



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.

A. J. MCNULTY COMPANY, INC.
Respondent.

**OSHRC DOCKET
NO. 93-0395**

**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 15, 1993. The decision of the Judge will become a final order of the Commission on November 15, 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 4, 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
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: October 15, 1993

DOCKET NO. 93-0395

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

Lawrence Weiss
A. J. McNulty & Co., Inc.
53-20 44th Street
Maspeth, Queens, NY 11378

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

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SECRETARY OF LABOR,

Complainant,

v.

A. J. McNULTY & CO., INC.,

Respondent.

Docket No. 93-0395

Appearances:

Steven D. Riskin, Esq.
U.S. Department of Labor
New York, New York

Lawrence Weiss
A. J. McNulty & Co., Inc.
Maspeth, Queens, 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.

On December 15, 1992, A. J. McNulty's worksite at 75 Vanderbilt Avenue, Staten Island, New York was inspected by an OSHA compliance officer. Subsequently, on December 24, 1992, the company received one citation resulting from this inspection. Respondent by letter dated December 29, 1992, filed a notice of contest to the citation and the penalty proposed. A hearing was held on June 9, 1993, in New York, New York. Both parties were represented at the hearing. Neither the Respondent nor the Secretary filed a post-hearing brief, but rather relied upon the arguments and evidence presented at the hearing. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

DISCUSSION

Serious Citation 1. item 1

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

The standard at 1926.100(a) states:

(a) Head Protection. Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary alleges that two of Respondent's employees were receiving a concrete pillar from an overhead crane without wearing protective helmets. The compliance officer, Lawrence Wheat, testified that he observed two employees standing on a wall waiting for a pillar to be lowered to them that was made of concrete, about six feet long and two feet wide that was to be used as a cross beam for a door arch. Both employees were giving directions to the crane operator for the beam to be lowered and neither employee was wearing a hard hat at the time (transcript, p. 7-8). The compliance officer subsequently asked

the employees where their foreman was, and one of the employees went to find him and brought him back to talk to the compliance officer. The compliance officer notified the foreman that the employees were being subjected to the hazard of possible head injuries from falling objects or impact and could not continue working without hard hats. The foreman then instructed one of the employees to go get hard hats which were located elsewhere on the jobsite. The employee returned shortly with hard hats, factory-sealed like in a bag. The compliance officer also noted that the foreman, who was hooking up the concrete pillar to be lifted, was not wearing a hard hat either (transcript, p. 9-10).

Respondent does not dispute that its two employees and foreman were not wearing hard hats on the day of the inspection. However, Respondent stresses that it has an excellent established written safety program which was discussed with its foreman and employees at the start of the job. Respondent characterizes this citation as an "oddball case" in which "the men were sloppy". A. J. McNulty's president, Lawrence Weiss, in his closing argument testified that "they were wrong and we made it clear to them, and we did what I thought was required of us by OSHA which was to dismiss the men at the end of the day and explain to them the reasons for it, which was the failure to observe the mandated safety ---, our safety policy. The men felt that they were under no serious risk. Whether they're right or wrong is immaterial. The point is they should have been wearing the hard hat. I'm in agreement with the Secretary of Labor on that. And we disciplined them for it. More than that, I don't know what I can do" (transcript, p. 35-36).

Clearly, the totality of the evidence and testimony in this case substantiate that the Respondent was in violation of the standard cited on the date of the inspection. The violation

was open and in clear view of Respondent's foreman who was supervising the employees' work, and who himself was also not wearing a hard hat. I therefore find that a serious violation of section 1926.100(a) occurred as charged.

The Secretary has proposed a penalty of \$1,500 for this alleged violation of the standard. Section 17(j) of the Act, 29 U.S.C. section 666(j), requires that in assessing penalties, the Commission must give ``due consideration`` to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. J. A. Jones Construction Company, 15 BNA OSHC 2201 (No. 87-2059, 1993), Specialists of the South, 14 BNA OSHC 1910 (No. 89-2241, 1990). A careful review of the record in this case and the four penalty criteria noted above leads me to the conclusion that a penalty of \$750 is appropriate under all the existing facts and circumstances of this case and is so Assessed.

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 \$750 is assessed.



IRVING SOMMER
Judge, OSHRC

DATED: **OCT 14 1993**
 Washington, D.C.