



UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
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SECRETARY OF LABOR  
Complainant,

v.

REDONDO CONSTRUCTION CORPORATION  
Respondent.

OSHRC DOCKET  
NO. 92-0177

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 April 8, 1993. The decision of the Judge will become a final order of the Commission on May 10, 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 April 28, 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  
1825 K St. N.W., Room 401  
Washington, D.C. 20006-1246

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) 634-7950.

FOR THE COMMISSION

  
Ray H. Darling, Jr.  
Executive Secretary

Date: April 8, 1993

DOCKET NO. 92-0177

NOTICE IS GIVEN TO THE FOLLOWING:

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Paul L. Brady  
Administrative Law Judge  
Occupational Safety and Health  
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SECRETARY OF LABOR,

Complainant,

v.

REDONDO CONSTRUCTION CORP.,

Respondent.

OSHRC Docket No. 92-177

Appearances:

Jane Snell Brunner, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
New York City, New York  
For Complainant

Jose A. Silva-Cofresi, Esq.  
Fiddler, Gonzalez & Rodriguez  
San Juan, Puerto Rico  
For Respondent

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 and proposed penalties issued by the Secretary of Labor (Secretary). Respondent, Redondo Construction Corporation (Redondo), at all times pertinent hereto, was the general contractor for construction of a pier and terminal at Pier 4 in San Juan, Puerto Rico. Compliance Officer Jose Carpena conducted the inspection which gave rise to issuance of the citations (Tr. 14-15).

Alleged Violation of 29 C.F.R. § 1926.1053(b)(1)

The standard provides in pertinent part as follows:

(1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. . . .

The citation alleges that:

Portable ladders observed on second level, north - north east corner of passenger terminal had side rails that did not extend at least 3 feet above upper landing surface. Hazard: Fall.

Mr. Carpena testified that during the inspection, he observed a wooden portable ladder on which the side rails did not extend 36 inches above the landing. The ladder, although secured, did not have any grasping device, such as a grabrail (Joint Exh. 1, Tr. 44-46). The evidence shows a guardrail was provided to abate this condition (Joint Exh. 14, Tr. 48, 114). Carpena stated the ladder was in use by Redondo employees at the time of the inspection (Tr. 37).

In order to establish a violation of the standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applied, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

Redondo argues that the first element of proof has not been met because the ladder was a "fixed ladder." It is maintained that since the ladder was admittedly secured both at the top and bottom, it was of a fixed nature and not portable as alleged.

In this regard, the definitions under 29 C.F.R. § 1926.1050 are governing. A portable ladder is defined as "a ladder that can readily be moved or carried," in contrast to a fixed

ladder, which is defined as “a ladder that cannot be readily moved or carried because it is an integral part of a building or structure.” The testimony of Carpena is not disputed that the ladder was not an integral part of Pier 4 (Tr. 44-45), that “it could be moved, carried or placed somewhere else” (Tr. 68-69). The cited standard applied in this case.

Redondo also denies the alleged violation occurred and that its employees had access to any violative condition. Reference is made to the testimony of Mr. Carmelo Calderon, Project Engineer, who explained that the ladder was being dismantled because concrete pouring in the area was completed and forms were being removed (Tr. 103). It is also pointed out that the compliance officer admitted there were other means of access to the work area (Tr. 95). Calderon described the location of two other means of access (Tr. 104). The project engineer also declared that the ladder was last used by employees about a week before the inspection, contradicting the testimony of the inspector. He added that the guardrail was put up only to show good faith, even though it was not necessary (Tr. 114).

Redondo argues that the contradiction in testimony regarding use of the ladder should be resolved in its favor because of Carpena’s lack of credibility. In support of this argument, Redondo refers to his testimony wherein he states the worksite was inspected on the 17th and 18th of August. He retracted this testimony when he was informed these dates were on a Saturday and Sunday. In addition, it is argued Carpena failed to interview or identify the carpenters allegedly using the ladder.

The record does not indicate a reasonable basis for questioning Mr. Carpena’s credibility, and his testimony regarding use of the ladder is not directly refuted. In addition, the evidence convincingly shows the ladder was accessible for use.

Redondo admits there were two other means of access to the work area and that the ladder was in place and had been used for such access. Although it is asserted the ladder was being dismantled, such task is easily accomplished by simply removing the ladder from service. Clearly, there was no need to add a guardrail, which can only be viewed as assuming a safe means of access. The violation has been established as alleged.

Alleged Violation of 29 C.F.R. § 1926.500(d)(1)

The standard requires in pertinent part as follows:

Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . . .

The alleged violation is described in the citation as follows:

Open sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

- a. Open-sided floor observed on south side of passenger terminal (2nd level), Pier #4, San Juan, P.R., exposing employees to a 25 ft. fall.
- b. Open-sided platform observed on north - north east corner of passenger terminal (2nd level), Pier #4, San Juan, P.R., exposing employees to a 14 ft. fall.

Mr. Carpena testified that he observed the unguarded open-sided floor 25 feet above the lower level. Employees were walking on the floor to gain access to the upper level (Joint Exhs. 2, 3, 5<sup>1</sup>). Carpena stated the project engineer indicated the area was “probably overlooked” in referring to the installation of guardrails (Tr. 90). Calderon agreed there were no guardrails in the area cited (Tr. 116). The inspector also described the second instance of the alleged violation as depicted in Joint Exhibit 1. Access to the open-sided platform was gained by use of the previously cited ladder (Tr. 30, 34-35, 46). He explained that Redondo’s employees walked on the platform, at times within 4 feet of the edge, to gain access to their work areas (Tr. 25, 36-37, 91).

Mr. Calderon explained that the forming operation at the site required dismantling and setting up in different locations. He stated that work was just commencing in the area at the time of the inspection, and guardrails were being erected (Tr. 108-110). The project

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<sup>1</sup> Joint exhibit 4 shows the area cited after the condition was abated (Tr. 22-23).

engineer concedes that at least some of the employees who walked along the open-sided floor were going to perform actual construction work and not perform guardrail installation (Tr. 117-118).

Redondo also argues that it began to abate the hazard as soon as employees became exposed to any danger. It is asserted that employees had not been exposed to any danger before, because they were not working near the open-sided floor and did not need to use the ladder for access to their work area (Respondent's Brief, p. 12). Redondo further contends employees wore safety belts; and, although there was evidence they wore safety belts, they were not tied off (Tr. 66-67, 81-81).<sup>2</sup> Calderon agreed, stating "they wouldn't be able to go far if they were tied off" (Tr. 92).

The evidence establishes that the open-sided floors described in the citation were not guarded by standard railings, thus exposing employees to fall hazards. The violations having been proven, a determination must now be made as to the types of violations and whether the proposed penalties are appropriate.

Citation No. 1 is alleged to be of a serious nature. A violation is deemed serious if there is a substantial probability that death or serious physical harm could result from the violative condition. Clearly, a fall of approximately 14 feet to a concrete surface could result in serious injury or death. The alleged violation set forth in Citation No. 2 is characterized as a repeat violation. "A violation is repeated under § 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979).

Joint Exhibit 6 shows that a citation charging violation for 29 C.F.R. § 1926.500(d)(1) was not contested and became a final order of the Commission on June 14, 1991. The violation occurred at the Pier 4 construction site.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission. *Secretary v. OSAHRC & Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). Under § 17(j) of the Act, the Commission is required to find and give "due

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<sup>2</sup> The employees depicted in Joint Exhibit 12 were not in the cited areas (Tr. 115).

consideration” to the size of the employer’s business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. The gravity of the offense is the principal factor to be considered. *Nacirema Operating Company*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

The record indicates Redondo’s concern for safety matters, as reflected by its written safety program. The evidence also shows guardrails were in place in all other areas on site, and the violations were immediately abated. Upon consideration of the foregoing factors and circumstances, the following penalties are deemed appropriate:

- (1) 29 C.F.R. § 1926.1053(b)(1) \$ 500.00
- (2) 29 C.F.R. § 1926.500(d)(1) \$4,500.00

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is hereby ORDERED that:

- (1) Citation No. 1, alleging violation of 29 C.F.R. § 1926.1053(b)(1), is affirmed and a penalty in the amount of \$500.00 is hereby assessed; and
- (2) Citation No. 2, alleging violation of 29 C.F.R. § 1926.500(d)(1), is affirmed and a penalty in the amount of \$4,500.00 is hereby assessed.

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

Date: March 11, 1993