennsylvania, 14 BNA OSHC 1397 (No. 88-2489, 1989).

Therefore, taking into consideration all the record evidence and credible testimony presented regarding this citation item, I find that the Secretary has established a violation of the standard by a preponderance of the evidence presented. The evidence further reflects that the Respondent knew or should have known of the hazards to its employees. The violation was obvious and discernible by mere observation. A review of all the relevant factors, the hearing transcript, and the original case record fully establishes that a penalty of \$1,000 is appropriate for this citation item.

Alleged serious violation of 29 C.F.R. section 1926.850(a)

Serious Citation 1, item 2 as amended alleges:

An engineering survey was not performed by a competent person to determine the conditions of the framing floors and walls and the possibility of unplanned collapse of any portion of the structure prior to permitting employees to start demolition operations. The employer did not have in writing evidence that such a survey had been performed, to wit, no engineering survey was performed prior to the demolition of a concrete ceiling.

The Secretary argues that the Respondent failed to perform an engineering survey prior to initiating the demolition work. Respondent's own superintendent, Mr. O'Neil, testified that though he inspected the jobsite with the general contractor to determine what had to be demolished, he did not think that

this particular project required an engineering survey to be done before work was started.

Respondent asserts that its supervisor, Mr. O'Neil, did inspect the jobsite prior to starting operations. In his capacity as construction superintendent, with his many years of experience, he felt that there were no inherent hazards and therefore he allowed work to begin. Further, Respondent introduced into evidence, exhibit R-1, a letter dated January 27, 1994, from Mr. Roy Gurnham, Director of the Office of Construction and Maritime Compliance Assistance, to support its position that the type of work that it performed on August 18, 1993, ostensibly did not require an engineering survey.

As to Respondent's exhibit R-1, this support is not really helpful to Respondent's case. The exhibit is a letter from OSHA's Office of Construction and Maritime Compliance Assistance dated January 27, 1994, a letter which was written five months after the inspection and accident occurred. Further, the exhibit did not even include a copy of Respondent's letter dated November 9, 1993, to the OSHA office detailing what specific questions were being asked of that office.

In this instance, it is evident from a review of all the record evidence, that the Respondent has presented no compelling evidence or witness whatsoever to refute the compliance officer's assertion that no engineering survey was performed prior to work being done on the concrete ceiling in this case. In fact, Respondent's own superintendent, Mr. O'Neil, testified that he did not think that this particular project required an engineering survey to be done before work was started. In addition, the general contractor's representative, Mr. Fortinberry, indicated to the compliance officer that as far as he knew no engineering survey had been done.

Clearly, the totality of the evidence and testimony in this matter substantiate that the Respondent was in violation of the standard on the date of the inspection. The Secretary has proposed a penalty of \$2,500 for this citation item. Under all the existing facts and circumstances herein, a penalty of \$2,500 for said violation of the standard is consistent with the criteria set forth in section 17(j) of the Act. See Secretary of Labor v. S.G. Loewendick and Sons, Inc., 2 BNA OSHC 3197 (No. 6120, 1974).

Alleged other violation of 29 C.F.R. section 1903.2(a)(1)

Other Citation 2, item 1 alleges:

The OSHA notice was not posted to inform employees of the protections and obligations provided for in the Act.

The Secretary asserts that Respondent failed to post the OSHA notice at the worksite to inform its employees of the protections and obligations provided for in the Act. The compliance officer testified that during his inspection he did not see the required OSHA poster.

The Respondent does not really deny that they were in violation of this particular OSHA standard. In fact, Respondent's superintendent, Mr. O'Neil, noted to the compliance officer that he was not aware that the OSHA notice was posted at Respondent's jobsite.

Consequently, since there is no dispute between the parties regarding this citation item, the violation is affirmed as other-than-serious, and no penalty is assessed. See Secretary of Labor v. Trident Seafoods Corporation, 14 BNA OSHC 1044 (Nos. 88-986 and 88-987, 1989); Secretary of Labor v. Mavrant Company, 14 BNA OSHC 1074 (No. 88-872, 1989); Secretary of Labor v. Maners & Son Electrical Company, 14 BNA OSHC 1094 (No. 88-1054, 1989).

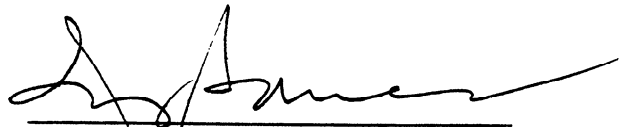
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1. Citation 1, item 1, alleging a serious violation of 29 C.F.R. section 1926.100(a) is affirmed and a penalty of \$1,000 is assessed.
2. Citation 1, item 2, alleging a serious violation of 29 C.F.R. section 1926.850(a) is affirmed and a penalty of \$2,500 is assessed.
3. Citation 2, item 1, alleging an other violation of 29 C.F.R. section 1903.2(a)(1) is affirmed and a penalty of \$0 is assessed.



IRVING SOMMER
Judge, OSHRC

DATED: SEP 29 1994
Washington, D.C.