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

v.

C.D. SMITH CONSTRUCTION CO., INC.,
Respondent.

OSHRC Docket No. 92-2425

APPEARANCES:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

Paul D. Lawent, Esq., The Associated General Contractors of America, Inc., Madison, Wisconsin

Before: Administrative Law Judge James A. Cronin, Jr.

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, C.D. Smith Construction Company, Inc. (Smith), at all times relevant to this matter, maintained a workplace at 920 East Michigan Avenue, Milwaukee, Wisconsin, where it was engaged in general building construction. Smith admits it employed workers at the Michigan Avenue worksite and is engaged in a business affecting commerce. Therefore, Smith is an employer within the meaning of, and subject to, the Act.

On June 16, 1992, a Compliance Officer (CO) with the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's Michigan

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OSHRC DOCKET
NO. 92-2425

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 15, 1993. The decision of the Judge will become a final order of the Commission on August 16, 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 August 4, 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: July 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2425

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
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On June 16, 1992, a Compliance Officer (CO) with the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's Michigan

Avenue worksite (Tr. 9). As a result, Smith was issued a "repeat" citation alleging violation of 29 CFR §1926.701(b) of the Act, and an "other than serious" citation alleging violation of §1926.102(a)(2).

By filing a timely notice of contest Smith brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On March 9, 1993, a hearing was held in Milwaukee, Wisconsin. At the hearing, Smith withdrew its contest to the "other than serious" citation; the Secretary amended the notification of penalty to $100.00 (Tr. 60). As amended, citation 2 is deemed a final order of the Commission.

The parties have submitted briefs on the remaining issue and the matter is ready for decision.

Alleged Violation

Repeat citation 1, item 1 alleges:

1
29 CFR 1926.701(b): All protruding reinforcing steel, onto and/or into which employees could fall or come against, was not guarded to the hazard of impalement:

> (a) Employees engaged in installing wood decking adjacent to #5 rebars protruding vertically 18 to 24 inches from floor elevation were not guarded posing a potential impalement hazard at the East end of mezzanine level.

Issues

1. Whether the Secretary has shown that Smith employees were exposed to the cited hazard?

2. Whether Smith has proved the "greater hazard" affirmative defense?

Alleged Violation of §1962.701(b)

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition

with the exercise of reasonable diligence. *Walker Towing Corp.*, 14 BNA OSHC 2072, 1991 CCH OSHD ¶29,239 (No. 87-1359, 1991).

During his June 16, 1992 inspection, CO Carl Meister observed and photographed vertical reinforcing steel bars for a poured concrete wall protruding above the level of the deck in the mezzanine area (Tr. 12, 16; Exh. C-3, C-3b). It is undisputed that §1926.701(b) applies, that the exposed rebar was unguarded, and that Smith supervisory personnel were aware of the condition.

Exposure

When CO Meister arrived on the mezzanine around 1:00 p.m., Smith employees were working approximately 20 feet from the exposed rebar (Tr. 13). However, Smith's foreman, Rex Bendrich, told the CO that that morning employees had been working laying the plywood deck which extended to within a foot of the exposed rebar (Tr. 13, 19). CO Meister saw clothing hanging from a concrete wall immediately adjacent to, or about two feet from, the exposed rebar (Tr. 17-18; Exh. R-2). A wood sawhorse was set up in front of the rebar, wood was leaning against the concrete forms behind the rebar, and an extension cord ran between the rebar and the form work (Tr. 17, 36-37, 40; Exh. C-3).

Mr. Bendrich testified that no employees were exposed to the unguarded rebar. He stated that after a concrete wall is poured, shoring is installed, I-beams and aluminum are laid on the shoring, and plywood placed on top of that (Tr. 69-70). Bendrich maintained that employees work from the shoring where the cited rebar extends approximately six feet above their heads (Tr. 70). Bendrich stated that the clothing and the extension cord CO Meister saw were thrown up from the shoring below onto rebar (Tr. 73, 74-75, 91).

Bendrich admitted, however, that employees would come within three or four feet of the rebar on the deck level when nailing the plywood sheets down. Bendrich maintained that the employees normally kneeled when performing this task, but agreed that they stood when finished and also that they returned to within a foot or two of the rebar carrying the materials with which to put up the guardrails. (Tr. 72-77, 89, 96; Exh. R-2).

The evidence establishes that Smith's employees came within three or four feet of the unprotected rebar, albeit briefly, when they moved from their task of nailing the plywood deck into place. Employees were also exposed when bringing materials into the area for constructing the guardrails.

The Secretary has thus established a prima facie violation of §1926.701(b).

Greater Hazard

CO Meister recommended guarding the rebar with plastic caps manufactured for that purpose (Tr. 46-48, 57). Mr. Bendrich testified, however, that the concrete pour would dislodge caps applied prior to pouring (Tr. 64-65). Bendrich further stated that there was no other safe way to use caps (Tr. 66), testifying that the cited rebar was 22 feet above ground that was rough and uneven, and that to set up a ladder to cap the rebar would have been dangerous (Tr. 78). Bendrich admitted, however, that planking was laid down prior to the shoring and that ladders could have been safely set up on the planking (Tr. 80).

Except when working on the ground, it was Smith's normal practice to wait until decking was installed before guarding exposed rebar (Tr. 97-98). Smith, however, did not apply for a variance from the application of the cited standard (Tr. 107).

In order to establish the greater hazard affirmative defense, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *Walker Towing Corp., supra.*

Smith admits it did not apply for a variance and failed to show that application for a variance was inappropriate. The circumstances litigated here were not unique or unforeseeable; the practices in this case were Smith's standard procedures whenever encountering exposed rebar above ground level. Because Smith failed to show that an application for a variance was inappropriate, it is unnecessary to discuss the first two elements of the greater hazard defense. *Spancrete Northeast, Inc.,* 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

Smith has failed to make out its affirmative defense to the violation, and the citation will be affirmed.

Penalty

A penalty of $5,000.00 is proposed.

CO Meister testified that Smith is a large company with over 250 employees (Tr. 50).

It is uncontested that the violation is properly characterized as "repeat." Smith previously received a citation for violation of the same standard, which became a final order of the Commission on April 11, 1992 (Tr. 48-49). Because the violation was repeated, no credit was given for either good faith or prior history (Tr. 50). Smith, however, introduced memoranda from its management emphasizing safety generally and protection of exposed rebar specifically (Exh. R-5, R-6). Other rebar on the site had been guarded with caps or railings, and guardrails protecting the cited rebar were erected immediately following the inspection (Tr. 85, 97; Exh. R-1 through R-4).

The gravity of the violation is moderately low. The probable result of an employee tripping or falling into rebar is impalement, a serious injury (Tr. 45). Smith's protective measures, although falling short of compliance with the standard, limited the period of exposure to a brief space of time between the completion of the plywood deck and the erection of guardrails. Because of the limited exposure, the likelihood of an accident occurring was small.

Taking into consideration the relevant factors, this judge finds that the gravity of the violation was overstated. In addition, this judge finds that Smith is entitled to a reduction in the penalty for good faith based on its efforts to alert its supervisory personnel to the hazard posed by exposed rebar and its immediate abatement of the hazard. A penalty of $1,000.00 will be assessed.

Conclusions of Law

1. The Secretary has shown, by a preponderance of the evidence, that Smith violated §1926.701(b) on June 16, 1991.

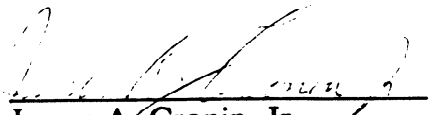
2. Respondent failed to prove the greater hazard affirmative defense.

Findings of Fact

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

ORDER

1. Repeat citation 1, item 1, alleging violation of §1926.701(b) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.



James A. Cronin, Jr.
Judge, OSHRC

Dated: July 9, 1993