UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
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SECRETARY OF LABOR
Complainant,
v.
KENNETH J. HERMAN, INC.
Respondent.

OSHRC DOCKET
NO. 92-3294

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 October 4, 1993. The decision of the Judge will become a final order of the Commission on November 3, 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 October 25, 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.

Date: October 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3294

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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Occupational Safety and Health
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 92-3294
KENNETH J. HERMAN, INC.,	:	
Respondent.	:	

Appearances:

Evan R. Barouh, Esq.
U.S. Department of Labor
New York, New York
For Complainant

Kenneth J. Herman, Pres.
Kenneth J. Herman, Inc.
Amityville, New York
For Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq., (the Act), to review citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act.

Following an inspection of Respondent's business site at Islandia, New York the Secretary of Labor issued three citations to the Respondent charging serious violations of the standard at 29 CFR 1926.100(a) and 29 CFR 1926.451(a)(13); repeat violation of the standard at 29 CFR 451(d)(10) and other than serious violation of the standards at 29 CFR 1926.20(b)(1) and 29 CFR 1926.21(b)(2). A hearing was held in New York, N.Y. No

standard at 29 CFR 451(d)(10) and other than serious violation of the standards at 29 CFR 1926.20(b)(1) and 29 CFR 1926.21(b)(2). A hearing was held in New York, N.Y. No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

Alleged Violation of 29 CFR 1926.100(a)

Section 1926.100-Head Protection

(a) Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets. The Secretary alleges that two employees were working on a without protective helmets and were subject to possible head injury from falling objects or impact. Mr. Ornellas, the compliance officer testified that the Respondent was engaged in the construction of two fire escapes on a building in Islandia, N.Y. He observed two employees working on the north side of the building, one on the 6th floor and one immediately below on the 5th floor, not wearing hard hats for protection. (T 11-12, Exh. C-1). He stated the employee on the 5th floor was in a dangerous area and subject to injury from falling tools. The evidence substantiates that this employee was at hazard and could be subject to head injuries from falling objects absent a protective helmet. However, as to the employee working on the 6th floor the evidence of record does not demonstrate that he was in a zone of danger. To allege as the compliance officer did that this individual could possibly suffer injury by impact is too speculative absent other evidence demonstrating a reasonable predictability of such potential danger. No violation is found as to the employee on the 6th floor. The violation was open and in clear view of Malley, the Respondent's foreman who was supervising the work. The foreman had actual or constructive knowledge of the violative condition, and such knowledge is imputed to the Respondent employer. Baytown Construction Co., 15 BNA OSHC 1705, 1710, 1992 CCH OSHD par. 29,741,p. 40,414(No. 88-2912s), aff'd w/o published opinion, 983 F2d 282 (5th Cir. 1993). Respondent alleges that the violation was caused by unpreventable employee misconduct since employees are furnished hard hats and told to wear them. However, there is no evidence that the Respondent adequately communicated and effectively enforced his

alleged rule as to the wearing of hard hats. There is no evidence that the rule was enforced through disciplinary action or any other penalties; there was no evidence of the presence of a systematic effort to monitor employees for conformity with the safety rule alleged. Actually, Kolkowski, one of the foreman admitted not wearing a hard hat. His action further demonstrates Respondent's failure to promulgate and carry out any such rule. The totality of the credible evidence does not demonstrate that the employer herein sustained his burden of establishing an unpreventable employee misconduct defense. I therefore find that a violation of section 1926.100(a) occurred as charged. Under all the existing facts and circumstances herein, a penalty of $600 is appropriate.

Alleged Violation of 29 CFR 1926.451(a)(13)

The cited standard reads in pertinent part:

Section 1926.451 - Scaffolding

(a) General requirements. (13) An access ladder or equivalent safe access shall be provided. The compliance officer observed an employee "using the frame of the scaffold to gain access to various levels". (T24, C 1). Specifically, he stated the employee "started at the 46 foot level, and he slowly went down, level by level, down to about almost to the bottom, and each time he did that he used the frame if the scaffold because there was no ladder at that point." (T60) The compliance officer found it to be a serious violation since the employee was subject to a fall of 46 feet which could cause serious physical injuries. While Kolkowski the foreman testified there was a ladder present, the totality of the evidence presented by the Respondent did not demonstrate that a ladder of the height, width, make-up with railings attached were present. These appurtenances are required by the standard to qualify as a ladder. The testimony of the compliance officer specifically stating he observed the frame of the scaffold being used for climbing down was unequivocal, direct and forthright and is accepted and is found to be more credible than the testimony of Kolkowski. I find that Respondent's employee in using the frame of the scaffold for movement was at a hazard of falling down and being seriously injured. The Respondent knew or should have known of this hazardous condition since it was visible to his foreman working in the area. The standard at 1926.451(a)(13) was violated in that no access ladder or equivalent safe access to the scaffold was provided. Respondent's

suggestion that hereto the violation was one caused by unpreventable employee misconduct is rejected on the same basis as previously stated. There is no evidence it had established work rules to prevent the violation, or if it had, that it communicated same to the employees, and enforced the rule when such violation occurred. The preponderance of the credible evidence establishes a violation of 1926.451(a)(13). The penalty proposed by the Secretary of $1500 is appropriate under all the existing facts and circumstances.

Alleged Violation of 29 CFR 1926.451(d)(10)

Section 1926.451(d) provides:

1926.451 Scaffolding.

(d) Tubular welded frame scaffolds.

--- (10) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection) and approximately 42 inches high, with a mid-rail of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section. The Secretary alleges that the Respondent committed a repeated, serious violation of 1926.451(d)(10) by failing to provide standard guardrails and toeboards for tubular welded scaffolding on which employees worked. The compliance officer testified he observed employees working on scaffolding that had no guardrails; specifically, on the south side of the building employees were working on the scaffold with no guardrails and they were not tied off in any way; on the north side of the building two employees were working on the scaffold, both had safety belts, but only one was tied off, the other being at risk of falling. The employees working without being tied off and with no guardrails present were at a hazard of falling a distance of more than 10 feet to the ground, thusly subject to serious injuries. The foreman Kolkowski admitted that while he had a belt on, he was not tied off. The Respondent knew or should have known of the hazard present. His foreman visibly observed the violation, and in fact, was a perpetrator himself. On the same basis as previously stated Respondent's alleged defense of unpreventable employee misconduct is rejected. The Secretary classified the violation as repeated.

The record shows that the Respondent was cited for violation of this standard during the three year period prior to the issuance of the current violation, and that such violations were affirmed against the Respondent. A violation is properly classified as repeated if at the time of the alleged repeated violation, there was a Commission order against the same employer for a substantially similar violation. The evidence of record shows that the Respondent previously was cited for violation of this standard and that such violation was found as charged and has become a final decision of the Commission. I, therefore conclude that the violation of 1926.451(d)(10) was repeated. The Secretary assessed a penalty of $6000 for the serious repeated violation. The compliance officer testified that in formulating the penalty he had considered the size of the corporation, its good faith, gravity of the violation, and history of previous violations. Taking into consideration the entire evidence of record and the criteria under 17(j) of the Act, I find the penalties assessed appropriate under all the existing facts and circumstances herein and affirm the assessment of the penalty of $6000.

Alleged Violation of 29 CFR 1926.20(b)(1) and 1926.21(b)(2).

The Respondent was charged with other than serious violations of 1926.20(b)(1) for failure to have an adequate safety program, and of 1926.21(b)(2) for failure to instruct employees to avoid unsafe conditions. The evidence clearly demonstrates that the Respondent did not comply with the cited standards. Mr. Shad, the company vice-president admitted to the compliance officer that they had no safety program (T-34). This is borne out by the current and past violations of the scaffolding requirements of 1926.451(d). The company knew of the past violations, yet took no effective steps to prevent their reoccurrence, or to institute a training program which was strictly monitored and effectively policed. The absence of either a safety program and failure to instruct employees in avoidance of unsafe conditions is vividly portrayed by the disregard by the company foreman of both the head protection and scaffolding standard. I therefore conclude that the Respondent violated the standard at 1926.20(b)(1) and 1926.21(b)(2) and assess no penalty.

Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is hereby ordered:

1. The allegation of a serious violation of 29 CFR 1926,100(a) is AFFIRMED and a penalty of $600 is assessed.

2. The allegation of a serious violation of 29 CFR 1926.451(a)(13) is AFFIRMED and a penalty of $1500 is assessed.

3. The allegation of a serious repeated violation of 29 CFR 1926.451(d)(10) is AFFIRMED and a penalty of $6000 is assessed.

4. The allegation of an other than serious violation of 29 CFR 1926.20(b)(1) is AFFIRMED with no penalty assessed.

5. The allegation of an other than serious violation of 29 CFR 1926.21(b)(2) is AFFIRMED with no penalty assessed.

IRVING SOMMER
Judge

DATED: OCT - 1 1993
Washington, D.C.