United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. THE SAMUELS GROUP, INC., Respondent.	OSHRC DOCKET NO. 07-1836

APPEARANCES:

For the Complainant:
Rafael Alvarez, Esq., U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, Room 844, Chicago, Il. 60604

For the Respondent:
Dean Henrickson, The Samuels Group, Inc. 2600 Stewart St., Suite 160, Wausau, WI. 54401
Louis Jungbluth, Wisconsin Safety Services, Inc., P.O. Box 492, Neenah, WI. 54957

Before: Administrative Law Judge: James R. Rucker

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").

On August 2, 2007, in response to a complaint filed against a subcontractor, OSHA Compliance Officer, Kelly Bubolz ("CO") conducted an inspection of a construction worksite in Wausau, Wi. (Tr. 16, 33) The general contractor at the site was The Samuels Group ("Respondent"). Respondent was also the masonry contractor.(Tr. 17)

The CO observed a scaffold onto which Respondent was using a rough terrain forklift to bring cement and block up to a scaffold. (Tr. 18-19) Employees were working from a platform formed by two-by-tens. (Tr. 17) The scaffold had cross bracing, but there was no mid-rail or top-rail. (Tr. 17, Ex. C-3-C-4).

As a result of the inspection, the Secretary issued a citation alleging a serious violation of the Act for violation of 29 C.F.R. §1926,451(g)(4)(i)[1]. As amended, the citation alleges that: "employees were laying block from a scaffold approximately 60 feet above the ground level without the use of guard rails on the side of the scaffold." A penalty of $2500 was proposed for the violation[2].

The evidence demonstrates that the scaffold lacked the required guarding. The CO testified that, while cross-bracing could substitute for either a mid-rail or a top-rail, it could not substitute for both. (Tr. 21) According to the CO, if the mid-rail is 33 inches high it could be used as a mid-rail, and if 42 inches high, it could be used as a top-rail. (Tr. 21)[3] The CO estimated that the cross-bracing was 32 inches high (Tr. 36), and testified that in this instance, to be properly guarded, the scaffold needed a top rail. (Tr. 20) She was concerned that employees could fall through the cross-bracing (Tr. 31). The parties stipulated that employees were working approximately 60 feet above the ground. (Joint Exh. 1, par. 12)

After conferring with the CO, Respondent began installing additional railing to the satisfaction of the CO. (Tr. 29-30)

Brent Hanson, Respondent's foreman of labor, testified that he could not understand how an employee could fall given the presence of the cross-bracing. (Tr. 54) In his view, there was no risk of an employee falling off the scaffold. (Tr. 57) Respondent's superintendent of field operations and safety director, Dean Henrickson, also testified that given the configuration of the scaffold, a top rail was not necessary. (Tr. 60) Moreover, at the hearing, it was Respondent's position that the edge was guarded by the masonry blocks on the work platform. However, the CO testified that to constitute proper guarding, the blocks had to be both stable and at least 48 inches high. She further testified that the blocks stacked only 32 inches high and were not secured in places. (Tr. 36)

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[1]The standard states:

§1926.451 General requirements.

* * *

(g) Fall protection.

(4)(1) 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.

[2]Respondent was also cited for violating 29 CFR §1926.454(4). However, pursuant to a an approved settlement agreement, this violation was withdrawn by the Secretary and is no longer before the Commission.

[3]I note that §1926.451(g)(xv) allows cross-bracing in lieu of a mid-rail when the corssing of the two braces is between 20-30 inches above the work platform, or in lieu of a top-rail when between 38-48 inches above the work platform.

I find that the Secretary established that the scaffold lacked a proper top-rail and, therefore, was technically in violation of the cited standard. The evidence does not support a conclusion that the stacked masonry bricks were of either sufficient height of stability to constitute an acceptable substitute for a proper top-rail. Had a fall occurred, an employee would have fallen approximately 60 feet to the ground. Such a fall would certainly result in death or serious physical harm. (Tr. 26) Accordingly, the violation was properly characterized as serious. However, I also find that, given the configuration of the scaffold, the likelihood of a fall was very low.

The Secretary proposed a penalty of $2500. I find the proposed penalty to be excessive. The record demonstrates that Respondent has an excellent safety history. It has not had a lost time work accident in over 5.5 years. Also, until this matter, it has never received an OSHA citation. (Tr. 64) Indeed, the CO opined that Respondent has a "great" safety training program that has "everything that we basically require." (Tr. 29) Furthermore, by immediately abating the violation, Respondent has demonstrated a good-faith attitude toward safety. Considering Respondent's good-faith and excellent safety history together with the low gravity of the violation, I find that a penalty of $1000 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation 1, item 1a for violation of 29 C.F.R. §1926,451(g)(4)(i) is AFFIRMED and a penalty of $1000 is ASSESSED.

/s/

James R. Rucker
Judge, OSHRC

Dated: November 18, 2009
Denver, CO.