United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. SEEDORFF MASONRY, INC., Respondent.	OSHRC DOCKET NO. 05-1154

APPEARANCES:

For the Complainant:
Tobias B. Fritz, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
A. Stevenson Bogue, Esq., McGrath North Mullin & Kratz, Omaha, Nebraska

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Seedorff Masonry, Inc. (Seedorff), at all times relevant to this action maintained a place of business at 72nd and Main Street, Ralston, Nebraska, where it was engaged in construction. Seedorff admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 7).

On May 24, 2005, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Seedorff's Ralston worksite. As a result of that inspection, OSHA issued a citation alleging violations of the scaffolding standards at 29 CFR §1926, Subpart L. By filing a timely notice of contest Seedorff brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On October 27, 2005, a hearing was held in Omaha, Nebraska. The parties have submitted briefs on the issues, and this matter is ready for disposition.

The Inspection

When he arrived at Seedorff's Ralston worksite, CO Darwin Craig observed Seedorff employees working on a mason's walk-through scaffold approximately 19 to 20 feet above the ground (Tr. 21). A mason's tender was working on the platform level; two masons were working from an outrigger on the back side of the scaffold next to the building (Tr. 21-22; Exh. C-1). During the inspection, the tender walked back and forth between the mud bucket at the left side of the scaffold and the outrigger (Tr. 23, 105; Exh. C-1, C-3).

There was no end rail on the right side of the scaffold platform. Craig observed the tender working within three feet of the scaffold's unguarded end (Tr. 32-33). Employees accessed the platform by way of a ladder attached at the right rear of the scaffold (Tr. 21, 30; Exh. C-3, C-5). The attached ladder was between 24 and 30 inches wide. A grab bar extended vertically from the side rail near the middle of the work platform (Tr. 102; Exh. C-5). The ladder's point of access was blocked by the materials platform. Employees, therefore, actually accessed the platform by swinging around to the left of the grab bar onto the unguarded edge of the platform rather than passing through the side rails of the ladder (Tr. 116-17; Exh. C-5).

The remainder of the scaffold was appropriately guarded (Tr. 24-25).

CO Craig also observed a cross brace on the left side of the scaffold that had not been secured with its pin (Tr. 37; Exh. C-1, C-8).

Alleged Violation of §1926.451(g)(4)(i)

Serious citation 1, item 1 alleges:

29 CFR 1926.451(g)(4)(i): Guardrail systems were not installed along all open sides and ends of platforms.

> Seedorff Masonry Inc. – Guardrail systems were not installed along all open ends and sides of platforms. The third level of the scaffold at the ladder access point was not equipped with a guardrail system on the open end of the scaffold.
>
> The cited standard provides:
>
> 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.

Discussion

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. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The facts are not disputed. Respondent argues, however, that the cited standard is superseded in this case by §1926.451(e)(2), which requires that employers comply with Subpart X when using portable, hook-on and attachable ladders. Seedorff specifically refers to §1926.1051(3), which provides, *inter alia*, "when a building or structure has only one point of access between levels, that point of access shall be kept clear to permit free passage of employees." According to Seedorff, the ladder standards are incompatible with the cited scaffold guarding standard, and preempt it in this situation.

Accepting, arguendo, Seedorff's interpretation of the interplay between the scaffold guarding and ladder standards, the facts nonetheless establish a violation of §1926.451(g)(4)(i). Section 1926.1051(3) requires only that the point of access be kept clear. Seedorff itself defines the "point of access" as the pass through between the side rails, and does not suggest that the standard preempts the guarding requirements in regard to remainder of the platform (Respondent's post-hearing brief, p. 7). Seedorff's failure to guard the end of the platform in front of the ladder, therefore, violates the standard. Seedorff cannot excuse its failure to guard by pointing to its employee's use of the unguarded end for access, where Seedorff created that hazardous situation by blocking the pass through.

Seedorff argues that it has used the identical configuration on its scaffolds for many years without objection by OSHA, despite repeated inspections (Tr. 63). It is well settled, however, that prior inspection alone does not give rise to an inference that OSHA previously determined there was no hazard or citable condition. *Seibel Modern Manufacturing & Welding*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991). The Secretary is not estopped from enforcing a standard except where she has engaged in some affirmative misconduct, or active misrepresentation, resulting in injustice to the employer. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1992 CCH OSHD ¶29,653 (No. 88-611, 1992). There has been no showing that OSHA affirmatively led Seedorff to believe its scaffold configuration complied with the cited standard. Seedorff's argument is, thus, rejected.

The record establishes that Seedorff knew that its employees were working on a platform with an unguarded end. The violation is established.

Penalty

A penalty of $875.00 was proposed for this violation. In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972).

Factors to be considered in determining the gravity of the violation include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

This violation was serious, in that an employee falling from the scaffold would likely suffer broken bones at a minimum (Tr. 44). The gravity of the violation was overstated, however. Only one employee, the tender, was exposed to the cited violation for a total of 10 to 15 minutes. According to the CO, the tender never came closer than three feet from the unguarded edge. The remainder of the scaffold was appropriately guarded. The likelihood of an accident occurring was extremely low.

Where the low gravity of a violation is the overriding factor, a penalty of as little as $100.00 has been deemed appropriate for a "serious" violation. *Flintco, Inc.*, 16 BNA OSHC 1404, 1993-95 CCH OSHD ¶30,227 (No. 92-1396, 1993); *Orion Construction, Inc.*, 18 BNA OSHC 1867; 1999 CCH OSHD ¶31,896 (No. 98-2014, 1999). A penalty of $100.00 will be assessed.

Alleged Violation of §1926.452(c)(2)

Serious citation 1, item 2 alleges:

29 CFR 1926.452(c)(2): All brace connections were not secured:

> Seedorff Masonry, Inc. – All brace connections were not secured on the scaffold. A cross brace was not secured at its attachment point. This particular brace was just below the working level or the scaffold.
>
> The cited standard provides:
>
> Frames and panels shall be braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together laterally. . . .All brace connections shall be secured.

Discussion

The facts are not disputed. Respondent should have known of the violative condition, as 29 1926.451(f)(3) requires inspection of the scaffold at the beginning of every shift. Nonetheless, Seedorff argues that the citation should be vacated because the evidence does not establish that the violation could result in serious harm.

Most occupational safety and health standards include requirements or prohibitions that by their terms must be observed whenever specified conditions, practices or procedures are encountered. These standards are predicated on the existence of a hazard when their terms are not met. Therefore, the

Secretary is not required to prove that noncompliance with these standards creates a hazard in order to establish a violation. *Austin Bridge Company*, 7 BNA OSHC 1761, 1979 CCH OSHD ¶23,935 (76-93, 1979). When a standard prescribes specific means of enhancing employee safety, a hazard is presumed to exist if the terms of the standard are violated. *Clifford B. Hannay & Son, Inc.*, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978). The cited violation has been established. Only the gravity of the violation is in question.

Penalty

The violation was not shown to be "serious." Seedorff's expert witness, structural engineer Charles Saul, testified that Seedorff's failure to attach the brace would cause neither a full nor a partial collapse of the scaffolding (Tr. 72, 90). At most, the unsecured brace could result in some lateral movement (Tr. 84, 88). CO Craig agreed, testifying that there could be some movement of the scaffolding, causing an employee to fall, and sustain scrapes and/or bruises (Tr. 49). Moreover, he agreed that because the missing brace was one of 32, all of which were properly attached, the chance of the platform being dislodged was small (Tr. 48-49, 72, 90).

Under §17(k) of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. Because scrapes and bruises do not constitute serious physical harm, and there was no substantial probability of a more serious injury,the violation will be reclassified as "other than serious," and no penalty assessed.

ORDER

1. Serious citation 1, item 1, alleging violation of 29 CFR §1926.451(g)(4)(i) is AFFIRMED and a penalty of $100.00 is ASSESSED.

2. Citation 1, item 2, alleging violation of 29 CFR §1926.452(c)(2) is AFFIRMED as an "Other than serious" violation, without penalty.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: January 24, 2006