UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
FRANKLIN E. SKEPTON
Respondent.

OSHRC DOCKET
NO. 93-2353

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 February 10, 1995. The decision of the Judge will become a final order of the Commission on March 13, 1995 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 March 2, 1995 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
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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: February 10, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2353

NOTICE IS GIVEN TO THE FOLLOWING:

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John H. Frye, III
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SECRETARY OF LABOR,

Complainant

v.

FRANKLIN E. SKEPTON,

Respondent.

Docket 93-2353

APPEARANCES:

Richard T. Buchanan, Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For Complainant

Franklin E. Skepton
Pennsburg, Pennsylvania
Pro Se

BEFORE: Administrative Law Judge John H Frye, III,

Findings of Fact

Background

1. Respondent Franklin E. Skepton is a proprietorship which was engaged in construction at a work place located at Montgomery Avenue and Walt Road, Upper Perkiomen High School, Red Hill, PA 18076. (Answer, ¶ II; Tr. 382.)

2. In its business activities, respondent utilizes tools, equipment, materials, goods and supplies which have originated in whole or in part from locations outside the Commonwealth of Pennsylvania. (Answer, ¶ IV.)

3. The work being performed at the workplace was an addition to a high school. (Tr. 55; GX 27 at 15.)

4. Respondent was the general contractor at the workplace. (GX 27 at 16.)

5. At all relevant times, respondent employed at least thirty-one employees in its business activities, including approximately four employees at the workplace. (Answer, ¶ III.)

The Inspection Warrant

6. Based on Respondent's previous refusal to permit an inspection without a warrant,[1] on July 12, 1993, George J. Tomchick, Allentown, Pennsylvania Area Director for the Occupational Safety and Health Administration (OSHA), applied for a warrant for inspection of the workplace from Magistrate Judge Arnold C. Rapoport, United States District Court for the Eastern District of Pennsylvania. (GX 1; Tr. 12, 16, 20.) The warrant was issued that day.

7. The application for the warrant stated that the workplace was selected for a comprehensive safety inspection pursuant to the relevant administrative criteria set forth in OSHA's Scheduling System for Programmed Inspections, which was attached to the application as Exhibit A. (GX 1, application at ¶¶ 3-9.)

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[1]On July 24, 1990, an OSHA inspector assigned to the Allentown Area Office attempted to conduct an inspection of respondent's worksite at 539 School Road, Nazareth, Pennsylvania, but respondent refused the inspection without a warrant. (GX 1, application at ¶ 12; Tr. 325-26, 327, 355.)

8. On July 14, 1993, a United States Marshal accompanying OSHA compliance officers George Boyd and Trudi Ketchell served the warrant on Paul Skepton, respondent's foreman at the workplace. After reviewing the warrant, Paul Skepton permitted Mr. Boyd, Ms. Ketchell, and the two United States Marshals accompanying them to proceed with the inspection of the workplace. (Tr. 52-54.)

Respondent's Motion to Quash and/or Dismiss All Charges

At the opening of the trial, Respondent filed a motion which seeks the dismissal of all charges. In its entirety, the motion states:

> Respondent, Franklin E. Skepton, hereby moves to quash all of the evidence because it was illegally obtained and/or to dismiss all charges for the reason that all evidence in support of the charges was illegally obtained.

Attached to the motion is an unsigned page listing five ''Reasons for Motion to Quash and/or Dismiss All Charges.'' The first of these is that OSHA based its application for a warrant on nonexistent evidence. The second alleges that an anonymous complaint received by OSHA with respect to this work site does not exist.[2] The third alleges that the compliance officers sought the warrant and were accompanied by armed U.S. Marshals because of a personal vendetta against Mr. Skepton on account of

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[2]Mr. Skepton correctly cites Brock v. Brooks Woolen Company, 782 F.2d 1066 (1st Cir. 1986) for the proposition that a warrant issued on the basis of false or misleading information cannot stand. However, that is not the case with respect to this warrant.

his Jewish ancestry on the part of Messrs. Doherty and Tomchick of OSHA. The fourth states that Messrs. Doherty and Tomchick falsely accused Mr. Skepton of threatening their physical well being and that criminal charges brought against Mr. Skepton based on this accusation were dismissed. The fifth states that the armed Marshals were brought in ''... solely to harass, intimidate, and embarrass [Mr. Skepton] into violating [his] constitutional rights.''

In Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21, 98 S.Ct. 1816, 1824-25 (1978), the Supreme Court held:

> For purposes of an administrative search . . . probable cause justifying the issuance of a warrant may be based . . . on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." . . . A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources . . . would protect an employer's Fourth Amendment rights.

In this case, the application for an inspection warrant [GX 1] sets forth in detail (¶¶ 3 through 9 and Exhibits A and B) the neutral administrative criteria used in the selection of respondent and the workplace for an inspection. Mr. Skepton has not challenged this selection process, other than to express ''... amaze[ment] at how the University of Tennessee comes up with the Skepton name when I never went to any university ....'' (Tr. 327-32.)

He has alleged that the warrant was obtained on the basis of false representations:

> The false swearing in the warrant application that the inspection was being solely called because of a computer selection; when in fact, the Department of Labor received an alleged anonymous complaint letter, the same letter had the post mark date erased and insufficient postage.

(Respondent's brief, ¶ 5; pp. 9-10.) The complaint to which he refers was dated July 8, a Thursday, and was date-stamped by OSHA as received on July 13, 1993, a Tuesday. (GX 2.) The warrant application was sworn to and the warrant issued on Monday, July 12, 1993. (GX 1.) Whatever Mr. Skepton's concerns regarding the legitimacy of the complaint letter may be,[3] he has furnished no reason to question the date-stamp on the complaint. The warrant was properly issued on the basis of neutral administrative criteria, not on the basis of a bogus complaint letter.[4] See

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[3]Mr. Skepton has pointed to an inconsistency between the testimony of Area Director Tomchick and that of Inspector Boyd. The former testified that he did not see the complaint letter until July 15 or 16 (Tr. 36), while the latter testified that the complaint letter and warrant were handed to him by the former on July 13 (Tr. 180-81). Assuming that Mr. Boyd's recollection is correct, no reason exists to believe that the complaint had been received before the filing of the warrant application.

[4]Mr. Skepton alleges the Secretary fabricated an anonymous letter complaining of unsafe work conditions at the workplace in order to obtain the warrant. However, the warrant was not based on the existence of such a complaint. Mr. Skepton also alleges that OSHA Compliance Officer Tom Doherty and Area Director George Tomchick have discriminated against him because of his Jewish ancestry, but presented no evidence to support this allegation.

Mr. Skepton also claims that Mr. Doherty wrongly accused Mr. Skepton of physically threatening Mr. Doherty in the past, and that the armed U.S. Marshals who accompanied the compliance officers were not needed and served only to harass and intimidate Mr. Skepton. Respondent presented evidence 1. that a District

(continued...)

Matter of Trinity Industries, Inc., 876 F.2d 1485, 14 BNA OSHC 1081 (11th Cir. 1989); Cf. Trinity Industries, Inc., 15 BNA OSHC 1827 (Nos. 89-2168 and 89-2169, 1992). Respondent's motion to quash is denied.

Respondent's Denial of Jurisdiction

In his brief, Mr. Skepton asserts that the Secretary has not proved that he has jurisdiction in this case, nor has jurisdiction been admitted by anyone authorized to act for Respondent. (Brief, p. 11.) However, the answer to the complaint filed on Mr. Skepton's behalf admitted that he uses tools, materials, goods, and supplies which have originated outside the Commonwealth of Pennsylvania.[5] This admission is sufficient to establish jurisdiction.

Respondent's Defense to the Merits of the Citations

Mr. Skepton's defense to the merits of the citations is best summed up by the following:

> ... I want to state for the record that all of the citations alleging violations against Franklin E.

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[4](...continued)
Justice found Mr. Skepton not guilty of harassment of Mr. Doherty in connection with an earlier inspection (RX 1), and 2. concerning Mr. Skepton's predisposition to avoid violence (Tr. 328). Mr. Tomchick personally spoke with Mr. Doherty and reviewed the file of the previous inspection. Based on this, he reasonably believed that the compliance officers needed protection. (GX 1, application at ¶ 12; Tr. 19, 26, 30-31.) Mr. Skepton's evidence does not defeat this conclusion, particularly in light of the lack of support for his allegation that the OSHA officials were prejudiced against him. Moreover, there is no evidence that the marshals did more than serve the warrant and accompany the inspectors.

[5]The answer was not amended by Mr. Skepton following his firing of his attorney who had filed it.

> Skepton certainly did not happen. There is not one photograph that truly depicts any OSHA violation by Skepton or any of his employees. The entire hearing was conducted primarily with hearsay evidence by Mr. George Boyd and his failure to produce any witnesses or for that matter even his fellow compliance officer who assisted in this investigation and allegedly taking [sic] the photographs while Mr. Boyd took his notes.[6]

(Respondent's brief, p. 8.)

Mr. Skepton consistently objected to the introduction of photographs taken by Ms. Ketchell on the ground that she was not present and therefore could not be examined with respect to them. However, in each instance Mr. Boyd testified that he was standing beside Ms. Ketchell when she took the picture being offered and that the picture was an accurate representation of the condition depicted.[7] Thus, Mr. Skepton was not prejudiced by Ms. Ketchell's absence.

In addition, Mr. Skepton presented the testimony of Joseph E. Ritchey, a Pennsylvania insurance broker who handles Mr. Skepton's worker's compensation insurance. (Tr. 164-80.) Mr. Ritchey testified that Mr. Skepton has ''... an enviable track

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[6]Mr. Skepton also takes the position that he did not create, nor were his employees exposed to, any violations which were revealed by the inspection, citing D. Harris Masonry Contracting v. Dole, 876 F.2d 343 (3rd Cir. 1989). (Brief, pp. 12-13.) The discussion of the specific violations alleged by the Secretary reveals that record does not support this assertion. Harris Masonry concerned application of the Commission's Anning-Johnson doctrine and is not applicable to the facts of this case.

[7]Mr. Skepton also pointed out that in the few pictures which he took of the two compliance officers, Mr. Boyd always held the camera and Ms. Ketchell the clipboard, rather than the other way round, and asserted that this reflects adversely on Mr. Boyd's credibility. (Tr. 273.) The fact that Mr. Boyd was photographed with camera in hand does not discredit his testimony that Ms. Ketchell took the pictures which were introduced in evidence.

record of safety specifically with worker's compensation ...'' and has a ''... continued commitment towards safety.'' (Tr. 165-66.) Mr. Ritchey also commented on the adverse effect that OSHA citations might have on a company's standing with insurers. The evidence must be viewed in light of this defense and the fact that no representative of Mr. Skepton consented to participate in an opening conference or accompany Mr. Boyd on his inspection. (Tr. 55-56.)

It is also worthy of note that Mr. Skepton did not attack Mr. Boyd's calculation of the proposed penalty for any violation.[8] Mr. Boyd is an experienced compliance officer who is familiar with the construction industry. (Tr. 41-44.) Moreover, his specific penalty recommendations were reviewed by his supervisor. In these circumstances, I have reviewed Mr. Boyd's calculations and their underlying assumptions to determine whether they might be sufficiently inaccurate as to call into question any individual penalty proposed. I find no reason to question his assumptions or calculations and accordingly have affirmed the individual penalties proposed.

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[8]Mr. Skepton did point out that Mr. Boyd's assumption that Mr. Skepton had 65 employees was too high. (Brief, p. 6; Tr. 192-93.) However, the actual number (31) as revealed in the answer would not entitle Mr. Skepton to a larger penalty reduction under the provisions of the OSHA Field Operations Manual.

Citation 1, Item 1 -- Alleged Violation of 29 CFR § 1926.500(b)(1) -- Failure to Guard Floor Openings

Section 1926.500(b)(1) states:

> Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

A floor opening is defined at 29 C.F.R. § 1926.502(b) as

> [a]n opening measuring 12 inches or more in its least dimension in any floor, roof, or platform through which persons may fall.

On July 15, 1993, during the course of the inspection, Mr. Boyd observed two workers, one an employee of respondent, placing a section of duct into an unguarded shaft opening measuring eighty by 100 inches, in the center of the roof of the addition. The employee was wearing no fall protection and had to bend over the opening to lower the duct into place, exposing himself to a fall hazard of approximately 157 inches. (Tr. 59 - 63, 202, 203; GX 4.)

This condition, which could have resulted in serious injuries, including compound fractures, concussion, severe lacerations, or death, was in plain view. By virtue of his frenetic activity at the site, Paul Skepton would have been aware of it. (Tr. 64-65, 237-39.)

Mr. Skepton objects to the admission of Mr. Boyd's testimony that one of the employees who were installing the duct was one of his employees. Mr. Boyd's testimony was based on a telephone conversation with that employee, Mr Bartman. Mr. Skepton urges that Mr. Boyd's testimony on this point is hearsay

and should have been excluded. He points to the absence of a photograph showing the employees installing the duct as casting doubt on the veracity of Mr. Boyd's assertion that he observed this event. (Respondent's brief, pp. 6-7.) However, the lack of a photograph does not cast any serious doubt on Mr. Boyd's credibility.

Mr. Bartman's statement to Mr. Boyd was a statement made by Mr. Skepton's employee concerning a matter within the scope of his employment. Therefore, it falls within the scope of Federal Rule of Evidence 801(d)(2) and is not hearsay. As such, it was properly admitted. See Secretary v. Regina Construction Co., 15 BNA OSHC 1044, 1047-48 (Rev. Com. 1991). However, the question remains whether Mr. Bartman's statement is reliable. Mr. Skepton expressed concern over the fact that Mr. Bartman was not produced as a witness. (Tr. pp. 285-86.) Mr. Bartman's statement concerns his activities in discharge of his duties as an employee. Therefore, while Mr. Bartman had ''... time to realize his own self-interest [and] feel pressure from [his] employer ...'' because he consented to be interviewed only by telephone after the work day, his ''... statement involves a matter of [his] work about which it can be assumed [he] is well-informed and not likely to speak carelessly ...,'' and Mr. Skepton may be ''... expected to have access to evidence which explains or rebuts the matter asserted.'' Regina Construction, supra, 15 BNA OSHC at 1048.

However, Mr. Skepton testified over the Secretary's objection that Mr. Bartman told him that he was not involved in trying to install the duct in question. (Tr. p. 366.) Moreover, Mr. Skepton testified that there was friction between him and his employees on the one hand, and Oley Mechanical on the other because the latter was not proceeding with its responsibilities in an efficient manner. According to Mr. Skepton, his employees would not have assisted Oley in performing its work. (Tr. pp. 333-36, 366-67.)

The Secretary regards Mr. Bartman's statement to Mr. Boyd as more reliable than his statement to Mr. Skepton because the latter occurred on an unspecified date months after the inspection, while the former was contemporaneous with the incident in question, and because of an employee's natural tendency to protect himself from reprisal from his employer when he has done something which could result in an OSHA citation. Indeed, Mr. Bartman would not talk to Mr. Boyd at the workplace for fear of losing his job. (Tr. 87.) Given Mr. Skepton's virulent opposition to OSHA and his disagreements with Oley Mechanical (Tr. 325-26, 333-36), it would not be surprising if Mr. Bartman were reluctant to tell Mr. Skepton that he assisted an Oley employee in installing duct in the roof opening. Mr. Bartman's statement to Mr. Boyd immediately following the walk around inspection is entitled to greater weight than his statement to Mr. Skepton months later.

In recommending a $3,000.00 penalty, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 67.) The Secretary has established a violation of § 1926.500(b)(1) and recommended an appropriate penalty.

Citation 1, Item 2 -- Alleged Violation of 29 CFR § 1926.100(a) -- Failure to Wear Hard Hat

On July 14, 1993, Mr. Boyd observed Paul Skepton passing under a scaffold without wearing a hard hat, thus exposing himself to the hazard of debris falling from the scaffold, striking him on the head, and possibly causing lacerations and/or concussions. (GX 5, 6; Tr. 70-78, 210.)

Mr. Boyd testified that there were people working on the scaffold above the area where Paul Skepton passed without a hard hat. (Tr. 74, 211-12; GX 19.) Mr. Skepton maintains that there were no employees or activity on the scaffold above Paul Skepton and that, therefore, no violation occurred. (Tr.332-33.)

The standard in question requires that ''[e]mployees working in areas where there is a possible danger of head injury ... from falling ... objects ... shall be protected by protective helmets.'' (§ 1926.100(a), emphasis supplied.) Because the standard protects against the possible danger of head injury from falling objects, it is immaterial whether any workers were on the scaffold when Paul Skepton passed under it. The existence of the scaffold provides the possibility that someone may be on it and cause an object to fall, or that, as pointed out by Mr. Boyd, the

person passing under the scaffold may shake it, causing the same result. (Tr. 210-11.)

In recommending a $1,200.00 penalty, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 79-80.) The Secretary has established a violation of § 1926.100(a) and recommended an appropriate penalty.

Citation 1, Item 3 -- Alleged Violation of 29 CFR § 1926.350(h) -- Use of Broken Fuel Gas Pressure Regulator

Section 1926.350(h) provides:

> Regulators and gauges. Oxygen and fuel gas pressure regulators, including their related gauges, shall be in proper working order while in use.

On July 15, 1993, Mr. Boyd observed an Airco fuel gas pressure regulator on a hose running from an acetylene tank located on the second floor of the addition; the outer plastic cover and the indicator needle of the regulator were missing. (GX 7, GX 8, Tr. 80-83.) The hose from the acetylene tank, along with another hose from an adjacent oxygen tank, were connected to a cutting torch located on exterior scaffolding on the south end near the southeast corner of the addition. (GX 9; Tr. 84-85.)

On July 16, Mr. Boyd ascertained on through the same conversation with respondent's employee, John Bartman, discussed in connection with item 1 that Mr. Bartman had used the acetylene cutting torch located on the scaffolding to cut some metal that was interfering with a woodworking project he was performing, that this use occurred on July 15, 1993, and that the torch and

tanks belonged to Mr. Skepton.[9] (Tr. 86-90, 224.) While he offered no direct evidence concerning the ownership of the torch and tanks, Mr. Skepton asserted that there is no evidence that shows a violation on his part. (Tr. 226). Mr. Skepton speculated that the cutting referred to by Mr. Bartman was performed by Oley Mechanical in connection with their efforts to install the HVAC system on the roof because he had finished the woodworking necessary to install the roof. (Tr. 334-35.) For the same reasons as those given for relying on Mr. Bartman's statement to Mr. Boyd in connection with item 1, I find that Mr. Bartman's statement to Mr. Boyd concerning the torch and tanks is reliable.

Paul Skepton walked by the particular area where the acetylene tank was located and thus was aware or reasonably should have been aware of the condition of the regulator. (Tr. 90.) That condition exposed Mr. Bartman to the hazard of an explosion which could cause severe burns. (Tr. 83-84, 91.) In recommending a proposed $1,200.00 penalty for this item, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 91.) The Secretary has demonstrated a violation of § 1926.350(h) and has recommended an appropriate penalty.

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[9]Like Mr. Boyd's testimony discussed in connection with item 1, Mr. Skepton objected to this testimony on the grounds that it is hearsay. However, it falls within the scope of Federal Rule of Evidence 801(d)(2) and is not hearsay.

Citation 1, Items 4a and 4b -- Alleged Violation of 29 CFR §§ 1926.404(b)(1)(i) and 1926.405(g)(2)(iv) -- Failure to Use GFCI or Assured Equipment Grounding, and Failure to Use Strain Relief Device, Respectively.

Section 1926.404(b)(1)(i) states in pertinent part:

> The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. . . .

Section 1926.405(g)(2)(iv) states:

> Strain relief. Flexible cords shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

On July 15, 1993, Mr. Boyd observed on the roof of the addition and existing structure a Milwaukee Sawzall and Makita circular saw plugged into an outlet through an orange extension cord that was not protected with a ground fault circuit interrupter (GFCI). Respondent did not have an assured equipment grounding program in use at the workplace. (Tr. 367-68.) There were puddles of water on the roof at the time. (GX 10-11, 13-16; Tr. 92-99, 100-01.) Mr. Boyd also observed that the strain relief of the orange extension cord attached to the Makita circular saw had been pulled loose from the female end of the cord. (GX 16; Tr. 104-06.)

When Mr. Boyd and Ms. Ketchell went out on the roof on July 15, 1993, there were two employees standing at the location where the two saws were. When Mr. Boyd and Ms. Ketchell attempted to speak with the employees, the employees walked away. (Tr. 309.) Mr. Boyd later ascertained that the two individuals

on the roof were respondent's employees John Bartman and Jeff Williams, and that they had used the two saws on the roof on July 15, 1993. (Tr. 99; 309.) The above conditions were in plain view. (Tr. 102.)

Mr. Skepton denied that his employees were using the Sawzall or Makita saw on the roof on July 15, 1993. He indicated that he "'. . . believe[s) -- and I didn't see it so I can only say I believe -- I believe that Oley Mechanical was altering these roof curbs . . ." (Tr. 334.) However, he was not with Mr. Boyd on the roof. The latter testified that he heard wood being cut on the roof while he was on the second floor, went up to the roof, and observed the only two employees on the roof walking away from the saws. (Tr. 308.) The box for the Sawzall had "Skepton Construction Co." written on it. (Tr. 310.) Mr. Skepton testified that the box belonged to Paul Skepton, which only corroborates Mr. Boyd's testimony that it was respondent's employees who were using the saws on the roof. (Tr. 381.) Indeed, Mr. Skepton failed to explain why an employee of Oley Mechanical, a company with which he had so many difficulties at the site, would be permitted to use his foreman's saw.

The lack of GFCI or an assured equipment grounding program, and the damaged strain relief, exposed Mr. Bartman and Mr. Williams to possible injuries of electrical shock, burns, or death.[10] (Tr. 102, 231-33.) A penalty of $3,000.00 for Item

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[10]Mr. Skepton objected to Mr. Boyd's testimony apparently on the basis that because the same potential injuries could be received (continued...)

4a, grouped with Item 4b, was proposed. In recommending the $3,000.00 penalty, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 109.) The Secretary has demonstrated violations of § 1926.350(h) and 1926.405(g)(2)(iv) and has recommended an appropriate penalty.

Citation 1, Item 5 -- Alleged Violation of 29 CFR § 1926.451(a)(2) -- Use of Unstable Materials to Support Scaffold

Section 1926.451(a)(2) states:

> The footing or anchorage for scaffolds shall be sound, rigid, and capable of carrying the maximum intended load without settling or displacement. Unstable objects such as barrels, boxes, loose brick, or concrete blocks, shall not be used to support scaffolds or planks.

On July 14, 1993, Mr. Boyd observed employees of respondent's masonry subcontractor, Nestor Brothers, working on a Hoist-o-Matic scaffold on the south side of the construction area. Two legs of the scaffold were supported by scrap lumber and concrete block, which was unstable and settling. The scaffold was approximately twenty-six to twenty-eight feet in height. These conditions were in plain view. (GX 17-18; Tr. 110-114, 116-117.) Mr. Skepton explained the reasons why this

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[10](...continued)
as a result of these two different conditions, charging two violations amounted to double jeopardy. (Tr. 106-07.) Mr. Skepton was charged with permitting two separate and distinct conditions, each of which violated a separate and distinct standard, rather than being charged twice under the same standard for the same condition. Thus, considerations of double jeopardy are not presented.

condition existed and testified that it was ''perfectly safe.'' (Tr. 336-37.) This explanation ignores clear prohibition against the use of concrete blocks to support scaffolds contained in the standard. Nestor Brothers employees were exposed to the hazard of falling on an unstable scaffold, and possible injuries of abrasions, cuts and bruises, and minor fractures as a result. (Tr. 114, 115-16.)

As general contractor, Mr. Skepton had the authority to control the work performed by its subcontractor, Nestor Brothers, and other subcontractors at the site. (Tr. 117-18; GX 27.) Under the multi-employer worksite doctrine, a general contractor is liable for the violations of a subcontractor where the general contractor had the authority at the worksite to assure compliance with safety standards, even if it did not create the hazard and its own employees were not affected. See National Industrial Constructors, Inc., 10 BNA OSHC 1081, 1089 (No. 76-4507, 1981); Gil Haugan d/b/a Haugan Construction Co., 7 BNA OSHC 2004, 2006 (Nos. 76-1512 and 76-1513, 1979) (general contractor liable for subcontractor's scaffolding-related violations).

Mr. Boyd took into consideration the gravity of the violation, respondent's size, good faith, and history of prior violations, and recommended a $900.00 penalty. (Tr. 119-20.) The Secretary has established a violation of § 1926.451(a)(2) and has recommended an appropriate penalty.

Citation 1, Item 6 -- Alleged Violation of 29 CFR § 1926.451(a)(4) -- Failure to Install Guardrails and Toeboards on Open Sides of Scaffold[11]

On July 14, 1993, Mr. Boyd observed Nestor Brothers employees working on the south end and west side of the addition on a Hoist-o-Matic scaffold that was not fully guarded with guardrails, exposing the employees to a fall hazard of approximately twenty-six to twenty-eight feet. The scaffold lacked guardrails in numerous locations. (GX 19; Tr. 121-26, 250-51, 259, 294, 313-14.)

In cross examining Mr. Boyd, Mr. Skepton took the position that the scaffold was in the process of being raised to a new level, and that the horizontal braces which also served as guardrails had not been fully installed. (Tr. 251, 259-60.) However, when cross examining Mr. Boyd with respect to another item and on direct, he took the position that the masons had completed their work at a location where Paul Skepton was photographed passing under the scaffolding. (Tr. 205-06, 333.) This is also on the west elevation where Mr. Boyd observed masons working on unguarded scaffolding. (Tr. 73-74.) I find that the Secretary has established that employees of the subcontractor, Nestor Brothers, were exposed to a fall hazard from the scaffolding as a result of the lack of guardrails. This condition was readily apparent and could have resulted in a fatality. (Tr. 126-27.)

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[11]The Secretary moved to amend this item to allege, in the alternative, a violation of § 1926.451(a)(5). This motion is denied as moot.

In recommending the proposed $3,000.00 penalty, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 127-28.) The Secretary has established a violation of § 1926.451(a)(4) and has recommended an appropriate penalty.

Citation 1, Item 7 -- Alleged Violation of 29 CFR § 1926.500(c)(1) -- Failure to Guard a Wall Opening.[12]

Section 1926.500(c)(1) states, in pertinent part:

> Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:
> (i) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided; . . .

Section 1926.502(o) a wall opening as

> [a]n opening at least 30 inches high and 18 inches wide, in any wall or partition, through which persons may fall, such as a yard-arm doorway or chute opening.

On July 15, 1993, Mr. Boyd observed respondent's employees and those of other employers at the workplace walking past an unguarded wall opening on the south stairwell of the addition. The wall opening measured approximately 116 inches wide by 170 inches high, with an approximately twelve inch lip at the bottom. From the outside, the bottom of the wall opening was

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[12]The Secretary moved to amend this item to allege that the employees were exposed to a nine foot, eight inch, fall hazard, rather than a six foot, eight inch, hazard as stated in the citation. This motion is granted.

approximately nine feet, eight inches above the ground. (GX 20-21; Tr. 128-32, 132-33.) Employees were exposed to the hazard of a fall which could have resulted in minor fractures, abrasions, sprains, and strains.

In his cross examination of Mr. Boyd with regard to this item, Mr. Skepton relied on a photograph of two large window openings on the second floor west side of the building. This photograph shows a step-down porch on the outside of a makeshift guardrail on one of the openings. Mr. Skepton premised his examination on the obvious fact that employees were only exposed to a fall of about one foot. (RX 7; Tr. 263-67.) However, this photograph does not depict the hazard shown in GX 20 and 21, which show a window on the south side of the building.[13] (Tr. 130.) It is not relevant to the violation charged.

In recommending a $900.00 penalty, Mr. Boyd took into consideration the gravity of the alleged violation, respondent's size, good faith, and history of prior violations. (Tr. 134-35.) The Secretary has established that a violation of § 1926.500(c)(1) occurred and has recommended an appropriate penalty.

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[13]Moreover, the hazard shown by the Secretary's photographs is a single opening which does not have a porch whose walls are brick, while Mr. Skepton's photograph shows two wide openings each with a step-down porch with brick walls.

Citation 2, Item 1 -- Alleged Violation of 29 CFR § 1926.152(a)(1) -- Failure to Use Approved Containers to Store Gasoline.

Section 1926.152(a)(1) states, in pertinent part:

> Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids.

To be approved by the National Fire Protection Association, cans used for flammable liquids must have self-closing lids. (Tr. 135.)

Item 1 consists of two separate instances. In Instance (a), the Secretary alleges that gasoline stored in a plastic five and one-quarter gallon container on the west side of the addition on July 14, 1993, did not have a self-closing lid. (GX 3, as amended.[14]) In Instance (b), the Secretary alleges that gasoline stored in a red plastic two and one-half gallon container in the storage trailer on July 16, 1993, did not have a self-closing lid.

On July 14, 1993, Mr. Boyd observed Nestor Brothers employee Ken Myers using a five-gallon orange colored can to refuel the mortar mixer. The can did not have a self-closing lid. These conditions were in plain view. Mr. Boyd testified that he learned from Mr. Myers that the can contained gasoline used to refuel the mixer. (Tr. 136-41, 305-06; GX 22.) The testimony concerning Mr. Myer's statements was conditionally admitted over Mr. Skepton's objection. Because Mr. Myers is not

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[14] Citation 2, Item 1 was amended at the hearing to reflect a date of July 14, 1993 rather than July 15, 1993. (Tr. 137-38.)

a Skepton employee, Mr. Boyd's testimony concerning his statements does not fall within the scope of Rule 801(d)(2)(D) of the Federal Rules of Evidence. Consequently, I reverse my ruling admitting this testimony, and find that the admissible evidence related to this instance falls short of establishing that a violation occurred.

On July 16, 1993, Mr. Boyd observed a red plastic two and one-half gallon container without a self-closing lid inside the trailer on the west side of the addition. The container was stored in the job trailer used by respondent's employees,[15] including Paul Skepton. Also on July 16, Mr. Boyd observed an employee of Mr. Skepton using a gasoline powered chop saw. Mr. Boyd ascertained from Mr. Bartman later that evening that Mr. Skepton's employees had used the container to refill the chop saw with gasoline on several occasions. (Tr. 141-44.) I find that the Secretary has demonstrated that Mr. Skepton violated § 1926.152(a)(1), and has proposed an appropriate penalty of $0.00.

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[15]Mr. Skepton objected to Mr. Boyd's identification of this trailer as his based on his conversation with workers at the site, pointing out that the trailer had no identifying markings and that an employee of another contractor might be inclined to misidentify the trailer as Skepton's in order to protect his employer. (Tr. 285-86.) I consider this to be a remote possibility. In any event, the identification of the trailer was based on more than Mr. Boyd's conversation with workers on the site.

Citation 2, Item 2 -- Alleged Violation of 29 CFR § 1926.1051(a) -- Failure to Provide Stairway or Ladder at Point of Access with a Break in Elevation of 19 Inches or More.

Section 1926.1051(a) states:

> A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

On July 14, 1993, Mr. Boyd observed Paul Skepton climbing from a window opening to the scaffold frame to the ground. In so doing, he used the window opening as a personnel point of access. Mr. Boyd did not observe anyone else so use the window opening. There was a break in elevation from the bottom of the window opening to the ground of approximately three feet, but no stairway or ladder was provided. As a result, Paul Skepton was exposed to a possible injury of a strain, bruise, or scrape as a result of the conditions described in the preceding paragraph. (GX 5; Tr. 146-49; 289-90.) I find that the Secretary has demonstrated a violation of § 1926.1051(a) and has proposed an appropriate penalty of $0.00.

Citation 2, Item 3 -- Alleged Violation of 29 CFR § 1926.1052(c)(1) -- Failure to Provide Stairway with a Handrail or Stairrail.

Section 1926.1052(c)(1) states:

> Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with: (i) At least one handrail; and (ii) One stairrail system along each unprotected side or edge.

On July 16, 1993, Mr. Boyd observed an employee of respondent using a wooden five-riser stairway, which was approximately three feet, eight inches wide and four feet high, and which lacked a handrail or stairrail along either side. The stairway provided access to the storage trailer at the workplace. On July 15, Mr. Boyd observed Paul Skepton using the same stairway. (GX 23-24; Tr. 149-53.) Mr. Skepton's employees were exposed to a slipping or falling hazard as a result of the conditions described in the preceding paragraph. I find that the Secretary has demonstrated a violation of § 1926.1052(c)(1) and has proposed an appropriate penalty of $0.00.

Citation 2, Item 4 -- Alleged Violation of 29 CFR § 1926.1053(b)(13) -- Use of Top of Stepladder as a Step.

Section 1053(b)(13) states: ''The top or top step of a stepladder shall not be used as a step.'' On July 15, 1993, Mr. Boyd observed an employee of respondent use the top step of a six foot step ladder while moving ceiling tiles at the direction of Paul Skepton. Paul Skepton was present when the event occurred. The employee was exposed to a hazard of a fall and a consequent minor fracture, strain, and/or sprain. (Tr. 155-58, 301-02.)

Mr. Skepton challenged Mr. Boyd's identification of one of the exposed employee as one of his by pointing out that Mr. Boyd's testimony that the employee pictured in GX 25 was the same employee pictured in GX 30 is incorrect. (Tr. 315, 317-19.) The fact that GX 25 and GX 30 portray different employees does not seriously question Mr. Boyd's credibility or the fact that an

employee was exposed to a fall by virtue of standing on the top of the stepladder. Paul Skepton directed two employees to remove ceiling tile from the area portrayed in GX 25. Even if they were not Mr. Skepton's employees, the fact that Paul Skepton directed the employees to do the work which resulted in the violation makes Mr. Skepton liable for the ensuing safety violations. I find that the Secretary has demonstrated that Respondent violated § 1926.1053(b)(13) and has proposed an appropriate penalty of $0.00.

Conclusions of Law

1. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

2. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

3. The inspection warrant issued by Magistrate Judge Rapoport on July 12, 1993 was valid in all respects and based on administrative probable cause.

4. The inspection warrant was properly served on Paul Skepton on July 14, 1993.

Citation 1, Item 1

5. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.500(b)(1). The proposed

penalty of $3,000.00 for respondent's violation of 1926.500(b)(1) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 2

6. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.100(a). The proposed penalty of $1,200.00 for respondent's violation of § 1926.100(a) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 3

7. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.350(h). The proposed penalty of $1,200.00 for respondent's violation of 1926.350(h) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 4a

8. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.404(b)(1)(i).

Citation 1, Item 4b

9. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.405(g)(2)(iv). The proposed grouped penalty of $3,000.00 for respondent's violations of 1926.404(b)(1)(i) and 1926.405(g)(2)(iv) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 5

10. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.451(a)(2). The proposed penalty of $900.00 for respondent's violation of 1926.451(a)(2) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 6

11. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.451(a)(4). The proposed penalty of $3,000.00 for respondent's violation of 1926.451(a)(4), was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 1, Item 7

12. Respondent was in serious violation of the standard set out at 29 C.F.R. § 1926.500(c)(1). The proposed penalty of $900.00 for respondent's violation of 1926.500(c)(1) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 2, Item 1

13. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.152(a)(1). The $0 proposed penalty for respondent's violations of 1926.152(a)(1) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 2, Item 2

14. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.1051(a). The $0 proposed penalty for respondent's violation of 1926.1051(a) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 2, Item 3

15. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.1052(c)(1). The $0 proposed penalty for respondent's violation of 1926.1052(c)(1) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

Citation 2, Item 4

16. Respondent was in other-than-serious violation of the standard set out at 29 C.F.R. § 1926.1053(b)(13). The $0 proposed penalty for respondent's violation of 1926.1053(b)(13) was properly calculated in conformity with the requirements of section 17(j) of the Act, 29 U.S.C. § 666(j), and is affirmed.

ORDER

1. All items of Citation 1 are affirmed as serious violations of the Act.

2. All items of Citation 2 are affirmed as other-than-serious violations of the Act.

3. A total civil penalty of $13,200 is assessed.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated: FEB 10 1995
Washington, D.C.