



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
UNIROYAL PITSTOP
Respondent.

**OSHRC DOCKET
NO. 93-1295**

**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 23, 1994. The decision of the Judge will become a final order of the Commission on July 25, 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 13, 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.
Ray H. Darling, Jr.
Executive Secretary

Date: June 23, 1994

DOCKET NO. 93-1295

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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James E. White, Esq.
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525 Griffin Square Bldg., Suite 501
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Dallas, TX 75202

Mr. Carl R. Smith, President
Pit-Stop, Inc.
422 North Air Depot Boulevard
Midwest City, OK 73110

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
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SECRETARY OF LABOR,

Complainant,

v.

PIT-STOP, INC.,

Respondent.

OSHRC Docket No. 93-1295

APPEARANCES:

Daniel Curran, Esquire
Office of the Solicitor
U. S. Department of Labor
Dallas, Texas
For Complainant

Mr. Carl R. Smith
Pit-Stop, Inc.
Midwest City, Oklahoma
For Respondent *Pro Se*

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest two citations issued by the Secretary of Labor (Secretary) pursuant to section 9(a) of the Act.

At the beginning of the hearing, the parties entered into an agreement in partial settlement of the issues pending before the Occupational Safety and Health Review Commission (Commission). The Secretary agreed to amend items 2, 3 and 4 of Citation No. 1 to allege "other" than serious violations with no penalties proposed. Respondent,

Pit-Stop, Inc. (Pit-Stop), agreed to withdraw its notice of contest as to Citation No. 2. As a result of the agreement, only item 1 of Citation No. 1, alleging a violation of 29 C.F.R. § 1910.23(a)(8), remained at issue.

The standard at § 1910.23(a)(8) requires:

Every floor hole into which persons can accidentally walk shall be guarded by either:

(i) A standard railing with standard toeboard on all exposed sides, or

(ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing

The alleged violation is described in the citation as follows:

Floor holes, into which persons could accidentally walk, were not guarded by standard railings with standard toeboards on all exposed sides or by floor hole covers of standard strength and construction:

In the shop area: bay 3, 4, and 5 where covers were not placed over the floor holes measuring 3 feet wide by approximately 10 feet long and 5 feet deep where employees go to do oil changes and grease jobs on cars and trucks, exposing employees to the hazard of falling into this operation.

Gerald Young, compliance officer with the Occupational Safety and Health Administration (OSHA), conducted the inspection which gave rise to issuance of the citations. He explained that the openings were service pits used by employees to gain access to the underside of motor vehicles. The pits, which were used to drain engine oil and grease vehicles, measured 3 feet wide, 5 feet deep and approximately 10 feet long (Tr. 19). He noted the floor in the area of the pit was slippery (Tr. 20). Young testified that adequate guards were provided for several pits and that Kerry Smith, a Pit-Stop official, told him that "it was a matter of time before the guards would be available to the other pits as well" (Tr. 28).

Jerry Hill, a Pit-Stop employee at the time of the inspection, testified about Pit-Stop's efforts to provide safe work conditions. Included was a tour of a General Motors plant to

seek feasible methods to guard the pits (Tr. 59-63). Hill also stated there were guards at the end of the pits. Although the inspector agreed, he pointed out there were gaps between the guards (Tr. 70).

Carl Smith, president of Pit-Stop, testified that the necessary guarding had been purchased but had not been installed (Tr. 71, 73). While his testimony was not refuted and guards were subsequently installed, the pit was open at the time of the inspection.

The standard was violated as alleged.

Section 17(k) of the Act provides as follows:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The evidence shows that a fall of 5 feet to the corrugated metal floor of the pit could result in death or serious physical harm to employees.

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 a 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.

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

Upon consideration of the relevant factors, it is determined that a penalty in the amount of \$100.00 is appropriate.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Citation No. 1

Item 1, alleging a serious violation of 29 C.F.R. § 1910.23(a)(8), is affirmed and a penalty in the amount of \$100.00 is hereby assessed.

Items 2, 3 and 4, alleging violations of 29 C.F.R. §§ 1910.147(c)(1), 1910.147(c)(5)(i), 1910.304(f)(4), 1910.1200(f)(5)(ii), and 1910.1200(g)(1), are hereby affirmed as “other” than serious violations without penalty.

Citation No. 2

Items 1, 2 and 3, alleging violations of 29 C.F.R. §§ 1903.2(a)(1), 1910.215(a)(4), and 1910.215(b)(9), respectively, are hereby affirmed.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: June 15, 1994