UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
LUIS A. AYALA COLON SUCRS., INC.
Respondent.

OSHRC DOCKET
NO. 93-1863

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 July 28, 1994. The decision of the Judge will become a final order of the Commission on August 29, 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 August 17, 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: July 28, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1863

NOTICE IS GIVEN TO THE FOLLOWING:

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Irving Sommer
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-1863
LUIS A. AYALA COLON SUCRS., INC.,	:	
Respondent.	:	

Appearances:

Jane S. Brunner, Esq.
U.S. Department of Labor
New York, New York

For the Complainant

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

For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

BACKGROUND

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.

Respondent is a corporation which was engaged in stevedoring and related activities. On or about May 13, 1993, the worksite at Pier Number 8, Ponce Municipal Pier, Ponce, Puerto Rico was inspected by an OSHA compliance officer. Subsequently, on June 11, 1993, the company received two citations resulting from this inspection. Respondent filed a timely notice of contest to the citations and penalties. Thereafter, the parties reached a partial settlement, resolving all issues except Citation 2, item 1. A hearing was held on December 9, 1993, in Hato Rey, Puerto Rico, regarding the remaining issue. Both parties were represented at the hearing and both parties have filed post-hearing briefs. No jurisdictional issues are in dispute. The matter is now before the undersigned for a decision on the merits.

Secretary's case

At the hearing on December 9, 1993, the compliance officer, Radames Santisteban, testified that at the time of the inspection, the Respondent was engaged in unloading containers from a vessel, the Nedlloyd Neellandia. The compliance officer noted that during the inspection, he observed two stevedores employed by the Respondent who were working on the apron of the pier, but were not wearing safety shoes. The employees were working on the apron attending the cargo that was coming down from the vessel to be locked onto the chassis and connecting the slings to the spreader-bar. Mr. Santisteban further testified that the employees were exposed to being hit by the slings of the wheels of trucks and chassis in the area. These employees were only inches away from the trucks and chassis (transcript, p. 6-10, Secretary's brief, p. 2-4).

The Secretary asserts that clearly Respondent violated the cited standard as it failed to direct its employees to wear safety shoes on the date in question. The employees were readily exposed to the hazard of falling objects or puncture hazards. Respondent could have known and should have observed that its employees were working on the apron without wearing safety shoes. In addition, Respondent's violation of the standard cited is characterized as repeated, as the company was previously cited for the very same violation by OSHA on September 7, 1990. In the previous case (Docket No. 90-2651), the same violation was affirmed and resolved by the parties in a settlement agreement which became a final order of the Commission on May 6, 1991 (exhibits, C-5, C-6, C-7). Further, the Secretary's case is supported by photographic evidence (exhibits, C-1 and C-2), though admittedly the compliance officer took the pictures of Respondent's employees on the vessel rather than on the apron of the pier, where he saw the violation of the standard cited. The compliance officer explained that he had merely forgotten to take additional pictures of the same employees working on the apron, who had previously been working on the vessel.

At the hearing, the compliance officer argued that the employees he observed not wearing safety shoes were working on the apron of the pier and not just on the ship. This assertion is significant as activity on the ship is governed by 29 C.F.R. section 1918, while activity on the apron of the pier is covered by 29 C.F.R. section 1917. The relevant standard under 29 C.F.R. section 1918 is less strict in that it only mandates an employer to make safety shoes available to its employees and promote their use. The relevant standard under 29 C.F.R. section 1917 more strictly mandates an employer to require its employees to wear safety shoes and have an enforcement policy to ensure their use.

The compliance officer also noted that he met with two of Respondent's supervisory officials, Mr. Martinez and Mr. Bennazar. He discussed with them the necessity of having the employees working on the apron of the pier wear safety shoes. During his testimony, Mr. Santisteban noted that though tennis shoes, as those worn by the employees, could sometimes be characterized as safety shoes, the specific tennis shoes that he saw Respondent's employees wearing while working on the apron were not safety shoes in this instance. He could be sure of this as he had touched the toes of the shoes that the men were wearing and determined that they were not protected with steel shields to qualify them as safety shoes (transcript, p. 11-32, Secretary's brief, p. 4-9).

Respondent's case

Respondent asserts that it is not guilty of violating the standard as cited here. The Respondent argues that the Secretary's case is based solely on the testimony of the compliance officer, Radames Santisteban, who conducted the inspection. Respondent asserts that the compliance officer's testimony at the very least is inconsistent and not supported by the weight of evidence in this case.

First, Mr. Santisteban claims to have seen Respondent's employees working on the dock without wearing safety shoes. However, the only evidence produced by the compliance officer to support this claim are two photos of Respondent's employees working on board the vessel wearing tennis shoes. Mr. Santisteban even acknowledges that the photos do not in

themselves depict a violation, as employees working on board the vessel are not even required to wear safety shoes by the applicable standard. Further, Mr. Santisteban's explanation of why he did not take additional photos of Respondent's employees actually working on the dock without wearing safety shoes, that he merely forgot as he simply got caught up in the inspection, is not very plausible considering the vast experience of the compliance officer.

Second, Mr. Santisteban had no proof to support his testimony that he observed Respondent's same employees do work on the vessel then go down and do work on the apron of the pier. Clearly, the compliance officer is mistaken about what he saw as Respondent's employees are divided into work gangs, each responsible for doing work in a different area. For example, the stevedores who work on board the vessel do not work landside as well.

Third, the compliance officer offered no proof that the tennis shoes that were worn by Respondent's employees working on the apron were not in fact safety shoes in conformance with the standard. His mere assertion that the shoes worn by the employees were not safety shoes does not prove that there was a violation.

Finally, Respondent argues that since the standard requires that the employer direct its employees to wear safety shoes, it has complied with the standard. To support its claim of compliance, Respondent refers to exhibits C-3 and C-4, which are two memorandums to its employees from its Operations Manager regarding the wearing of safety shoes. In addition, Respondent submitted exhibits R-1 - R-5 to support its case (transcript, p. 33-41, Respondent's brief, p. 2-5).

DISCUSSION

Alleged repeat violation of 29 C.F.R. section 1917.94(a)

Repeat Citation 2, item 1 alleges:

The employer did not direct that employees exposed to impact, falling objects, or puncture hazards wear safety shoes, or equivalent protection.

A.

The primary question to consider here is whether or not the Respondent violated the particular standard for which it was cited.

The Secretary asserts that during his inspection he observed Respondent's employees working on the apron of the pier without wearing the required safety shoes in violation of the cited standard. Further, Respondent did not direct its employees to wear the required safety shoes.

Respondent argues that it was not in violation of the standard as its employees were not working on the apron without safety shoes. Further, it directed its employees to wear safety shoes in compliance with the standard.

In this case, it is evident from a review of all the record evidence, that though Respondent disagrees with the testimony presented by the compliance officer, the Respondent presented no witnesses whatsoever to refute the compliance officer's view that Respondent's employees were indeed working on the apron of the pier on the date of the inspection. Also, Respondent produced no evidence to support its claim that its workers were wearing safety shoes on the day in question.

B.

Another question to consider is whether or not Respondent ``directed'' its employees to wear safety shoes.

The Respondent asserts that it did ``direct'' its employees to wear safety shoes. The Secretary counters that Respondent did not ``direct'' its employees to wear safety shoes.

The term ``direct'' is defined in Webster's Third New International Dictionary (p. 640, 1986) as to supervise and guide or to prescribe by formal or mandatory instruction. In this matter, since the standard cited does not elaborate any exotic definition for the term ``direct'', I understand the term to be used as commonly understood and utilized.

Both parties touched on this issue at the hearing and in their post-hearing briefs. In addition, the two exhibits (C-3 and C-4) which the company submits show that the Respondent did direct its employees to wear safety shoes are not persuasive to that position. Exhibit C-3 does not direct the employees to wear safety shoes, as it only recommends that employees wear safety shoes. Exhibit C-4 does direct that employees wear safety shoes, but it is dated May 18, 1993, a date after the citation was issued in this case. Consequently, the totality of the evidence leads to the conclusion that Respondent did not ``direct'' its employees to wear safety shoes.

C.

A final question to consider is whether or not the violation is properly classified as repeated.

As the Commission has previously held, a repeated violation is established if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. See Secretary of Labor v. Potlatch Corporation, 7 BNA OSHC 1061 (No. 16183, 1979). A review of this case record as well as Commission precedent reveals that this same Respondent was previously cited for the very same violation by OSHA on September 7, 1990. In the previous case (Docket No. 90-2651), the same violation was affirmed and resolved by the parties in a settlement agreement which became a final order of the Commission on May 8, 1991 (exhibits, C-5, C-6, C-7). Accordingly, the violation is properly classified as repeated.

CONCLUSION

Despite Respondent's protestations to the contrary, the facts in this case indicate that the company was in violation of 29 C.F.R. section 1917.94(a). Clearly, it has been shown that the employer here failed to direct its employees to wear safety shoes while working on the apron on the date of the inspection.

The compliance officer in this case gave his testimony in a straightforward, frank and convincing manner and appeared to be truthful and honest. Mr. Santisteban's testimony is sufficient to make out a prima facie case of a violation of the standard at issue. His testimony was not discredited in any way, nor contradicted by direct evidence, nor by any legitimate inferences from the evidence.

Therefore, taking into consideration all the record evidence and credible testimony presented regarding this citation, I find that the Secretary has established a violation of the standard by a preponderance of the evidence presented.

The evidence further reflects that the Respondent knew or should have known of the hazard to its employees. The violation was obvious and discernible by mere observation. A review of all the relevant factors, the hearing transcript, and the original case record fully establishes that a penalty of $320 is appropriate for this citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or 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. Citation 2, item 1, alleging a repeat violation of 29 C.F.R. section 1917.94(a), is affirmed and a penalty of $320 is assessed.

IRVING SOMMER
Judge, OSHRC

DATED: [illegible]
Washington, D.C.