UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 01-1626
KENNY INDUSTRIAL SERVICES, LLC, d/b/a KENNY MANTA INDUSTRIAL SERVICES Respondent.	:	

Appearances: Linda M. Hastings, Esq.
U.S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant.

Peter J. Engelbert
Rick Napier
Kenny Industrial Services
Hammond, Indiana
For Respondent.

BEFORE: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Kenny Industrial Services, LLC ("Kenny"), at all times relevant to this case maintained a work site in Akron, Ohio, where it was engaged in applying fireproofing material on a building under construction.[1] Kenny admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

On August 1, 2001, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the site and issued to Kenny one two-item citation alleging serious violations with a proposed total penalty of $3,600.00. Kenny filed a timely notice of contest, and a hearing was held

[1] OSHA originally issued citations to Respondent under the name "Kenny Manta Industrials." The Secretary filed a motion to amend the case caption to "Kenny Industrial Services, LLC, d/b/a Kenny Manta Industrial Services" which I granted in an order dated August 7, 2002.

May 14-15, 2002, in Cleveland, Ohio. The parties have submitted post-hearing briefs and reply briefs, and this matter is ready for disposition.

Factual Background

On August 1, 2001, OSHA conducted a planned inspection of a construction site in Akron, Ohio. In addition to the general contractor, several subcontractors were working at the site. OSHA's compliance officer ("CO") was going to the fifth floor to continue his inspection of another employer when he noticed a Kenny employee working on a mobile scaffold on the fourth floor of the building. On his way down from the fifth floor, the CO again observed a Kenny employee working on a mobile scaffold on the same level near the edge of the concrete floor. The edge of the floor was unprotected except for two rails running parallel to the floor. When the CO saw him, Dan Mullaly, the Kenny employee, was standing on the mobile scaffold and using a high-pressure spray gun to apply fireproofing material to the ceiling. Demetrius Coleman, another Kenny employee, had the job of pushing the mobile scaffold to the desired area. (Tr. 14-16, 25-26, 60, 85.)

Citation 1, Item 1

Item 1 alleges a serious violation of 29 C.F.R. § 1926.451(g)(1), which states that "[e]ach employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold." Paragraphs (g)(1)(i)-(vi) provide for various types of scaffolds, but do not refer specifically to mobile scaffolds. Paragraph (g)(1)(vii), however, states that "[f]or 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."

I conclude that the Secretary has established her burden of proving the alleged violation by a preponderance of evidence.[2] It is undisputed that the platform of the mobile scaffold was not more than 10 feet tall and that the toprail on the scaffold was approximately knee-high to thigh-high.[3] (Tr. 20-21, 162; C-1-2.) The issue, however, is not the height of the scaffold

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2 To establish a violation of a standard, the Secretary must show (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 employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

3 Although the CO did not take measurements, it is undisputed that the top rail on the scaffold did not meet 29 C.F.R. § 1926.451(g)(4)(ii), which provides that:

platform, but whether the employee on the scaffold was more than 10 feet above a lower level. 29 C.F.R. § 1926.450 defines "lower levels" as "areas below the level where the employee is located and to which an employee can fall. Such areas include, but are not limited to, ground levels, floors, roofs, ramps, runways, excavations, pits, tanks, materials, water, and equipment." Therefore, an employer must provide fall protection when an employee can fall more than 10 feet from the scaffold.

The record demonstrates that Mr. Mullaly was working on the mobile scaffold near the edge of the fourth floor, which was protected only by two rails installed parallel to the floor. (Tr. 21-22, 61; C-1-3.) The record also demonstrates that a fall from the edge of the fourth floor would have been to the second floor, which was 20 to 24 feet below. (Tr. 22-23). Because of the height of the scaffold's toprail, the proximity of the scaffold to the edge of the floor, and the fall distance from the fourth floor to the second floor, I find that Mr. Mullaly was working more than 10 feet above a lower level without the required fall protection. Kenny thus violated the terms of the standard.

I further find that Mr. Mullaly was exposed to the cited condition and that Kenny had knowledge of the violation. The undisputed testimony of the CO and the photographs he took clearly establish Mr. Mullaly's exposure to the hazard. (Tr. 30, 34; C-1-2.) The CO also testified that the foreman on the project admitted that he was aware of the condition.[4] (Tr. 102.) As further evidence that Respondent was aware of the condition, James Blanchard, Kenny's superintendent of fireproofing, testified that he set the job up and was familiar with how the employees were instructed to perform the job. (Tr. 156-58.) As a competent person in scaffolding and fall protection, Mr. Blanchard should have known that an employee in the

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> The top edge height of toprails or equivalent member on supported scaffolds manufactured or placed in service after January 1, 2000 shall be installed between 38 inches (0.97 m) and 45 inches (1.2 m) above the platform surface. The top edge height on supported scaffolds manufactured and placed in service before January 1, 2000, and on all suspended scaffolds where both a guardrail and a personal fall arrest system are required shall be between 36 inches (0.9 m) and 45 inches (1.2 m). When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of paragraph (g)(4).

While the record does not establish the date the scaffold was manufactured or placed in service, it is clear that the toprail was lower than 36 inches. (Tr. 67; C-1-2.)

[4] Even if Kenny had not had actual knowledge, however, the violation was in plain view and could have been discovered with the exercise of reasonable diligence. (Tr. 30, 34.)

circumstances of Mr. Mullaly was exposed to a 20 to 24-foot fall. Based on the record, the Secretary has met her burden of proving the alleged violation.[5]

I find that this violation was properly classified as serious because there was a substantial probability that the cited condition, a fall of 20 to 24 feet, could have resulted in death or serious physical harm. (Tr. 30-31.) The Commission, pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. *See also*, *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The CO testified that Kenny was given credit for history. (Tr. 32.) I agree with the Secretary that no adjustments are warranted for size or good faith. (Tr. 31-32.) In evaluating the gravity of the violation, consideration is given to factors such as the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury. *J.A. Jones Constr.*, 15 BNA OSHC at 2214. In this case, only one employee was exposed to a fall hazard of 20 to 24 feet, and some precautions, though inadequate, were taken against injury, such as the toprail on the scaffold and the guard rail on the floor. (Tr. 20-23; C-1-3.) While I agree that there would be serious consequences if an accident should occur, the evidence does not support a finding that there was a high probability of an accident occurring. Therefore, this item is affirmed as a serious violation, and a penalty of $1,000.00 is assessed.

Citation 1, Item 2

Item 2 alleges a serious violation of 29 C.F.R. § 1926.452(w)(2), which states that "[s]caffold casters and wheels shall be locked with positive wheel and/or wheel and swivel locks, or equivalent means, to prevent movement of the scaffold while the scaffold is used in a stationary manner." While the CO testified that he observed the scaffold being used in a stationary manner, he did not specifically testify as to what the employee was doing on the scaffold and how long he observed the employee on the scaffold. (Tr. 28.) It is unclear from the CO's testimony whether he actually saw the employee using the scaffold in a stationary manner while applying fireproofing material to the ceiling. The CO did admit, however, that the

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[5] In its post-hearing brief, Respondent appears to argue in essence that any other configuration for fall protection was not feasible. To demonstrate the affirmative defense of infeasibility of compliance, the employer must prove both that (1) literal compliance with the requirements of the standard was infeasible under the circumstances, and that (2) either an alternative method of protection was used or no alternative means of protection was feasible. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (Nos. 90-1620 & 90-2894, 1993); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28 (No. 88-821, 1991). Respondent neither asserted this defense in its Answer nor did Respondent identify this issue in its Pre-Hearing Statement. Even if Respondent had properly raised this defense, I would find that Respondent failed to present sufficient evidence to carry its burden of proving infeasibility.

employee was not on the scaffold long before he informed him of the hazard. (Tr. 89.) It is reasonable to infer from this testimony that the CO did not observe the employee on the scaffold for more than a few minutes, which would not provide sufficient opportunity to determine if the employee was in fact using the scaffold in a stationary manner. Indeed, a more reasonable inference, in view of the evidence, is that the scaffold was not used in a stationary manner. In this regard, several witnesses testified that in order to apply the fireproofing material to the ceiling, one employee pushed the scaffold while another employee standing on the scaffold sprayed the material from a high-pressure spray gun or hose. (Tr. 139-40, 144-46, 172, 199-203, 213-14.) According to these witnesses, the fireproofing material is pumped through a hose and comes out of a nozzle at a very high volume, which would make the operation of applying the material uniformly along the ceiling difficult if the scaffold was indeed stationary as alleged. *Id.* Therefore, I find that it is unlikely that the scaffold was being used in a stationary manner as intended by the standard. Based on the foregoing, I conclude that the Secretary has failed to prove the alleged violation by a preponderance of evidence. This item is accordingly vacated.

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 upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1926.451(g)(1), is AFFIRMED, and a penalty of $1,000.00 is assessed.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1926.452(w)(2), is VACATED.

/s/

Covette Rooney
Judge, OSHRC

Dated: August 19, 2002
Washington, D.C.