



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1365 PEACHTREE STREET, N.E., SUITE 240
 ATLANTA, GEORGIA 30308-3119

(404) 347-4197
 FTS 257-4086

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 88-2268
	)	
AMERICAN ASBESTOS CONTROL CO.,	)	
	)	
Respondent.	)	

APPEARANCES:

Bruce C. Heslop, Esquire, Office of the Solicitor,
 U. S. Department of Labor, Cleveland, Ohio, on behalf
 of complainant

Robert W. Thomson, Esquire, Pittsburgh, Pennsylvania,
 on behalf of respondent

DECISION AND ORDER

SALYERS, Judge: The respondent, American Asbestos Control Co. ("AACC"), is a Pennsylvania corporation engaged in asbestos removal and abatement operations in a multi-state area. The company is a "certified abatement contractor", and its employees are licensed to perform asbestos removal and abatement in the various states where AACC operates (Tr. 73-74). The company engages approximately 120 employees in its operations (Tr. 193).

Armco is a large steel manufacturer with a plant located in Middletown, Ohio, where it produces a variety of products for use in the auto industry. On August 11, 1988, Mr. Patsy

3-057407

LAM 026984

Izzo, together with Mr. Robert Wilson, were sent by AACC to the Armco plant to remove certain material from the inside of a large aluminizing pot (pot "A") located in an area designated as "Door 661." At the time in question, pot "A" had been taken out of service, was partially dismantled, and consisted of a frame on a base supporting a number of vertical "yokes" (Exs. C-2, C-6). Izzo and Wilson were instructed by an Armco foreman to remove insulation believed to contain asbestos from the inside of the yokes.

Before the work began, Izzo took samples of the ambient air in the vicinity of pot A. These samples were later analyzed by AGX, Inc., an independent testing laboratory, and found to contain fibers at a concentration of .003 fibers per cubic centimeter (Tr. 222-223, 232; Ex. R-4). Both Izzo and Wilson wore appropriate protective clothing and respirators at all times while they worked in the pot removing insulation (Tr. 18-19, 40, 192). While performing the work inside the pot, Wilson wore a personal air sampling monitor to measure the amount of airborne fibers during the period the work was performed (Tr. 224). These samples were also submitted to AGX, Inc., after the work was completed, and the results reflect a concentration of asbestos fibers in the .003 to .004 range (Tr. 224-227; Ex. R-4).

Izzo and Wilson began working inside pot A around 9:00 a.m. The work consisted of pulling material off the yokes by hand, putting this material into plastic bags, and then

removing the bags by lifting them out the top of the pot by rope (Tr. 20-21, 24). Izzo described the material removed from the yokes as "boardlike," resembling a plywood sheet, and testified it broke easily in his hand (Tr. 22-23, 28, 243). About 20 bags of this material were removed during the course of the day (Tr. 25). While working in the pot, Izzo observed employees of Armco working in the area just outside the pot. One of these employees, William Sparks, who was working in the area along with other Armco employees, observed the removal operation from a vantage point about three to four feet away and described the conditions around the pot as "very dusty" (Tr. 54-55). Sparks also noted Armco employees had placed a fan at the bottom of the pot blowing air from the outside into and through the pot (Tr. 69-70). None of the Armco employees working in the area were wearing respirators or protective clothing (Tr. 56). After removing the bags containing the material pulled from the yokes, Izzo and Wilson used a vacuum to remove any remaining particles of this material from the floor of the pot (Tr. 22). The removal operation was concluded about 3:00 p.m.

In response to a complaint received concerning the above described procedure, William Wilkerson, an industrial hygienist employed by the Occupational Safety and Health Administration, conducted an inspection of the removal site (Tr. 83). After an initial meeting with Armco officials, Wilkerson proceeded to the area in question about 2:45 p.m. and observed Izzo and

Wilson walking out of Door 661 (Tr. 83). Wilkerson interviewed both Izzo and Wilson, determined from them the general nature of the work they had performed, and then proceeded to inspect the removal site and sketch out a diagram of the area (Tr. 85; Ex. C-6). He took a series of photographs which are contained in the record as Exhibits C-1 through C-5 (Tr. 88). Wilkerson also took a "bulk sample" from the "square base of the pot outside of the framework which contained the yokes . . . at most a foot and a half away from the yokes" (Tr. 96). He described this sample as "a white boardlike material . . . triangular in shape, about an eighth of an inch thick" (Tr. 97). The sample was placed in a vial, sealed, marked and shipped to the OSHA laboratory in Salt Lake City, Utah, for analysis (Tr. 98-99). The results of the tests conducted on this sample (bulk sample #4) reflect an asbestos content of 70 percent (Tr. 99; Exs. C-9, C-10).

As a result of Wilkerson's inspection, AACC was issued a willful citation¹ as follows:

29 CFR 1926.58(e)(6)(i): The employer did not establish negative pressure enclosures where feasible, before commencing removal, demolition and renovation operations:

1

An "other" citation alleging a violation of 29 C.F.R. § 1904.5(b) was also issued but was not contested and has become a final order of the Review Commission by process of law.

(a) On August 11, 1988, employees [sic] removed asbestos containing material from the interior of pot A at door 661 at Armco, Inc.'s Middletown Works and a negative pressure enclosure was not constructed around the removal operation.

29 CFR 1926.58(j)(2)(i): The employer did not establish a decontamination area consisting of an equipment room, shower area and clean room in series, that is adjacent and connected to the regulated area for the decontamination of employees contaminated with asbestos:

(a) On August 11, 1988 at Armco, Inc.'s Middletown Works, employees removed asbestos containing material from the interior of aluminizing pot A, door 661 and were not provided with appropriate decontamination facilities.

It is undisputed in the record that AACC did not install a negative pressure enclosure nor a decontamination area at the site in question. However, AACC raises the following arguments in support of its position that such safeguards were not required:

1. There is no evidence that respondent handled asbestos-containing material.

2. The area in question was not a "regulated area" requiring the use of negative pressure enclosures and decontamination facilities.

3. The installation of negative pressure enclosures and decontamination facilities was not feasible under the circumstances of this case.

4. The work performed by AACC falls within the "small scale short duration exemption" provided in the pertinent regulation.

Respondent's first argument is considered specious. It is incredulous that respondent, an asbestos removal specialist, would be called in by Armco to remove a totally neutral substance. Indeed, Mr. Barry Krieder, respondent's vice-president and former operations manager, admitted under cross-examination that the principal activity performed at the Armco plant was "insulation removal," a process in which you would reasonably expect to "encounter asbestos" (Tr. 211).

The primary thrust of this argument is that the sample taken at the site by Wilkerson (bulk sample #4, which was later determined to contain 70 percent asbestos), was not representative of the material removed from inside the pot. Wilkerson is an industrial hygienist with 14 years' experience and extensive training in his field (Tr. 81). The sample he selected was taken from the base of the pot in the area depicted in Exhibit C-3 and was "at most a foot and a half away from the yokes themselves" (Tr. 96). Prior to selecting the sample, he had obtained from Izzo and Wilson a description of the material removed, and the sample fit the description (Tr. 97). Wilkerson did not obtain a sample from the bagged material pulled from the yokes because this material had already been removed from the site. His method of selecting the bulk sample was reasonable under the circumstances of this case, and respondent's argument that the material removed from the yokes contained no asbestos is rejected.

Respondent's remaining arguments are based upon its interpretations of the involved standards differing significantly from that of the Secretary. The first point of departure relates to the term "regulated area," which is defined at 29 C.F.R. § 1926.58(b) to mean:

" . . . [a]n area established by the employer to demarcate areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite, or a combination of these minerals exceed or can reasonably be expected to exceed the permissible exposure limit."

Respondent asserts the facts of this case support a conclusion that the airborne concentration of asbestos fibers did not exceed the permissible exposure limit of 0.2 fiber per cubic centimeter of air nor could it have been reasonably expected to exceed such limit. The Secretary does not challenge the results obtained in the air sampling performed by respondent during the removal procedures at "pot A" which reflect a range (.003 to .004 fibers per cubic centimeter) well below the PEL. Accordingly, respondent urges that the Secretary can prevail on this issue only if the record establishes that it was reasonable to expect the PEL would be exceeded during the course of the removal procedures. Respondent relies upon a subjective determination made by Izzo prior to beginning the work that the removal operation would not produce a concentration of asbestos fibers in excess of the PEL. In this regard, Izzo testified that the "boardlike substance (to be removed) was already hanging from the yoke,

and when you touch it, you can see that nothing was coming off of it; nothing friable was coming off." He further testified that since he considered the material was not "friable", he did not believe the removal operation would generate much dust and, therefore, the PEL would not be exceeded (Tr. 39-40). Since Izzo is experienced in asbestos removal, respondent urges that his determination satisfied the "reasonable expectations" provisions contained in the foregoing definition of "regulated area" and relieved respondent of any requirement for installing an enclosure or decontamination area.

The Secretary takes a decidedly different position in the case based primarily upon OSHA Instruction CPL 2-2.40 issued by the Assistant Secretary of Labor for Occupational Safety and Health (Ex. C-8). The pertinent part of this instruction reads as follows:

3. Regulated Areas. Paragraph 29 CFR 1926.58(e)(1) requires employers to establish regulated areas where airborne concentrations of asbestos, tremolite, anthophyllite, actinolite or a combination of these minerals exceed or can be expected to exceed the PEL. Paragraph 29 CFR 1910.1001(e) of the General Industry Standard requires the same.

a. The construction standard describes two distinctly different types of regulated areas which must be established based on the type of work being performed. Employers performing general construction operations, such as the cutting of asbestos-cement sheets, the lathing of asbestos-cement pipes or the removal of asbestos-containing floor tiles, are required to establish regulated areas in accordance with 29 CFR 1926.58(e)(1) and demarcated in accordance with 29 CFR 1926.58(e)(2).

b. 29 CFR 1926.58(e)(6) requires employers performing asbestos removal, demolition, and renovation operations to establish negative-pressure enclosures before starting their work, wherever feasible.

Under this interpretation, the Secretary urges that the work performed by respondent's employees was asbestos removal which brings respondent within the ambit of § 1926.58(e)(6) and requires the installation of a negative-pressure enclosure before beginning the removal process unless such installation is not feasible. In support of her position, the Secretary refers to the preamble to the revised asbestos standard for the construction industry (51 Federal Register 22705, et seq., June 20, 1986), which sets forth increasingly stringent requirements for those operations found to be associated with the highest levels of asbestos exposure:

As the record demonstrates, employees engaged in asbestos removal, demolition, and renovation operations generally have the highest asbestos exposures of all construction workers (51 Fed. Reg. 22706).

The Secretary further notes § 1926.58(e) provides for two types of regulated areas requirements explained in the preamble as follows:

The definition of "regulated area" in the revised asbestos standard covers two types of regulated areas; the negative-pressure enclosures mandated in paragraph (e)(6) for major asbestos abatement operations, and the restricted access required wherever airborne asbestos concentrations exceed the PEL. The fact that the revised standard contains requirements for two types of regulated areas reflects both the wide differences in construction worksites and OSHA's approach in this standard to dealing with this wide range in exposure

conditions The negative pressure enclosure that constitutes the second type of regulated area defined and required by the revised rule (paragraph (e)(6)) is intended to provide employees engaged in the most hazardous asbestos operations - asbestos abatement projects - with the greatest possible amount of protection, and also to protect members of the public and other workers on site who are not directly involved in the abatement project from bystander exposure to asbestos. (51 Fed. Reg. 22707-22708).

The law is clear that the Secretary's interpretations of Department of Labor regulations are controlling unless unreasonable. United Steelworkers v. Schuylkill Metals, 828 F.2d 314 (5th Cir. 1987); Usery Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978). It is concluded that the Secretary's interpretation of the requirements under § 1926.58(e) is reasonable and consistent with both the language of the regulations and the overall purpose of the Act.

To allow an employer engaged in asbestos removal to forego the installation of negative-pressure enclosures and decontamination areas based upon pure speculation that the PEL will not be exceeded would nullify the preventive purposes of the Act. Even though the test results in this case established, after the fact, that the PEL was not exceeded, each asbestos removal site presents its own particular circumstances and there appears to be no reliable method to determine in advance whether a removal operation will or will not produce fibers in excess of the PEL (Tr. 164-167). To apply the regulations as respondent urges would, as the Secretary suggests, be "akin to playing Russian roulette" and

place at risk the health of asbestos workers and other persons in the area, in the event of a miscalculation.

Having determined that asbestos removal operations are controlled by § 1926.58(e)(6) of the regulations, as those regulations are interpreted by the Secretary, it is now necessary to consider whether the installation of negative-pressure enclosures was "feasible"² as that term is used in the regulations. CPL 2-2.40 (Ex. C-8) recites the following:

Negative pressure enclosures are considered to be feasible in all situations, except where space limitations prohibit the construction of the enclosure, or where the erection of a negative-pressure enclosure would create a greater hazard (e.g., toxic gases present in area). (At page 7)

The Secretary relies upon the testimony of Industrial Hygienist Wilkerson to support her position that the installation of a negative-pressure enclosure was feasible in this case. Wilkerson testified the enclosure could have been constructed using two by four lumber, six-mil plastic sheeting, and a filtering system as described in Appendix F of § 1926.58 (Tr. 106, 111). The framework of the pot and yokes could have been utilized to support the enclosure (Tr. 106-108, 136). It was his opinion that a decontamination area, including a portable shower, could have been located in the pit

2

The Secretary notes in her brief that § 1926.58(j)(2)(i) relating to decontamination facilities does not contain a reference to "feasible". It is, therefore, her position that respondent has the burden of proof in this regard.

opposite the location of pot B (Tr. 117-119, 138; see also Ex. C-6). Any spacial limitations imposed by the configuration of the area could have been eliminated by moving pot A since it could be moved on a track to various locations (Tr. 15, 116).³

Respondent's evidence consisted of the testimony of Izzo and Mr. Barry Krieder, respondent's current vice-president and former operations manager (Tr. 190). Izzo considered it "impractical" to install an enclosure (Tr. 40) and gave the opinion that there was no appropriate location to install a decontamination chamber (Tr. 41) but conceded the construction of a negative-pressure enclosure was "a possibility" (Tr. 42). Krieder visited the site in question the day before the hearing, took photographs (Exs. R-2, R-3), and prepared a sketch of the area (Ex. R-1). Based upon his observations, Krieder concluded the construction of an enclosure and decon chamber was "unfeasible" (Tr. 196) because (1) the location of the pot at the time of the removal operation did not permit the fitting of the poly-sheeting between the outer sides of the yokes and the walls of the pit (Tr. 199, 201-202), and (2) enclosing the pot would require employees to remove the stripped insulation from the top of the pot while standing on its narrow rim, thereby creating a falling hazard to these

William Sparks, respondent's maintenance millwright, also confirmed that the pot could be and was actually moved ten feet from the wall prior to the removal operation (Tr. 220-224).

employees (greater hazard) (Tr. 197, 200-202). Krieder also testified that constructing the enclosure and decon chamber would be a time-consuming and expensive undertaking turning "a very small job into a major project" (Tr. 204).

Respondent's argument that the position of the pot at the time of the removal operation prevented the installation of an enclosure overlooks the fact that the pot was movable (Tr. 220-221) and could have been placed in a location which would have afforded sufficient space to construct both the enclosure and the decon chamber outlined in Appendix F, and as described in the testimony of Wilkerson. The argument that the use of an enclosure would expose respondent's employees to a falling hazard while standing on the rim removing material from inside the pot is unconvincing since any hazard created by moving the pot away from the walls of the pit could be compensated for by installing temporary railings to protect against falls (Tr. 215).

Respondent's argument that construction of an enclosure and decon chamber would be difficult, expensive and time-consuming does not warrant a conclusion that this factor makes compliance with the standard infeasible. In American Textile Mfg. Institute, Inc. v. Donovan, 101 S. Ct. 2478 (1981), representatives of the cotton industry challenged the validity of the cotton dust standard on "feasible" grounds. In that case, the Supreme Court held the plain meaning of the word "feasible" in a standard dealing with toxic or harmful physical

agents is "capable of being done" (Id. at 2490). The court further held that a cost-benefit analysis is valid only if the "benefit" of the worker's health is placed above all other considerations save those making attainment of this "benefit" unachievable. See also Sun Ship, Inc., 82 OSAHRC 69/A2, 11 BNA OSHC 1028, 1983 CCH OSHD ¶ 26,353 (No. 16118, 1982); Harmony Blue Granite Co., 83 OSAHRC 14/A2, 11 BNA OSHC 1277, 1983-84 CCH OSHD ¶ 26,467 (No. 14189, 1983); Ace Sheeting and Repair v. OSHRC, 555 F.2d 439 (5th Cir. 1977); Bratton Furniture Manufacturing Co., 83 OSAHRC 30/A2, 11 BNA OSHC 1433, 1983 CCH OSHD ¶ 26,538 (No. 81-799, 1983). In this case, respondent did not establish that the installation of the required facilities was unachievable or impossible. At most, respondent's evidence shows only that implementing the procedures required by the standard would be time-consuming and costly. These factors, when balanced against the health of employees, cannot serve to excuse respondent from compliance with the mandate of the standard.

Finally, respondent urges that its operation at this particular work site falls within the exception provided in § 1926.58(e)(6)(iv) as follows:

(iv) Exception: For small-scale, short-duration operations, such as pipe repair, valve replacement, installing electrical conduits, installing or removing drywall, roofing, and other general building maintenance or renovation, the employer is not required to comply with the requirements of paragraph (e) of this section.

Both the preamble and Appendix G of the standard define the "small-scale, short-duration" exception in terms of the tasks to be performed rather than in terms of the size of the job or the time required to complete it.

Although OSHA finds it impossible to specify with precision the exact size of a "small-scale" maintenance job or to pinpoint the time involved in a "short-duration" task, the Agency believes that providing employers with examples of the type of operations that OSHA considers to be included in this class of operations will provide employers with the guidance needed to use the rule's exemptions appropriately. Paragraph (e)(6) enumerates several of these operations including: Pipe repair, valve replacement, installation of telephone circuits, electrical conduits, and drywall; and other general building maintenance and renovation tasks. (51 Fed. Reg. 22706).

Appendix G to § 1926.58 defines "short-term, small-scale operations" in terms of renovation and maintenance activities which are tasks such as, but not limited to:

- Removal of asbestos-containing insulation on pipes
- Removal of small quantities of asbestos-containing insulation on beams or above ceilings
- Replacement of an asbestos-containing gasket on a valve
- Installation or removal of a small section of drywall
- Installation of electrical conduits through or proximate to asbestos-containing materials

In similar fashion, OSHA Instruction CPL 2-2.40 defines "small-scale, short-duration" to mean:

LAM 026998

(1) Maintenance or renovation tasks, where the removal of asbestos-containing materials is not the primary goal of the job (e.g., repairing a valve which entails the removal of asbestos, installing electrical conduit which must be fastened to asbestos-cement siding, etc.).

(2) Activities where employees' exposures to asbestos can be kept below the action level via worker isolation techniques, such as glove bags or other methods described in Appendix G.

(3) An operation which has been included in the employer's asbestos maintenance program (as required in Appendix G) of all employers who are claiming an exemption from the requirements of 29 CFR 1926.58(e)(6).

(4) Nonrepetitive operations (viz.: not a series of small-scale jobs, which if performed at one time would have resulted in a large-scale removal).

Wilkerson considered the possible application of the exception to respondent's operations (Tr. 119) but concluded that the exception did not apply because the "primary goal of (respondent's) work was to remove asbestos" (Tr. 121). He also considered whether respondent utilized isolation techniques such as glove bags or other methods described in Appendix G and concluded none of these procedures had been followed⁴ (Tr. 122-124).

In summary, the Secretary urges that the exception is limited in scope to certain maintenance tasks and not to

4

This aspect of the case is not in dispute. Izzo testified no "mini-enclosures" or "glove bags" were used (Tr. 26). He testified that some attempt had been made to "sponge wet" the insulation, but he was "not permitted to douse it with water" sufficiently to prevent the escape of fibers (Tr. 27-28).

asbestos removal operations, which operations fall within the upper limits of exposure to asbestos fibers (Secretary's Brief, pgs. 21-23). Respondent counters that such an interpretation is a blatant attempt by the Secretary to amend the standard by administrative fiat without regard to the notice and comments provisions of the Administrative Procedures Act (5 U.S.C. § 553, et seq.) and results in unconstitutional discrimination against asbestos removal contractors (Respondent's Brief, pgs. 21-29).

On balance, it is concluded that the Secretary's position relating to the nonapplication of the exception provided in sections 58(e)(6)(iv) and 58(j)(2)(i) to those engaged in asbestos removal is a reasonable interpretation of the standard and is in accord with the overall purposes of the Act. The very nature of asbestos removal places those engaged in this activity, as well as those working in close proximity thereto at high risk of exposures to hazardous asbestos fibers. Asbestos contractors who hold themselves out to the general public and to those who engage their services as professional removers of such hazardous substance must make every reasonable effort to insure that exposure is kept to a minimum even if these efforts increase the time and costs to achieve the desired results of protecting workers from the hazard. It is appropriate for the Secretary to require a higher standard of performance from those who engage in asbestos removal and to restrict the application of the exception in question to those

engaged in activities less likely to result in high levels of exposure.

Respondent's argument that the Secretary's interpretation unconstitutionally discriminates against asbestos removal contractors has been noted but is rejected. Since the Act's inception, the Review Commission has issued decisions holding that it lacks the authority to consider the constitutionality of OSHA standards or to question their wisdom. Divesco Roofing & Insulation Co., 73 OSAHRC 35/F6, 1 BNA OSHC 1279, 1973-74 CCH OSHD ¶ 16,443 (No. 345, 1973); Carpenter Rigging & Contracting Corp., 75 OSAHRC 32/D13, 2 BNA OSHC 1544, 1974-75 CCH OSHD ¶ 19,252 (No. 1399, 1975); Van Raalte Co., Inc., 76 OSAHRC 48/B8, 4 BNA OSHC 1151, 1975-76 CCH OSHD ¶ 20,633 (No. 5007, 1976); Hana Shoe Corporation, 77 OSAHRC 69/B4, 5 BNA OSHC 1552, 1976-77 CCH OSHD ¶ 21,033 (No. 76-392, 1977).

The final question for resolution is whether the actions of respondent constitute a willful violation of the Act's provisions. The Secretary takes the position that respondent, as a result of a conscious decision by its foreman at the jobsite not to install a negative pressure enclosure and decontamination chamber while engaged in asbestos removal, committed an intentional, knowing or voluntary disregard for the requirements of the Act. In support of her position, the Secretary cites inter alia Asbestos Textile Co., 84 OSAHRC 48/B12, 12 BNA OSHC 1062, 1984-85 CCH OSHD ¶ 24,763 (No. 79-3831, 1984); Intercounty Construction Co. v. OSHRC, 522 F.2d

777 (4th Cir. 1977); Georgia Electric Co. v. OSHRC, 595 F.2d 309 (5th Cir. 1979); Williams Enterprises, Inc., 1986-87 CCH OSHD ¶ 27,787 (No. 85-1415, 1986).

Respondent contends that it acted reasonably and in the good faith belief that its actions at the work site did not contravene the Act's requirements. Respondent relies on Secretary v. Keco Industries, Inc. 13 BNA OSHC 1161 (No. 81-263) and Secretary v. RSR Corporation, 11 BNA OSHC 1163, aff'd, 764 F.2d 355 (5th Cir. 1985).

After giving due consideration to the argument of both parties, it is concluded that respondent's actions on the day in question did not constitute a willful violation of the Act. This is a case of first impression. So far as this court has been able to ascertain, there are no reported cases which have dealt with or construed the involved standards or the Secretary's interpretation of these standards. Even though this court has concluded that the Secretary's interpretation of these standards is reasonable under the circumstances, neither the standards nor the Secretary's interpretations are so clearly drawn as to render respondent's asserted position indefensible or implausible. Respondent was at liberty to test its position through judicial review without running the risk of being declared in willful violation of the Act. Accordingly, the violations will be characterized as serious and a penalty of \$2,000.00 will be assessed.

ORDER

The foregoing constitutes my findings of fact and conclusions of law. Based on the foregoing, it is ORDERED:

1. Willful Citation No. 1, item 1, is affirmed as a serious citation and a penalty of \$1,000.00 is assessed.

2. Willful Citation No. 1, item 2, is affirmed as a serious citation with a penalty of \$1,000.00 assessed.

/s/ Edwin G. Salvers
EDWIN G. SALYERS
Judge

Date: September 18, 1989



ACTIVITY OF OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

This Section includes —

Review Commission Decisions: Decisions and orders of the full commission.

Judges' Reports Ordered Reviewed: Date ordered reviewed, judge's report, and issues on review.

Notices of Contest: Notices of contest to Labor Department citations.

REVIEW COMMISSION DECISIONS

American Asbestos Control Co., Secretary of Labor v., 9/25/90—action is dismissed in light of receipt of secretary of labor's notice to withdraw citations and conclusion that no further matters remain requiring consideration; case previously ordered reviewed (19 OSHR 1079).

Armour Food Co., Secretary of Labor v., 9/24/90—see article, p. (No. 86-247).

JUDGES' REPORTS ORDERED REVIEWED

Sprinkle Masonry Inc., Secretary of Labor v., 9-24-90—Affirmed items in citation 2 alleging willful violation of Section 5(a)(2) of Occupational Safety and Health Act: 1926.451(a)(4), for failure to use standard guardrails and toeboards on all open sides and ends of platforms more than 10 feet above ground or floor; and 1926.451(d)(10), for failure to use standard guardrails and toeboards on all open sides and ends of tubular welded frame scaffolds more than 10 feet above ground or floor on scaffold on west and south sides of building which exposed employees to potential fall of approximately 30 feet.

Proposed penalty is reduced from \$7,000 to \$6,000 in light of unclear evidence on size of work platform; willfulness is shown by employer's indifference to duty under cited standards, deliberate disregard for known safety requirement, failure to remedy visibly dangerous condition known to supervisor, and previous OSHA citation for same violation.

Items in citation 3 alleging repeat violation of Section 5(a)(2) and 1926.500(e)(1)(iv), for failure to provide stairways with one standard stair railing on each open side and one standard handrail on each closed side, are affirmed; fall of about seven feet to nine feet posed potential for serious injuries; by not complaining to general contractor, employer took no realistic protective measures; prior citation for substantially similar violation justifies \$1,000 penalty.

Item in citation 4 alleging other-than-serious violation of Section 5(a)(2) and 1926.25(a), for failure to keep debris cleared on first floor, loading dock area, is affirmed with no penalty assessed; employees were exposed to tripping hazard (Sommer, Judge).

Order of Aug. 21, 1990, grants secretary of labor's motion to sever citation 1, items 1a and 1b, from rest of case and

approves settlement of same, including \$300 penalty (Sommer, Judge).

Issues on review: whether hearing judge erred in concluding that employer violated 1926.451(a)(4), as alleged in citation 2, item 1(a), for failure to install standard guardrails and toeboards on all open sides and ends of platforms more than 10 feet above ground or floor; whether judge erred in concluding that employer violated 1926.451(d)(10), as alleged in citation 2, item 1(b), for failure to install standard guardrails and toeboards at all open sides and ends of tubular welded frame scaffolds more than 10 feet above ground or floor; whether judge erred in concluding that these alleged violations were willful; whether judge erred in concluding that employer violated 1926.500(e)(1)(iv), for failure to provide one standard stair railing on each open side and one standard handrail on each closed side of stairways between 44 inches and 88 inches wide, having four or more risers (No. 89-2195).

Well Solutions Inc., Rig #37, Secretary of Labor v., 9/26/90—citation items alleging serious violations of 1910.23(c)(1), for failure to place guardrails around platform, and 1910.132(a), for failure to wear hard hats, are vacated; Occupational Safety and Health Administration compliance officer was not in public place from which he could legally make observations under "plain view" doctrine.

Citation item alleging serious violation of 1910.151(b), for lack of ready access by employees to first aid by physician or other person trained to render such aid, is vacated; tool pusher had received first aid training from Red Cross; his lack of up-to-date Red Cross certification does not mean training was inadequate.

Citation item alleging non-serious violation of 1910.242(a), for employer's failure to provide safe tools, is vacated; there was no evidence that four-pound sledge hammer with cracked handle was unsafe (Blythe, Judge).

Issues on review: whether hearing judge erred in refusing to consider compliance officer's testimony concerning compliance officer's observations of employer's work site on Feb. 15, 1989, on ground that compliance officer was not in public place from which he could legally make such observation under "plain view" doctrine; whether judge erred in concluding that employer did not violate 1910.23(c)(1), 1910.132(a), and 1910.242(a) (No. 89-1559).