SECRETARY OF LABOR, Complainant, v. D. ALLEN BROS., INC., Respondent.	OSHRC DOCKET NO. 02-0647

Appearances: Carolyn V. Bostic, Esquire
U.S. Department of Labor
Office of the Solicitor
Philadelphia, Pennsylvania
For the Complainant.

Dennis E. Allen, President
D. Allen Bros., Inc.
Glenmoore, Pennsylvania
For the Respondent, *pro se.*

Before: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970 , 29 U.S.C. § 651 *et seq.* ("the Act"). On January 9, 2001, the Occupational Safety and Health Administration ("OSHA") learned of an accident that had occurred on September 26, 2001, at a work site of Respondent, D. Allen Bros., Inc. ("D. Allen), at 4th Street and Lehigh Avenue in Philadelphia, Pennsylvania. D. Allen was the masonry subcontractor at the site, and the accident involved D. Allen employee Charles Stier, a bricklayer, who died as a result of falling 42 feet from scaffolding on which he was working. (Tr. 37, 109; Exh. G-3). On January 10, 2002, OSHA Compliance Officer ("CO") Robert McDonough began an investigation into the events surrounding the accident. On March 26, 2002, OSHA issued to D. Allen a citation alleging a serious violation of 29 C.F.R. § 1926.451(g)(1)(vii) and proposing a total penalty of $4,200.00.[1] D. Allen timely contested the citation, and, on May 2, 2002, this matter was designated for E-Z Trial pursuant to Commission

[1] 29 C.F.R. § 1926.451(g)(1)(vii) provides as follows:

> For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

Rules 200-211, 29 C.F.R. §§ 2200.200-211.[2] On November 15, 2002, the hearing was held in this matter. At the end of the hearing, the parties asked for the opportunity to file post-hearing briefs. Post-hearing briefs have been submitted, and this matter is ready for disposition.

The Relevant Testimony

CO McDonough testified that he learned the construction manager at the site had investigated the accident right after it occurred; that investigation included photos of the area from which the employee had fallen and an accident report. CO McDonough interviewed management employees of the construction manager, including Safety Manager Kevin Garnot, one of the individuals who had performed the investigation. The CO also interviewed D. Allen employees, including Keegan Shinholster, the person who was working with Mr. Stier on the day of the accident. As a result of his investigation, CO McDonough concluded the guardrail system in use on September 26, 2001, did not meet OSHA requirements, in that it did not have end rails on it; further, while Mr. Stier could have used personal protective equipment as an alternative, he had worn no such equipment. The CO recommended the issuance of a citation alleging a violation of 29 C.F.R. 1926.451(g)(1)(vii), which requires employees to be protected by the use of personal fall arrest systems or guardrail systems that meet specified requirements.[3] (Tr. 121-24, 130-33; Exhs. G-2, G-3).

Kevin Garnot, the construction manager's safety manager, testified that his responsibilities included performing safety audits for 10 hours a week, which resulted in his being on site two to three times a week. He inspected D. Allen's scaffolding as a part of his audits, and, based on his inspections between July 31, 2001, and September 24, 2001, he documented ten occasions in which D. Allen's scaffolds lacked end rails. He reported each of these observations to D. Allen's foreman, Robert Grant, who always said he would try to correct the problem as soon as he could. Mr. Garnot further testified that he was on site on September 26, 2001, when, around 7:30 or 7: 45 a.m., Mr.

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[2] D. Allen does not dispute that it is an employer within the meaning of the Act or that the Commission has jurisdiction in this matter.

[3] 29 C.F.R. § 1926.451(g)(4)(i) provides as follows:

> Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

Grant advised him of the accident. Mr. Garnot and another official of the construction manager promptly began an investigation, which involved taking photos of the scaffold, talking to Mr. Grant and other employees, and completing a written report. The investigation led Mr. Garnot to conclude that Mr. Stier, who was on the top level of the scaffold at a height of 42 feet, lost his balance and fell as he was attempting to access the building's west side from the northwest side.[4] Mr. Garnot also concluded that there were no end rails on the scaffolding and that Mr. Stier was not wearing fall protection at the time of the accident. (Tr. 11-30, 37, 41-44, 88-91; Exhs. G-1, G- 2, G-3).

Keegan Shinholster, the D. Allen bricklayer who was the only witness to the accident, testified that he working with Mr. Stier on September 26, 2001, and that they were both on the scaffold when the accident occurred. He stated that Mr. Grant had assigned them the task of washing down the brick wall on the street or west side of the building and that this task required them to work on the top level of the scaffold. He also stated there were no end rails on that level of the scaffold that day and that neither he nor Mr. Stier wore any personal protective equipment. Mr. Shinholster said that Mr. Stier had crossed over to the scaffold on the northwest side of the building and was attempting to cross back over to the west side scaffold; Mr. Stier grabbed hold of a wet brick at the top of the wall, the brick came loose, and Mr. Stier fell to the ground. (Tr. 105-12; Exh. G-2).

Robert Grant, D. Allen's foreman, testified that every day before employees began work he performed an inspection of the scaffolding that included checking for end rails. He further testified that although the guardrails and end rails were moved "constantly" during the course of the day, he would try to install a rail "instantly" upon being notified that one was not in place. Mr. Grant first stated that he "believed" the scaffold in question had end rails in place at the beginning of the shift on the day of the accident; he later said he was "positive" this was the case. (Tr. 149-151, 154-58).

The Secretary's Burden of Proof

In order to establish a violation of an OSHA standard, the Secretary has the burden of proving, by a preponderance of the evidence: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the

[4] D. Allen removed the scaffold on the northwest side right after the accident, and, as a result, the photos taken show only the scaffold on the west side of building. (Tr. 30-33, 39, 109; Exh. C-2).

employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).[5] *Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Discussion

I find that the Secretary has met her burden of proving the alleged violation. It is undisputed that the cited standard is applicable because fall protection is required for employees on a scaffold more than 10 feet above a lower level. The record establishes that the subject scaffold was a tubular frame scaffold that had seven tiers, each of which was about 6 feet high, and that the scaffold was approximately 42 feet in height. (Tr. 14, 44). Mr. Shinholster, the only witness to the accident, testified that both he and Mr. Stier were working on the scaffold that day. Mr. Shinholster further testified that the scaffold lacked end rails and that neither he nor Mr. Stier wore any personal protective equipment. Mr. Shinholster's testimony at the hearing was unequivocal, and it was consistent with what he told CO McDonough during the OSHA investigation. In addition, I observed the demeanor of Mr. Shinholster on the stand and found him a credible and convincing witness.

I also observed the demeanor of Mr. Grant on the stand, and I have closely examined his testimony. In so doing, I note that his statements about the presence of end rails on the scaffold were equivocal. He first testified that he "believed" that end rails were in place on the scaffold that day. (Tr. 151). He also testified that he "fe[lt]" there were end rails on the top level of the scaffold on the day of the accident, but he then testified that he was "positive" this was so. (Tr. 154, 156). He subsequently reverted to his statement that he "fe[lt]" there were end rails on the scaffold. (Tr. 158). I find that Mr. Grant's use of the words "believed" and "fe[lt]" renders his testimony unpersuasive, especially in light of the testimony of Mr. Shinholster. I further find that the scaffold checklist that Mr. Grant completed at the beginning of the day on September 26, 2001, does not validate his

[5] "Reasonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' *Frank Swidzinski Co.*, 9 BNA OSHA 1230, 1233 (No. 76-4627, 1981). ...Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe." *Pride Oil Well Serv.*, 15 BNA OSHA 1809, 1814 (No. 87-692, 1992).

"belief" or "feeling" that the scaffold had end rails that morning.[6] Finally, I find that other evidence in the record supports a conclusion that the scaffold did not in fact have end rails in place. In particular, the photos that were taken of the west wall just after the accident show no end rails on the scaffold's top level, and the inspections that Mr. Garnot made previously of D. Allen's scaffolding establish that there were missing end rails on a number of occasions. *See* Exhibits G-1 and G-2. Based on the record, D. Allen was in violation of the terms of the cited standard.

The record also establishes both employee access to and employer knowledge of the violative condition. Mr. Shinholster and Mr. Stier plainly had access to the condition, in light of the fact that they were assigned to work on an open-ended scaffold that was 42 feet in height. Moreover, D. Allen clearly could have known of the violative condition with the exercise of reasonable diligence. The evidence shows that Mr. Grant was advised that end rails were missing from scaffolding at the site on ten prior occasions, and, had Mr. Grant been reasonably diligent, he would have taken measures to ensure that end rails were in place as required or that employees wore personal protective equipment. In addition, Mr. Grant should have discovered the missing end rails during his inspection on September 26, 2001, because that was where employees were going to be working that morning and the condition was in plain view. Mr. Grant's knowledge is imputed to D. Allen, and the alleged violation of 29 C.F.R. § 1926.451(g)(1)(vii) is accordingly affirmed.[7]

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[6] D. Allen's scaffold checklist does not contain a specific itemization for end rails, which I find significant in view of the previous notices the company had received about missing end rails. Further, Mr. Grant's testimony that his inspection of "braces" included checking for end rails was unconvincing, as it is clear there were no end rails on the cited scaffold. (Tr.157; Exh. R-1).

[7] Knowledge or constructive knowledge may be imputed to an employer through a supervisory agent. *Hamilton Fixture*, 16 BNA OSHC 1073 (No. 88-1720, 1993), *Dun Par Eng'd Form Co.*, 12 BNA OSHA 1962, 1965 (No. 82-928, 1986). When the Secretary seeks to establish knowledge by demonstrating that the supervisor violated the standard, the Secretary must show that the supervisor's actions were reasonably foreseeable because of inadequacies in the employer's safety program and that the employer, therefore, did not exercise reasonable care to prevent or detect the condition. *Pennsylvania Power & Light Co.*, 737 F.2d 350, 357-58 (3d Cir. 1984). Further, "an employer will be held 'excused from responsibility for acts of its supervisory employees' upon a showing 'that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors.'" *Id.* at 358. D. Allen made no such showing here.

Classification of the Violation

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. To show that a violation was serious, the Secretary need not establish that an accident was likely to occur, but, rather, that an accident was possible and that the probable result of an accident would have been death or serious physical harm. *Flintco, Inc.*, 16 BNA OSHA 1404, 1405 (No 92-1396, 1993). The Secretary appropriately classified this violation as serious because Mr. Stier incurred serious injuries from his fall and subsequently died. The violation is thus affirmed as serious.

Penalty Assessment

Pursuant to section17(j) of the Act, 29 U.S.C. § 666(j), the Commission is authorized to assess for each violation an appropriate penalty, giving due consideration to the gravity of the violation and to the size of the employer's business, its previous history of OSHA violations, and its good faith. *Merchant's Masonry, Inc.*, 17 BNA OSHA 1005, 1006-07 (No. 92-424, 1994). The most significant of these factors is the gravity of the violation, which includes the number of exposed employees, the duration of exposure, the precautions taken to prevent injury, and the degree of probability that an injury would occur. *Id.*

With respect to the gravity of the violation, the Secretary determined that the severity of the violation was high and that the probability of an injury occurring was greater. The gravity-based penalty was reduced in view of the small size of the employer's business; however, no reductions were given for history or good faith. (Tr. 133-36). On the basis of the foregoing, I find that the Secretary's proposed penalty of $4,200.00 is appropriate. The proposed penalty of $4,200.00 is accordingly assessed.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, it is ORDERED that:

1. Serious Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.451(g)(1)(ii), is AFFIRMED, and a penalty of $4,200.00 is assessed.

/s/
COVETTE ROONEY
Judge, OSHRC

Dated: January 27, 2003
Washington, D.C.