UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
ISLAND ADC, INC.
Respondent.

OSHRC DOCKET
NO. 93-1203

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 June 17, 1994. The decision of the Judge will become a final order of the Commission on July 18, 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 July 7, 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
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Review Commission
1120 20th St. N.W., Suite 980
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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: June 17, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1203

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
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SECRETARY OF LABOR, Complainant, v. ISLAND ADC, INC., Respondent.	OSHRC Docket No. 93-1203

Appearances:

Luis A. Micheli, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Burton W. Stone, Esq.
Garden City, New York
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and 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 on or about January 29, February 3 and February 11, 1993[1],

[1] Request for Admissions, ¶ 1. The ruling made at hearing denying the Secretary's motion (Tr. 6) is hereby reversed. Inasmuch as Respondent never responded at all to the Secretary's Request for Admissions, each and every request made therein is deemed to have

Island ADC, Co., Inc., ("Respondent") was issued one citation alleging four serious violations of the Act. Penalties totalling $3125.00 were proposed by the Secretary. 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 10, 1994, in New York, New York. No affected employees sought to assert party status.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction related activities. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce (Complaint, ¶ ¶ II, III; Answer; Request for Admissions, ¶ ¶ 2 & 3). 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.[2] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

At the outset of the hearing, Respondent indicated that it conceded the four violations had occurred as alleged and that it wished to exercise its right to have a hearing on the record only as to the appropriateness of the penalties proposed by the Secretary (Tr. 5). The Secretary did not object.

The violative conditions which existed and the penalties proposed by the Secretary for each violation are as follows:

Item 1 - An electric tool (a cutter) connected via an extension cord was missing the ground pin thus was not grounded. (29 C.F.R.§ 1926.404(f)(6).) Penalty proposed: $500.

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been admitted. Rule 54(b), 29 C.F.R. § 2200.54(b) (1993).

[2] Title 29 U.S.C. § 652(5).

Item 2 - A scaffold 5 ft. high did not have guardrails. (29 C.F.R. § 1926.451(a)(4).) Penalty proposed: $875.

Item 3 - Casters on the scaffold were not locked. (29 C.F.R. § 1926.451(e)(8).) Penalty proposed: $875.

Item 4 - A stairway was not equipped with a handrail along the unprotected side. (29 C.F.R. § 1926.1052(c)(1).) Penalty proposed: $ 875.

Under § 17(j) of the Act, 29 U.S.C. § 666(j), the Commission has the

> 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.

Where the record contains little relevant information concerning the factors set out above, the Commission has "given [the respondent] the benefit of the doubt on each of these three factors in determining an appropriate penalty." *Moser Construction Co.*, 15 BNA OSHC 1408, 1416 (No. 89-1027, 1991).

The OSHA supervisor who reviewed the citations prior to their issuance, testified as to how she calculated the proposed penalty as to each of the four items. In each case she started with a "gravity based" amount and, following the formula in the Field Operations Manual, gave Respondent "adjustments (reductions)" for its small size, good faith and history of no prior violations." These adjustments were based on a company of 85 employees with 26 at this particular work site (Tr. 12-13). She testified that if she were aware that Respondent operated under at least one other name and had had prior violations under that name, the "adjustment" for history would have been different (Tr. 9, 12-13). Based on her calculations, the Secretary proposed the penalty amounts contained in the citation.

Respondent argued that as a sub-contractor on multi-employer work sites its employees often face conditions which were created by other contractors over which it has no control. It also argued that it is required by many of its contracts in the New York area to "hire" from the local union hiring hall a number of employees equal to the number of its "regular" employees it assigns to the site. Respondent points out that no matter how much it trains its "regular" employees, the requirement to "hire" from the hiring hall means that

they get individuals they do not know had who have no long term commitment to Respondent. These employees, who may be with Respondent for only a day or two, cannot be trained economically.

Respondents "defenses" do not demonstrate particular good faith nor do they warrant reduction in the proposed penalties. In order to avoid liability under the Act, a noncontrolling, noncreating subcontractor, such as Respondent, must show either that its exposed employees were protected by other realistic measures taken as an alternative to literal compliance with the cited standard or that it did not have, nor with the exercise of reasonable diligence could have had, notice that the condition was hazardous. *Anning-Johnson Co. v. OSHRC*, 516 F.2d 1081, 3 BNA OSHC 1166 (7th Cir. 1975). In this case Respondent has shown neither.

Moreover, the fact that Respondent has constantly changing personnel on its worksite should heighten its responsibility for at least basic safety training. To accept Respondent's position would be to agree that temporary or hiring hall employees are somehow entitled to less protection from hazardous conditions than are a respondent's "regular" employees.

Even though Respondent is to be given any "benefit of the doubt," this record contains little information as to the penalty assessment factors, and if anything, demonstrates why the penalties might be increased, at least as to the one item mistakenly failed to be identified as repeated.[3]

In sum, the penalties as proposed by the Secretary are deemed to be 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.

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[3] Amending the item now to "repeated" by a post-hearing amendment would be prejudicial and basically unfair to Respondent.

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 serious violation of the Act as alleged in the citation issued to it on or about March 30, 1993.

4. The penalties proposed by the Secretary in the citation issued to Respondent on or about March 30, 1993, are appropriate within the meaning of § 17(j) of the Act.

ORDER

1. The citation issued to Respondent on or about March 30, 1993, is AFFIRMED.

2. Respondent shall pay to the Secretary of Labor - OSHA an aggregate civil penalty totalling $ 3125.00.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: JUN 15 1994
Washington, D.C.