United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
WELL-TECH, INC.
Respondent.

OSHRC DOCKET
NO. 94-2921

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 August 23, 1995. The decision of the Judge will become a final order of the Commission on September 22, 1995 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 September 12, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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.

Date: August 23, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2921

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant,	
v.	OSHRC Docket No. 94-2921
WELL-TECH, INC., Respondent.	

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

George R. Carlton, Jr., Esquire
Godwin & Carlton
Dallas, Texas
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

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

Well-Tech Inc., a well servicing contractor, at all times relevant to this action was an employer engaged in a business affecting commerce within the meaning of the Act.

On August 4, 1994, Compliance Officer Thomas M. Henry of the Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite in Barberton, Ohio, where an employee had fallen from a well platform on July 27, 1994. As a result of the inspection, Well-Tech was issued a serious citation alleging violations of 29 C.F.R. §§ 1910.23(a)(7), 1910.23(c)(1), and 1910.23(d)(1)(iii) and an

"other" than serious citation alleging violations of 29 C.F.R. §§ 1903.2(a)(1) and 1904.7. The total proposed penalties were $10,125. Well-Tech timely contested the citations and the hearing was held in Akron, Ohio, on April 12, 1995.

Background

Well-Tech contracted to replug leaking wells at the Pittsburgh Paint and Glass (PPG) chemical plant in Barberton, Ohio (Tr. 78-79). Also, it was to assist other contractors at the site in sampling fluids from the wells to determine if they were hazardous (Tr. 81). The replugging and sampling operation took approximately a year and Well-Tech maintained two crews, each consisting of four rig hands and a supervisor working 12-hour shifts (Tr. 138, 141). Well-Tech did not keep a copy of its OSHA 200 logs or the OSHA poster at the PPG worksite (Tr. 47, 64). According to the safety manager, they were maintained at its corporate offices in Mt. Pleasant, Michigan (Tr. 126-127).

To replug a leaking well, Well-Tech first drilled a hole to open the well (Tr. 79). The drilling operation was done from Well-Tech's drilling platform which stood approximately 16 feet high. The platform floor measured 16 feet by 16 feet with standard railing around the perimeter (Exhs. C-4, C-5; Tr. 25, 70). Near the center of the platform floor, there was a 3-foot square opening referred to as the "rat hole" (Exh. C-7; Tr. 40-41, 67). The rat hole was open during the drilling operation to allow for the movement of pipe in and out of the hole (Tr. 61-62). When there was no drilling, the rat hole was covered by replacing the floor boards (Exh. C-7; Tr. 61).

After opening the well but before replugging, ICF Kaiser, a consulting firm, and Eastern Well Service, the wire line contractor, were contracted to collect samples of fluid from the open well (Tr. 77, 79, 81-82). To collect the samples, Eastern Well Service designed a monitoring cone which was attached to a wire line and controlled by a computer system on a truck (Tr. 83). The wire line, originating from the truck, ran to Well-Tech's drilling platform and through a system of two sheaves down into the opened well (Exh. C-4; Tr. 121-122).

On July 27, 1994, Well-Tech finished drilling the hole, opening well No. 10 at the south plant. This took approximately two weeks (Tr. 78-79). Because of a building which prevented the truck from locating in front of the drilling platform, the wire line was run to the side of the platform (Tr. 106, 122). To accommodate the wire line, Well-Tech's employees removed an 8-foot section of the platform's guardrail

and placed yellow caution tape across the opening (Exh. C-11; Tr. 104, 123-124). A safety meeting was held with Well-Tech employees to explain the removal of the guardrail (Tr. 104, 124). Well-Tech had four employees on the platform (Tr. 104). Within fifteen minutes of removing the guardrail, a Well-Tech employee fell from the platform approximately 12 feet onto the pipe rack, injuring himself (Exh. C-10; Tr. 95-96, 99). The accident occurred around 9:00 p.m. (Tr. 87). The nature and extent of the employee's injuries was not brought out at the hearing.

Based on a referral from another OSHA office, Compliance Officer Henry was assigned the inspection. He arrived at the PPG plant on August 4, 1994 (Exh. C-2; Tr. 14). Although he testified that the drilling platform was operating during his inspection, he could not recall what work was being done or if employees were on the platform floor at that time (Tr. 54).

ALLEGED VIOLATIONS

CITATION NO. 1

Item 1 - Alleged Serious Violation of § 1910.23(a)(7)

The Secretary alleges that Well-Tech violated § 1910.23(a)(7) which provides that "[E]very temporary floor opening shall have standard railings, or shall be constantly attended by someone." The OSHA citation describes the violation as "a temporary floor opening (approximately 3' x 3'), on the well rig platform, did not have standard railings."

There is no dispute that in the platform floor, there was a 3-foot square floor opening referred to as the "rat hole." It was used to move drilling pipe in and out of the well (Exh. C-7; Tr. 40, 125, 133). The opening was approximately 8 feet from the platform's edge and, when open, was not guarded by a railing (Exh. C-7; Tr. 41). According to Henry, the opening was large enough for an employee to easily fall through (Tr. 40). The rat hole was only open when employees were drilling. Otherwise, it was covered with floor boards (Tr. 125). Henry testified that he has never heard of a person falling through a rat hole, and he did not know if it could be guarded by standard railing because of the movement of the pipe (Tr. 62).

The record establishes that the drilling platform constituted a "platform" within the meaning of § 1910.21(a)(4) and that the rat hole was a "floor opening" as defined at § 1910.21(a)(2). There is no dispute that during the drilling operation, the floor opening was not covered or guarded by standard railings.

However, the Secretary failed to establish that Well-Tech violated § 1910.23(a)(7) and that Well-Tech's employees were exposed to a violative condition. Section 1910.23(a)(7) allows an employer two options to comply: either the employer must provide standard railings, or the employer must require someone to constantly attend to the opening, presumably to warn and protect employees from a fall hazard. The Secretary's evidence failed to show that Well-Tech did not provide "someone to constantly attend the opening." Compliance Officer Henry did not recall seeing employees on the platform during his inspection nor did he identify employee exposure prior to his inspection. Although it is presumed that employees were on the platform during the drilling operation and the rat hole was uncovered, the Secretary failed to establish that Well-Tech did not have someone on the platform to constantly attend the opening as permitted by the standard. Thus, a violative condition and employee exposure have not been shown.

Accordingly, the alleged violation of § 1910.23(a)(7) is vacated.

Item 2 - Alleged Serious Violation of § 1910.23(c)(1)

Well-Tech was cited for failing to have all open sides of the drilling platform guarded by a standard railing or its equivalent on July 27, 1994, the date of the accident. Section 1910.23(c)(1) provides:

> [E]very open sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent . . .) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

Well-Tech acknowledges that immediately prior to the accident, a portion of the railing on the drilling platform was removed and yellow caution tape was placed across the opening (Exh. C-11; Tr. 121, 124). Well-Tech argues that it removed the railing temporarily in order for the wire line contractor to rig the monitoring tool and take samples from the well (Resp's. Brief, pg. 5). A building near well No. 10 prevented the truck with the computer system used to control the wire line from moving into a position where the wire line could be run to the front of the platform (Tr. 106). Thus, it was decided to remove the railing and run the wire line to the side of the platform (Exh. C-11; Tr. 90-91).

Well-Tech's argument that the removal of the railing was temporary and was needed to accommodate the wire line operation is rejected based on the record. Although there was no evidence that the guardrail had ever been removed other than the fifteen minutes prior to the accident, the court finds that the brevity of exposure does not negate a finding of a violation. Even for a short period of time, such as fifteen minutes, the regulation does not allow for the removal of the guardrail. However, the brevity of

exposure may be relevant for the purpose of penalty assessment. *See Stahr & Gregory Roofing Co.*, 7 BNA OSHC 1010, 1979 CCH OSHD ¶ 23,261 (No. 76-88, 1979).

The Commission has permitted noncomplinance with the specific requirements of a regulation if an employer can establish an infeasibility defense. In this case, Well-Tech argues that the railing was removed to rig the sampling tool (Resp's. Brief, pg. 5). Thus, in essence, arguing infeasibility. However, Well-Tech failed to properly plead the affirmative defense of infeasibility, and there is no evidence that it was tried by the consent of the parties. Therefore, a claim of infeasibility, if now being asserted by Well-Tech, must be rejected. *See Northeast, Inc.*, 15 BNA OSHC 1020, 1023, 1991 CCH OSHD ¶ 23,313, p. 39,357 (No. 86-521, 1991); *National Engineering & Contracting Co.*, 16 BNA OSHC 1778, 1779, 1994 CCH OSHD ¶ 30,030 (No. 92-73, 1994).

Furthermore, the evidence of record does not support an infeasibility defense. Constance Livchak, a senior hydrogeologist with an environmental consulting firm, and Michael Hottinger, Well-Tech's safety manager, testified that the railing had to be removed for the rigging operation. However, there was no evidence offered showing the basis or reason for their opinion. Therefore, the court gives little weight to their conclusion. Further, the record reflects that after the rigging, the sampling operation was accomplished with the guardrail in place (Tr. 109). Livchak testified that the railing was "back up because of the accident," and the lower sheave was moved up higher from the floor to allow for the railing (Tr. 106). There was no evidence that the reinstalled guardrail caused any problem during the four days of sampling or exposed employees to any hazard. If the sampling operation could be done with the railing in place, the court finds that Well-Tech failed to show that the rigging operation could not likewise have been done with the railing in place. Thus, Well-Tech failed to prove that compliance with the requirements of the standard precluded performance of its required work.

Also, Well-Tech failed to provide adequate alternative employee protection as required by the infeasibility defense. The safety meeting held with employees and the placement of yellow caution tape were not sufficient in this situation and was not what Well-Tech required in similar situations. Well-Tech's safety manual provides that handrails can be removed during material handling (Exh. R-2(9)). Well-Tech's safety manager, Michael Hottinger, testified that when the railing is removed for material handling, safety belts were required to be worn by employees (Tr. 142-143). There is no evidence that safety belts could not have been utilized in the wire line operation, including rigging the monitoring tool. Hottinger testified

that the safety belts were available for use but that employees were not required to wear them (Tr. 143-144). Well-Tech has an obligation to provide reasonable alternative safety protection to its employees. In this case, alternative safety protection included more than holding a safety meeting and using yellow caution tape. Consideration should have included more active measures, such as requiring the use of safety belts.

Finally, it is noted that Well-Tech employees removed the guardrail at the request and under the supervision of Kaiser's project engineer (Tr. 102, 110, 131). Well-Tech has not asserted a multi-employer defense, and the record does not support such a defense. As previously discussed, Well-Tech has not shown that the removal of the guardrail was necessary or that it provided adequate alternative methods of abatement to its employees. Further, there was no evidence that Well-Tech did not retain control of the well platform and the supervision of its employees.

Therefore, a violation of § 1910.23(c)(1) is affirmed.

The violation was correctly classified as serious. A violation is serious under section 17(k) of the Act (29 U.S.C. § 666(k)), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. Based on the area where the railing was removed and the location of the pipe rack where the employee was found, the record establishes that the Well-Tech employee fell from the area of the platform where the railing was removed and suffered injuries. The employee fell approximately 12 feet. Although the nature and extent of employees' injuries is not in the record, it is reasonable to assume that a fall of 12 feet onto pipes could have resulted in serious injury or death within the meaning of section 17(k). Also, Well-Tech was aware of the condition since its crew supervisor was at the site and should have been aware of the removal of the railing. Thus, Well-Tech's violation of § 1910.23(c)(1) is serious.

Item 3 - Alleged Serious Violation of § 1910.23(d)(1)(iii)

The Secretary's citation alleges that "on the west side of the well rig, a stairway having 5 risers, did not have a handrail on both open sides" in violation of § 1910.23(d)(1)(iii) which provides:

> (d) *Stairway railings and guards.* (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(I) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:

(iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.

The record establishes that there was a stairway with five risers and no handrail on one side (Exh. C-8; Tr. 41-42). Compliance Officer Henry described the stairway as being less than 44 inches wide and leading to a small platform which stood about 3 to 4 feet above ground level on the west side of the drilling rig (Tr. 46). Lying on the small platform, he observed a number of hand tools (Tr. 42, 63). Henry noted that there were holders along the side of the stairway which could be used to place a hand railing (Exh. C-8; Tr. 69). During the inspection, Henry did not observe any employees using the stairway or standing on the small platform (Tr. 63). Also, he testified that he did not know the purpose of the stairway and platform or why employees would go onto the platform (Tr. 63, 72). He conceded that someone on the ground could have placed the tools on the platform (Tr. 69).

Based on this record, there has been no showing that Well-Tech's employees used the stairway, or if they did, that a standard railing was not placed on the open side in the holders observed by Henry. Thus, employee exposure was not established.

Accordingly, the alleged violation of § 1910.23(d)(1)(iii) is vacated.

"OTHER" THAN SERIOUS CITATION

Item 1 - Alleged "Other" Than Serious Violation of § 1903.2(a)(1)

Well-Tech was cited for violating § 1903.2(a)(1) by failing to post at the PPG worksite the OSHA poster informing employees of the protection and obligations provided for in the Act.

Compliance Officer Henry testified he asked Well-Tech's crew supervisor about the OSHA poster and was told there was no poster at the worksite (Tr. 47). According to safety manager Hottinger, it was posted at Well-Tech's main office in Mt. Pleasant, Michigan (Tr. 129). Well-Tech argues that the regulation does not require posting at a temporary worksite (Resp's. Brief, pg. 6).

Section 1903.2(b) defines an "establishment" as "a single physical location where business is conducted or where services or industrial operations are performed." This section also provides, in part:

> Where employers are engaged in activities which are physically dispersed such as agriculture, construction, transportation . . ., the notice or notices required by this section shall be posted at the location to which employees report each day. Where employees do not usually work at, or report to, a single establishment, such as longshoremen, traveling

salesmen, technicians, engineers, etc., such notice or notices shall be posted at the location from which the employees operate to carry out their activities.

"Thus, the definition of establishment distinguishes between situations where employers maintain multiple worksites and each employee reports to a particular location each day, and those where each employee frequently changes the physical location at which he works. In the former situation, the notice must be posted at each location; in the latter, it need only be posted at the location from which the employees operate to carry out their activities." *Western Waterproofing. Inc.*, 7 BNA OSHC 1499, 1500, 1979 CCH OSHD ¶ 23,692 (No. 14523, 1979).

The record in this case shows the PPG worksite was an "establishment" within the meaning of the standard. The work being done at the PPG site was analogous to a construction project where employees are on site for a long period of time. Well-Tech's employees were working at the PPG plant for a year (Tr. 137). Well-Tech maintained ten employees: two crews of employees consisting of four rig hands and one supervisor per crew, each working 12-hour shifts (Tr. 141). The PPG worksite was the place where employees reported each day. The record reflects that it was a six-hour drive from the Mt. Pleasant, Michigan corporate office to the worksite (Tr. 127). There was no evidence that employees reported to the Mt. Pleasant office or that they frequently changed their work location. Also, there was no showing Michigan was the location where the "employees operate to carrying out their activities."

Therefore, the court finds the PPG worksite was where Well-Tech employees reported each day and where the OSHA poster was required to be posted.

An "other" than serious violation of § 1903(a)(1) is affirmed.

Item 2 - Alleged "Other" Than Serious Violation of § 1904.7

For the most part, there is no factual dispute between the parties. Well-Tech was cited for failing to make available to Compliance Officer Henry the OSHA 200 log. Henry testified that when he asked about the OSHA 200 log, he was told that the log was maintained at the Mt. Pleasant, Michigan corporate office. Henry telephoned Well-Tech's safety manager Hottinger and requested the log. Hottinger confirmed the log was at his office and requested Henry to submit a written request. Hottinger agreed to mail the 200 log. On August 8, 1994, Henry mailed the written request to Hottinger (Exh. C-12; Tr. 145). Hottinger confirmed the telephone conversation but testified he never received the written request (Tr.

136). Neither Hottinger nor Henry followed up on the written request and, after OSHA did not receive the 200 log, the violation was cited (Tr. 147). Henry testified that maintaining the OSHA 200 logs at the corporate offices satisfied the standard (Tr. 64). There was no evidence that Well-Tech refused to provide the log.

Section 1904.7 requires the OSHA 200 logs be provided to OSHA for inspection and copying. Section 1904.2 requires that an employer maintain the log at each establishment. As discussed previously, the court has found the PPG worksite was an establishment under § 1904.12(g)(2) as the "place to which employees report each day." However, under § 1904.2(b), an employer may maintain the log at a place other than an establishment if "[t]here is available at the place where the log is maintained sufficient information to complete the log to a date within 6 working days after receiving information . . ." and "at each of the employer's establishments, there is available a copy of the log . . . current to a date within 45 calendar days."

Because Well-Tech was at this site for a year and maintained ten employees, including two supervisors, the court finds that at least a copy of the log under § 1904.2(b)(2) should have been at the PPG worksite and available to OSHA. Respondent's argument that Henry should have come to Mt. Pleasant to inspect the logs was not required in this case. Well-Tech was on notice that OSHA wanted to inspect the log, and it failed to follow up when it did not receive the written request from Henry. The standard does not require OSHA to make a written request, but the record establishes that one was mailed. It was Well-Tech's obligation under the standard to make the logs available. By failing to provide the log to Henry, Well-Tech was not in compliance with the standard.

Accordingly, an "other" than serious violation of § 1904.7 is affirmed.

PENALTY DETERMINATION

Section 17(j) of the Act, 29 U.S.C.§ 666(j), requires that when 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 Constr. Co.*, 15 BNA OSHC 2201, 2213-14, 1993 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken

against injury, and the likelihood that any injury would result. *J. A. Jones*, 15 BNA OSHC at 2214, 1993 CCH OSHD at p. 41,032.

Hern Iron Works, Inc., 16 BNA OSHC 1247, 1994 CCH OSHD ¶ 30,155 (No. 88-1962, 1994).

Well-Tech is a large employer with approximately 1,200 employees corporate wide. At the PPG worksite, Well-Tech had ten employees, including two crew supervisors, working 12-hour shifts. There was no evidence that Well-Tech had been cited for any OSHA violations within the prior three years and, thus, is entitled to credit. However, Well-Tech's lack of history for penalty purposes does not mean that it has not received prior citations or was unfamiliar with the Act's requirements and OSHA procedures. *See Well-Tech*, Docket Nos. 80-2974 (1981); 81-2740 (1982); 83-843 (1984); 84-919 (1985); 83-1118 (1985); 88-1404 (1990); and 89-2864 (1991). Also, Well-Tech is entitled to some credit for good faith because of its attempts to comply with the standards and its cooperation during the inspection.

After considering the above factors and the gravity of the violation, a penalty of $2,000 is deemed appropriate for Well-Tech's violation of § 1910.23(c)(1). By removing the railing and exposing employees to a fall hazard of 12 to 16 feet, the gravity is considered as moderate. Consideration is given to the evidence which shows there were four Well-Tech employees on the platform and that the railing was down only fifteen minutes prior to the accident. Also, there was no evidence the railing was removed at any other time during the drilling operation. Although not found adequate in this situation, yellow caution tape was placed at the opening and a safety meeting was held with employees prior to the removal.

The "other" than serious violation of § 1903.2(a)(1) is a posting violation intended to keep employees informed of their protections and obligations provided by the Act. There was no poster at the PPG worksite despite the fact that Well-Tech had been working at the site for a year. Well-Tech maintained ten employees at the site. Therefore, a penalty of $750 is assessed.

The "other" than serious violation of § 1904.7 is a record-keeping violation designed to require employers to record all occupational safety or health injuries and to make such reports available to OSHA as part of its inspection. This enables OSHA to identify what, if any, hazards may be present at a worksite. Based on the evidence, Well-Tech maintained OSHA 200 logs at its corporate offices. There is no evidence that the logs were not being maintained or that the logs were deficient. The violation involves Well-Tech's not making the logs available to OSHA upon request. Failure to obtain a copy of the log was due mainly to a misunderstanding between the parties. Therefore, a penalty of $100 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, alleging a violation of § 1910.23(a)(7), is vacated;

2. Citation No. 1, item 2, alleging a violation of § 1910.23(c)(1), is affirmed and a penalty of $2,000 is assessed;

3. Citation No. 1, item 3, alleging a violation of § 1910.23(d)(1)(iii), is vacated;

4. Citation No. 2, item 1, alleging a violation of § 1903.2(a)(1), is affirmed and a penalty of $750 is assessed; and

5. Citation No. 2, item 2, alleging a violation of § 1904.7, is affirmed and a penalty of $100 is assessed.

KEN S. WELSCH
Judge

Date: August 16, 1995