UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CISNEROS PACKING COMPANY, INC.
Respondent.

OSHRC DOCKET
NO. 93-1082

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 April 29, 1994. The decision of the Judge will become a final order of the Commission on May 31, 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 May 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.

Date: April 29, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1082

NOTICE IS GIVEN TO THE FOLLOWING:

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Benjamin R. Loye
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR, Complainant, v. CISNEROS PACKING COMPANY, INC., Respondent.	OSHRC DOCKET NO. 93-1082

APPEARANCES:

For the Complainant:

Jack F. Ostrander, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas

For the Respondent:

Raul R. Cisneros, Raymondville, Texas

DECISION AND ORDER

Loye Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Cisneros Packing Company, Inc. (Cisneros) at all times relevant to this action, maintained a worksite at Kimball and 5th Street, Raymondville, Texas, where it was

engaged in processing pork skins (Tr. 28, 30). Cisneros is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 31).

On February 8, 1993 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Cisneros' Kimball worksite (Tr. 28). As a result of the inspection, Cisneros was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission). Cisneros contests only the proposed penalty assessments; the cited violations themselves were not placed at issue (Tr. 15). On March 8, 1994, a hearing was held in Corpus Christi, Texas on the contested issue. At the hearing, Complainant's motion to withdraw citation 1, item 4(a) was granted (Tr. 8), as was its motion to amend the classification of citation 1, items 4(b), 5, 6(a) and 6(b) to "other than serious" citations without penalties (Tr. 9). The penalties assessed in citation 1, items 1 through 3, and citation 2, items 1 and 2 remain at issue. The parties have waived an opportunity to submit briefs, and this matter is ready for disposition.

Serious Citation 1, item 1

Citation 1, item 1(a) through 1(c) state:

29 CFR 1910.23(a)(1): Stairway floor openings were not guarded by standard railings on all exposed sides except at entrance to stairway:

> At the Hamilton Kettle, a four feet eight and one-half inch stairway did not have standard midrails and guardrails, exposing employees to a fall hazard.

29 CFR 1910.23(d)(1)(iii): Flights of stairs with 4 or more risers, less than 44 inches wide and having both sides open were not equipped with one standard stair railing on each side:

> At the Hamilton Kettle, a twenty-two inch (22") wide stairway did not have the handrails, exposing employees to a three feet ten inch (3'10") fall hazard.

29 CFR 1910.24(d): Fixed stairways did not have minimum width of twenty-two inches:

> At the Hamilton Kettle, the stairway measured twenty and one-half inch wide and did not meet the requirement, exposing employees to a fall hazard.

As noted above, the existence of the cited violations is not contested.[1] A combined penalty of $750.00 is proposed.

The non-conforming stairway is used to gain access to the kettle (Tr. 35). Once a day, for approximately 30 minutes, two employees use the stair, one climbing backwards, one forwards, to empty bins of rinds into the kettle (Tr. 35-36). Compliance Officer Sandra Garcia testified that condensation from the kettle increased the probability of an employee slipping and falling (Tr. 37; Exh. C-1). Garcia stated that broken bones were the probable injury to an employee falling 3'10" to the concrete floor (Tr. 38, 113).

Raul Cisneros testified that it is normal practice for one employee to stand on the stair platform while a second employee hands a plastic container of skins to him for dumping (Tr. 84). Cisneros further stated that the stair is constructed from grated slip-proof metal and does not become slippery (Tr. 80-81; Exh. R-3). Cisneros further stated that an employee could grab hold of the steam jacketed kettle for support if required (Tr. 80).

Serious Citation 1, item 2

Serious citation 2(a) and 2(b) allege:

29 CFR 1910.36(b)(4): Exit(s) were locked or fastened, preventing free escape from inside of the building:

> In the Old Office Area, the exit to the outside was marked, but was not maintained to allow free escape. The door had two boards nailed to the door, exposing employees to a fire hazard.

29 CFR 1910.37(f)(6): Ways of exit access were less than 28 inches in width:

> In the old office, access to the office measured thirteen inches (13") directly out of the door and nine inches (9") aisle space; the space allowed does not meet the minimum requirement.

A combined penalty of $450.00 is proposed.

One employee entered the old office at the back of the building to place items in storage, and to inspect for rodents (Tr. 50). Cisneros' employees told CO Garcia the exit from the office to the outdoors had been boarded up for approximately three months (Tr.

[1] Because only the penalties were placed at issue in this case, Cisneros' argument that the cited staircase is not fixed and therefore not subject to the cited standards (Tr. 84-85) cannot be considered.

41). The aisle leading into the office was blocked with cardboard boxes (Tr. 47; Exh. C-3). In the event of fire, an employee working in the office would not have a clear means of escape (Tr. 42). CO Garcia testified that the storage of combustibles in the office and the presence of the cardboard boxes increased the probability of a fire occurring (Tr. 43).

Cisneros testified that the old office is rarely used since it was closed off in 1980 (Tr. 85), but admitted that his employees do not ask permission to go into the room, and that he did not know how often they were in it (Tr. 105-06). The room is not closed off, entrance is restricted only by the cardboard boxes in the hall (Tr. 106).

Serious Citation 3, item 3

Serious citation 3 alleges:

29 CFR 1910.147(c)(1): The employer did not establish a program consisting of an energy control procedure and employee training to ensure that before any employee performed any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment would be isolated, and rendered inoperative in accordance with 29 CFR 1910.147(c)(4):

> In the plant, a Hydrau Slicer is dismantled for cleaning and the employer did not develop a written Lockout/Tagout program.

A penalty of $750.00 was proposed.

Cisneros admitted that it had no lockout/tagout program (Tr. 54). During the inspection an employee was cleaning the Hydrau Slicer while it was still energized. The slicer was cleaned daily (Tr. 53). Garcia testified that the probable injury an employee would sustain should the slicer engage would be amputation (Tr. 55).

The slicer is equipped with a safety lever which is intended to prevent accidental start-up when depressed (Tr. 88-89; Exh. C-4). The guard had been disconnected, and was not working at the time of the inspection (Tr. 114-15). Cisneros stated he was unaware that the guard had been disconnected (Tr. 118).

Other than Serious Citation 2

Citation 2, items 1 and 2 allege:

29 CFR 1903.2(a)(1): The OSHA notice was not posted to inform employees of the protections and obligations provided for in the Act:

The employer did not have an OSHA poster to inform the employees of their right (sic) and protections provided for them by this agency.

29 CFR 1904.5(a): The annual summary of occupational injuries and illnesses (applicable portion of OSHA Form No. 200) was not posted:

The employer did not post the annual summary of occupational injuries and illnesses to inform employees of the company record.

A penalty of $300.00 was proposed for each violation.

Cisneros argues that he was unaware of OSHA requirements regarding the OSHA poster and Form No. 200 (Tr. 90). Cisneros had been inspected twice before the February 8, 1993 inspection, in 1979 and 1981 (Tr. 57, 99-101).

Discussion

As a threshold matter, the undersigned notes that Cisneros' unfamiliarity with OSHA requirements cannot affect the penalty assessment in this case. Employers are presumed to know of standards that affect their business; ignorance of the standards does not excuse noncompliance. *Capform, Inc.*, 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989). "An employer has a duty to inquire into the requirements of the law." *Peterson Brothers Steel Erection Company*, 16 BNA OSHC 1196, 1993 CCH OSHD ¶30,052 (No. 90-2304, 1993).

In regards to the relevant testimony regarding gravity; after observing the demeanor of the witnesses, and examining the evidence, the undersigned finds that the testimony of Complainant's CO is the more credible. Moreover the Secretary has correctly assessed the gravity of the cited violations, giving due weight to the Respondent's size, good faith and history of violations.

The proposed penalties are affirmed in their entirety.

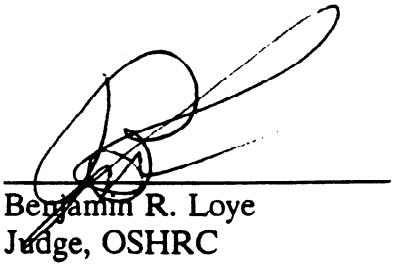
Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

Order

The following penalties will be ASSESSED:

Serious Citation 1, items 1(a)(b)&(c)	$750.00
Serious Citation 1, items 2(a)&(b)	$450.00
Serious Citation 1, item 3	$750.00
Other Citation 1, item 1	$300.00
Other Citation 1, item 2	$300.00



Benjamin R. Loye
Judge, OSHRC

Dated: April 22, 1994