UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
SEIFERT CONSTRUCTION CO., INC.
Respondent.

OSHRC DOCKET
NO. 92-3379

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 December 15, 1993. The decision of the Judge will become a final order of the Commission on January 14, 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 January 4, 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: December 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3379

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
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SECRETARY OF LABOR, Complainant, v. SEIFERT CONSTRUCTION CO., INC. Respondent.	OSHRC Docket No. 92-3379

DECISION AND ORDER

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

The sole remaining issue in this matter is whether the violation of 29 C.F.R. § 1926.500(b)(8), which Respondent concedes existed, is serious within the meaning of § 17(k) of the Act.

Respondent was issued a citation alleging one serious violation for a failure to comply with the standard at 29 C.F.R. § 1926.500(d)(1). An amendment so as to allege a violation of 29 C.F.R. § 1926.500(b)(8) in the alternative was made and granted. The parties requested that the case be decided without a hearing and submitted a joint Stipulation of Facts. This Decision and Order is based upon the facts as stipulated. Respondent's written argument following the filing of the stipulation essentially concedes the applicability of the standard, the existence of the violative condition, employee exposure to the condition, and Respondent's knowledge thereof. Thus, all of the essential elements of a violation have

been taken by Respondent as proven.[1] *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

The Secretary has alleged that this violation is serious within the meaning of § 17(k) of the Act. Under section 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. *Dravo Corp.*, 7 BNA OSHC 2095, 2101, (No. 16317, 1980), *pet. for review denied*, 639 F.2d 772 (3d Cir. 1980). In is not necessary for the occurrence of the accident itself to be probable. It is sufficient if the accident is possible, and its probable result would be serious injury or death. *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980). The Commission has held serious violations to have been demonstrated under circumstances where the hazard was a fall of ten to fifteen feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980); *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977).

Facts relating to the issue of seriousness are included in the stipulation. Paragraphs 5 and 6 describe the characteristics of the violative condition. Paragraphs 9 and 10 describe what the content of the Compliance Officer's testimony would be if he took the stand. In essence, he would testify that an employee could stumble or fall and sustain broken bones due to the 8" depressions, some of which had four 5-inch bolts located in the opening. On the other hand, paragraphs 12, 13, 14 and 15 describe what testimony would have been given by Respondent's General Superintendent, a tradesman with over 20 years experience in the industry.

Inasmuch as the case was submitted on stipulated facts, with no testimony being taken from either "witness," there may well be no issue of credibility as between the testimony of the compliance officer and the superintendent. There is however, a reasoned manner with which to resolve this case.

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[1] Even if not conceded by Respondent, the facts as stipulated to are sufficient to support the alleged violation.

As the advocate of an order, the Secretary bears the burden of proof as to the alleged seriousness of an alleged violation. Thus, the Secretary, after proving a violation, has the burden to show by a preponderance of the evidence of record that the violation is serious if it has been alleged as such. In this case, the evidence is, at best, in equipoise. If the testimony of the compliance officer and that of the superintendent are given equal weight neither tips the scale in one direction or the other. Under these circumstances, the Secretary has not proven the seriousness of the alleged violation.

On the other hand, if a comparative weight of the evidence assessment of the stipulated proffered statements of the compliance officer and superintendent were required to be made based solely on the stipulation, the view of the superintendent would have to prevail. Even if the Compliance Officer's opinions are to be accorded some weight, the only way to assess what weight they should be given must be based upon his education and personal experience. In this stipulation there is no indication whatsoever of the degree of the compliance officer's experience as a CO or in employee safety at all. Nor is there any indication that he is experienced in the field of construction. The Superintendent, however, is shown to have over 20 years experience in the particular industry, that he knows of no serious hazards resulting from such floor depressions, and that he has stepped into floor depressions without serious consequences. While much of such testimony goes to the likelihood of an accident occurring rather than the consequences of a mishap, the lack of a serious injury over 22 years tends to show that such an incident would "probably" not result in serious injury or death. On balance, the weight of the evidence is that stepping into a depression such as existed at this work site would probably not result in serious injury or death. Accordingly, the alleged violation is not serious as alleged.

As an other than serious violation of the Act a civil penalty of $100 is 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.

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 violation of § 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 in that it failed to comply with the standard at 29 C.F.R. § 1926.500(b)(8) in the manner alleged in the citation issued to it on or about September 24, 1992.

4. The violation found above was other than serious.

5. A civil penalty of $100 is appropriate.

ORDER

IT IS ORDERED THAT the citation issued to Respondent on or about September 24, 1994 is MODIFIED to reflect an other than serious violation of the Act.

IT IS FURTHER ORDERED THAT a civil penalty of $100 is assessed.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: DEC 14 1993
Washington, D.C.