



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
ACTION CRAFT, INC.
Respondent.

OSHRC DOCKET
NO. 93-0129

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 24, 1993. The decision of the Judge will become a final order of the Commission on July 26, 1993 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 14, 1993 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.
Executive Secretary

Date: June 24, 1993

DOCKET NO. 93-0129

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Ms. Bobbye D. Spears
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Office of the Solicitor, U.S. DOL
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1371 Peachtree Street, N.E.
Atlanta, GA 30309

Mr. John Guard, Vice-President
Action Craft, Inc.
2603 Andalusia Boulevard
Cape Coral, FL 33909

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
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1365 Peachtree Street, N.E.
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SECRETARY OF LABOR,

Complainant,

v.

ACTION CRAFT, INC.,

Respondent.

OSHRC Docket No. 93-129

APPEARANCES:

Stephen Alan Clark, Esquire
Office of the Solicitor
U. S. Department of Labor
Fort Lauderdale, Florida
For Complainant

Mr. John E. Guard
Vice-President
Action Craft, Inc.
Cape Coral, Florida
For Respondent *Pro Se*

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

The respondent, Action Craft, Inc., manufactures small draft fishing boats at a facility in Cape Coral, Florida. It employs approximately eighteen people in this manufacturing operation.

On June 18, 1992, Compliance Officer S. J. Martin inspected respondent's operation under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*). During the course of this inspection, Martin observed conditions which he believed

constituted violations of the standards promulgated under the Act and on September 24, 1992, the Secretary issued a serious citation comprised of the following eight items:¹

Item 1

A violation of 29 C.F.R. § 1910.22(b)(1) resulting from respondent's failure to post load limit signs in a storage area located above the restroom and breakrooms in respondent's facility.

Item 2

A violation of 29 C.F.R. § 1910.23(c)(1) for respondent's failure to guard with standard railings the open sides of the overhead storage area to protect employees from fall hazards.

Item 3

A violation of 29 C.F.R. § 1910.106(e)(2)(iv)(V) for respondent's failure to use an approved self-closing valve on containers from which flammable liquids were dispensed.

Item 4

A violation of 29 C.F.R. § 1910.106(e)(6)(ii) for respondent's failure to electrically interconnect the nozzle and the container when dispensing flammable liquids from 55-gallon drums.

Item 5

A violation of 29 C.F.R. § 1910.178 for operating a powered industrial truck which had been modified by adding extensions to the forks without the manufacturer's approval.

Item 6

A violation of 29 C.F.R. § 1910.212(a)(1) for respondent's failure to provide guarding on the ingoing nip points of a cylinder machine.

¹ Respondent was also issued two "other" items which were not contested and have become final orders of the Review Commission.

Item 7

A violation of 29 C.F.R. § 1910.213(i)(1) for respondent's failure to enclose with guarding the non-working portions of the blade of a bandsaw used in its manufacturing process.

Item 8

A violation of 29 C.F.R. § 1910.215 for respondent's failure to properly guard a bench grinder in the woodshop area.

The Secretary proposes a penalty of \$375 for each of the above described violations.

On October 8, 1992, the respondent filed its notice of contest limited to the penalties assessed for each of the above described items. By letter dated October 17, 1992, respondent again indicated an intent to contest the penalties but raised some question as to whether the charge with respect to item 2 (the guarding of the open sides of the storage area) was proper. In an undated answer to the complaint received by the Review Commission on December 16, 1992, respondent raised a defense that it lacked knowledge of any of the alleged violations contained in the citation.

This matter came on for hearing before the undersigned in Tampa, Florida, on May 6, 1993. Mr. John E. Guard, an officer of respondent corporation, represented the respondent acting *pro se*.

Since it did not appear that respondent was disputing the factual allegations set forth in the body of the citation, this circumstance was verified by the court at the hearing (Tr. 14-27).

Respondent's principal defense at the hearing was that respondent lacked knowledge that any of the items charged constituted a violation of the cited standards. Respondent urged that it had not been furnished notice of the requirements by the Occupational Safety and Health Administration prior to the inspection. This defense, of course, is untenable since the Secretary is not required to advise employers of the Act's requirements prior to making an inspection. The knowledge element of a charge relates to an awareness of the facts which constitute a violation of the standard and not the employer's knowledge of the standard's requirements. *Shaw Construction, Inc.*, 6 BNA OSHC 1341, 1978 CCH OSHD ¶ 22,524 (No. 3324, 1978). Since all of the items cited were in plain view, the respondent should have known of these conditions or could have attained such knowledge through the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶ 29,239 (No. 87-1359, 1991).

The sole issue in this case is whether or not the penalties proposed by the Secretary are appropriate under the circumstances of this case. In determining penalties, the Review Commission is required by section 17(j) of the Act to give due consideration to the size of the business of the employer, the gravity of the violations, the good faith of the employer, and the history of previous violations. These factors were initially considered by the compliance officer in arriving at the proposed penalties (Tr. 37-38), and full allowances were granted except in the case of good faith.

The Review Commission is the final arbiter in determining appropriate penalties. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). While the Secretary's penalties were computed according to the guidelines set forth in the

agency's operating procedures, this court believes, upon consideration of the full circumstances, that a further reduction of penalties is appropriate.

Respondent is a small company and has not been previously investigated by the Secretary. The compliance officer reported that respondent cooperated fully during the course of the inspection and immediately corrected all items brought to its attention (Exhs. R-1 thru R-11; Tr. 39). This court was impressed with the sincerity of respondent during the hearing and believes that respondent is fully committed to an effective safety program. It is also indicated that this company has suffered financial setbacks and is struggling to survive under the current economic conditions (See Exhs. R-16 thru R-22). In view of these circumstances, this court believes a penalty of \$200 for each of the cited items is appropriate and this amount will be assessed.

The foregoing will constitute the findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing, it is hereby ORDERED:

Serious Citation No. 1, items 1 through 8, are affirmed and a total penalty of \$1,600 is assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: June 14, 1993