SECRETARY OF LABOR, Complainant, v. NEW AGE, INC., Respondent.	OSHRC Docket No. 98-0415

ORDER

The Respondent, New Age, Inc., filed a petition for discretionary review ("PDR") in the above-referenced case, and Commissioner Thomasina V. Rogers directed the decision of Commission Judge Stanley M. Schwartz for review. In that decision, Judge Schwartz held that the Secretary had established her *prima facie* case in support of the alleged serious violation of 29 C.F.R. § 1926.451(g)(1) (inadequately guarded four-tiered scaffold) and the proposed penalty of $1500. Because the Respondent had failed to appear at the hearing held on September 23, 1998, Judge Schwartz affirmed the alleged violation and assessed the proposed penalty on the basis of the Secretary's evidence, without receiving any evidence or argument from the Respondent.[1]

[1]The Secretary's counsel had stated at the outset of the hearing that she had tried unsuccessfully "on many occasions" to contact J.B. Gonzalez, the Respondent's representative, after receiving notice of the hearing date, including six or seven attempts to page him, but had "heard nothing from him since."

In its PDR, the Respondent, which has appeared *pro se* throughout this E-Z Trial proceeding, challenges the judge's rulings on the merits of the contested citation and the penalty that the judge assessed. It also argues in effect that its failure to appear at the September 23 hearing should be excused because Mr. Gonzalez had called the office of the Secretary's trial counsel several times on September 22 in an unsuccessful effort to notify her of "an emergency in our family."

We conclude that the Respondent's implied request for a reopening of the record is governed by Commission Rule 64, 29 C.F.R. § 2200.64, which pertains to the failure of a party to appear at a hearing.[2] On the record before us, we are unable to determine whether the Respondent's failure to appear at the September 23 hearing may be excused and whether a hearing is warranted. We therefore remand this case to Judge Schwartz for a determination of whether the record should be reopened. If the judge concludes that the Respondent is entitled to a rescheduled hearing under Commission Rule 64, he should hold a new hearing in the case, and then reconsider his prior decision, including the penalty amount, in light of the newly-created record.

/s/
Stuart E. Weisberg
Chairman

Dated: December 8, 1998

/s/
Thomasina V. Rogers
Commissioner

[2]Although Rule 64 is included in Subpart E ("Hearings") of the Commission's Rules, rather than Subpart M ("E-Z Trial"), Commission Rule 209(a), 29 C.F.R. § 2200.209(a), makes Rule 64 expressly applicable to E-Z Trials.

SECRETARY OF LABOR, Complainant, v. NEW AGE, INC., Respondent.	OSHRC DOCKET NO. 98-0415

APPEARANCES:

For the Complainant:
Mary K. Schopmeyer, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

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, New Age, Inc. (New Age), at all times relevant to this action maintained a place of business at 955 N. Walnut, New Braunfels, Texas, where it was engaged in construction (Tr. 11). Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act. *See; Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983).

On November 14, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of New Age's New Braunfels work site. As a result of that inspection, New Age was issued a citation alleging violation of 29 CFR §1926.451(g)(1) together with proposed penalty. By filing a timely notice of contest New Age brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

An E-Z Trial hearing was set for June 1, and later rescheduled for June 8, 1998 in San Antonio, Texas. That hearing was canceled on the representation of the Secretary that the matter had settled. New Age did not sign off on the proposed settlement agreement, however, and, though numerous attempts were

made, neither the Secretary nor this judge were able to reach J.B. Gonzales, New Age's representative. On September 1, 1998, this judge issued an order resetting the case for September 23, 1998. (Tr. 4-7).

On September 23, 1998, a hearing was held in San Antonio, Texas. New Age failed to appear at that time. The Secretary set forth her *prima facie* case.

Alleged Violation

Citation 1, item 1 alleges:

29 CAR 1926.451(g)(1): Standard guardrails and toeboards were not installed at all open sides and ends on scaffolds more than 10 feet above the ground or floor:

> (a) The employer, New Age, Inc., located on 955 N. Walnut did not provide guardrail and toeboards along the open sides of the scaffold erected on the east side of the building. The scaffold sections north of the access ladder and south of the hoisting areas were missing the guardrails and the entire third level was missing the toeboards.

Facts

Compliance Officer (CO) Tony Sanchez testified that when he arrived at the New Braunfels work site he observed and photographed men working on an inadequately guarded four tier scaffold (Tr. 12; Exh. C-1 through C-4). CO Sanchez testified that the scaffolding had no guardrails or cross braces to the right of the access ladder (Tr. 17-19; Exh. C-1, C-2, C-3). Sanchez also stated that there was no top rail at the end of the scaffold (Tr. 19; Exh. C-4). Finally, Sanchez testified that there were no toeboards on the scaffold when he arrived on the work site (Tr. 19-20). Toeboards were installed before Sanchez completed his inspection, and before the photographs of the scaffold were taken (Tr. 20; Exh. C-1 through C-4). Sanchez stated that the cited conditions were in plain sight (Tr. 24).

CO Sanchez ascertained that the men on the scaffold were New Age employees (Tr. 12, 14, 21). Sanchez testified that those men were exposed to a fall hazard (Tr. 21). New Age employees sawing cinder blocks on the ground below the scaffold were also exposed to a hazard, in that objects on the scaffold could fall from the unguarded scaffold boards (Tr. 20-21). Sanchez testified that cited conditions could result in bone fractures, and/or scrapes and lacerations in the event of an accident (Tr. 22-23). Because employees were walking back and forth along the length of the scaffold with wheelbarrows, Sanchez believed that the likelihood of an accident was high (Tr. 23).

Sanchez stated that after taking into account the gravity of the violation and the size of the employer, he suggested an adjusted penalty of $1,500.00 (Tr. 26-27).

Discussion

The Secretary has made out her *prima facie* case, and the citation and proposed penalty will be affirmed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of $1,500.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: