United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
KEITH RASMUSSEN & SONS CONSTRUCTION
Respondent.

OSHRC DOCKET
NO. 94-1954

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 31, 1995. The decision of the Judge will become a final order of the Commission on November 30, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 20, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 31, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-1954

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. KEITH RASMUSSEN & SONS CONSTRUCTION, Respondent.	OSHRC DOCKET NO. 94-1954

APPEARANCES:

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

For the Respondent:
Roland C. Hinkson, Ouray, Colorado

Before: Administrative Law Judge: James H. Barkley

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, Keith Rasmussen & Sons Construction (Rasmussen), at all times relevant to this action maintained a place of business at 655 Main, Ouray, Colorado, where it was engaged in construction. Respondent admits it is an employer engaged in the construction business. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent was found, therefore, to be subject to the requirements of the Act (Tr. 26).

On April 21, 1994 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Rasmussen's 655 Main, Ouray, Colorado worksite. As a result of that inspection, Rasmussen was issued citations alleging violations of the Act together with proposed penalties. By filing a timely

notice of contest Rasmussen brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 25, 1995, a hearing was held in Durango, Colorado.[1] This matter is ready for disposition.

Alleged Violation of §1926.45(a)(13)

"Serious" citation 1, item 1 alleges:

29 CFR 1926.451(a)(13): An access ladder or equivalent safe access to scaffold(s) was not provided:

> (a) 655 Main , Ouray, CO.: Employees working on a tubular welded frame scaffold were not provided a ladder or other safe means of access to the scaffold.

Compliance Officer David Nelson testified that on the date of the inspection, he observed a Rasmussen employee climb down the end rails of the scaffold he was working on (Tr. 75). A fixed ladder was welded to the end rail of each scaffold section, however, one scaffold section had been reversed, and as a result, the ladders were not continuous. In order to ascend or descend the ladder, it was necessary for employees to cross over from one side of the scaffold to the other to continue climbing (Tr. 75, 130-31; Exh. C-3). CO Nelson did not believe that climbing up the scaffold in this manner posed a hazard, but stated that while descending, the employee would not know where the ladder ended, and could misstep and fall up to 20 feet to the pavement, resulting in broken bones and potential death (Tr. 75-77, 135-36). Nelson noted one employee descending the scaffolding, but stated that two other employees were potentially exposed (Tr. 76). Nelson computed the penalty based on three employees going up and down the scaffolding four or five times during three eight hour days (Tr. 134). Nelson found that the gravity of this item was of "medium severity" and "greater probability" (Tr. 77). The gravity based penalty was reduced by 60% because of Rasmussen's small size, four workers. Sixty percent is the maximum reduction allowed under OSHA guidelines set out in its Field Operations Manual (Tr. 78-79). A penalty of $525.00 was proposed.

Rod Rasmussen testified that he and his employees generally used an interior staircase to climb to the upper floors where they gained access to the scaffold by climbing through a window (Tr. 146-47). Nelson did not ask employees working on the scaffold how may times they ascended the scaffold each day (Tr. 96, 135).

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[1] Rasmussen was represented at the hearing by Roland C. Hinkson, who is not a lawyer and who represented Respondent without charge.

Discussion

The cited standard requires that "[a]n access ladder or equivalent safe access shall be provided." The Secretary admits that the ladder built onto the end frames would have been acceptable if they had been erected in a continuous line (Tr. 130-31; Exh. R-1). The evidence establishes that one of the scaffold sections was reversed, and that Rasmussen was in violation of the cited standard.

The undersigned finds, however, that the Secretary overstated employee exposure, severity, and probability in this case, resulting in an inappropriately high gravity assessment. CO Nelson based his exposure on projected employee exposure without interviewing employees to ascertain whether they actually used the scaffold ladder for access. Rasmussen testified that employees, in fact, used interior staircases for accessing the scaffold. Only one exposure was proven, not the 36 to 45 exposures used by the CO in his penalty calculation. Moreover, the evidence shows that the cited hazard was located at the ten foot level, where the scaffold section was turned. No danger of falling from the 20 foot level was shown. Finally, the Secretary introduced no exacerbating circumstances which would establish a "greater" probability of an accident occurring.

In addition, Respondent argues that OSHA's penalty guidelines do not adequately take into account the very small employer's ability to pay. This judge agrees. Here, Ron Rasmussen testified that he would have to take out a loan to pay the total fines for this citation, which amount to $4,050.00, a fact which CO Nelson did not take into account when calculating the penalties (Tr. 182-83).[2] The proposed penalty of $525.00 for this item is found to be inappropriate; a penalty of $50.00 will be assessed.

Alleged Violation of §1926.451(d)(4)

"Serious" citation 1, item 2 states:

29 CFR 1926.451(d)(4): Tubular welded frame scaffolds were not set on a foundation adequate to support the maximum rated load.

(a) 655 Main, Ouray, CO.: Adequate footing was not provided for a tubular welded frame scaffold set up in front of the building.

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[2] OSHA Instruction CPL 2.107 (Penalty Policy for Employer Size), effective October 2, 1995, recognizes the inability of small employers to pay penalties calculated at the current levels. The new policy calls for reductions of up to 80% for employers with 10 or fewer employees. [25:12 Current Report] O.S.H. Rep. (BNA) 474 (Aug. 23, 1995).

CO Nelson testified that three legs of Rasmussen's scaffold were in good shape, and that the scaffolding was tied to the second floor of the building under construction (Tr. 82, 139). Nelson stated, however, that the fourth leg of the scaffold was supported by a 6x6 piece of lumber which was broken or rotted and cracked (Tr. 81; Exh. C-4). Nelson stated that the scaffold leg could shift and wear into, or come off the wooden footing, causing the scaffold to collapse (Tr. 82). Rod Rasmussen testified that the scaffold leg was secured onto the wooden footing with nails to keep it from shifting, and that the footing was also nailed to a crosspiece to keep it from turning under the scaffold leg (Tr. 144-45, 149-51; Exh. C-4). Rasmussen stated that when he nailed on the crosspiece, he could tell that the footing lumber was structurally sound and was adequate to support the scaffold (Tr. 145).

Discussion

The cited standard requires scaffolds to be "set on adjustable bases or plain bases placed on mud sills or other foundations adequate to support the maximum rated load."

In this case the witnesses disagree as to the adequacy of the lumber used as a footing. CO Nelson admitted that "reasonable minds" might differ in determining whether this footing was adequate (Tr. 107). This judge finds that, because he worked with it, had driven nails into it, Rod Rasmussen had a better opportunity to assess the adequacy of the lumber used for a footing. His testimony is preferred, therefore, to that of CO Nelson.

Complainant failed to show by a preponderance of the evidence that Rasmussen violated the cited standard; citation 1, item 2 will, therefore, be vacated.

Alleged Violation of §1926.451(d)(10)

"Serious" citation 1, item 3 states:

29 CFR 1926.451(d)(10): Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor:

> a) 655 Main, Ouray, Co.: Employee working on a tubular welded frame scaffold in excess of 10 feet in height was not protected from a fall hazard by either standard guardrails or equivalent fall protection.

CO Nelson testified that he observed a Rasmussen employee standing on a 2x10 foot plank at the 18' mark of the scaffold without benefit of guardrails or other fall protection (Tr. 85). Nelson stated that a fall from 18' to the concrete sidewalk would result in broken bones or death (Tr. 86). Nelson

testified that one employee was actually, and two other employees potentially exposed to the hazard (Tr. 86).

Discussion

The cited standard provides that:

> Guardrails made of lumber, not less than 2x4 inches (or material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.. . .

It is undisputed that the cited standard was violated. Moreover, the undersigned finds that the gravity of this violation was correctly assessed as high severity and probability. However, in computing the proposed penalty of $1,500.00 the CO failed to adequately consider the size and ability of Respondent to pay, as discussed above. A penalty of $400.00 will be assessed.

Alleged Violation of §1926.500(d)(1)

"Serious" citation 1, item 4 alleges:

29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

> a) 655 Main, Ouray, Co.: Employees working on the second floor were exposed to fall hazards in excess of 6 feet in height on both the east and west side of the building.

CO Nelson testified that he observed Rasmussen employees standing on an open sided floor on the west side of the construction site where sliding glass doors opened nine or more feet above the concrete sidewalk (Tr. 88, 141, 145; Exh. C-6). On the east side of the construction site employees climbed a ladder onto an open-sided deck to gain access to the second floor (Tr. 88, 142, 155; Exh. C-7). The CO assessed the gravity of this violation as high severity, high probability, identical to the preceding item, and proposed an identical penalty (Tr. 89-90).

Discussion

The cited standard requires standard railings be installed on "[e]very open-sided floor or platform 6 feet or more above adjacent floor or ground level. . .." The evidence establishes the cited violation.

The undersigned finds that the gravity of this item was overstated not only in that the fall distance of 9 feet involves probable injuries of a lesser severity than a 20 foot fall, but because the

probability of an employee falling from an open-sided deck used solely for access is less than the probability of falling from a 2'x10' plank used as a work platform.

For these reasons, and because the CO did not adequately consider Rasmussen's ability to pay, the proposed penalty of $1,500.00 is found inappropriate. A penalty of $100.00 will be assessed.

Alleged Violation of §1926.20(b)(1)

"Other than serious" citation 2, item 1 alleges:

29 CFR 1926.20(b)(1): A safety program was not initiated and/or maintained to provide compliance with the general safety and health provisions of the standard:

The Safety and Health Program did not include the following elements:

1. Management Commitment and Leadership
   - A. Policy statement; goals established, issued and communicated to employees.
   - B. Program Reviewed Annually.
   - C. Participation in safety meetings, inspections; agenda item in meetings.
   - D. Adequate commitment of resources.
   - E. Safety rules and procedures incorporated into site operations.
2. Assignment of Responsibility
   - A. Safety designee on site, knowledgeable and accountable.
   - B. Supervisors' (including foremen) safety and health responsibilities understood.
   - C. Employees adherence to safety rules.
3. Identification and Control of Hazards
   - A. Periodic site inspection program involving supervisors.
   - B. Preventative controls in place (PPE, Maintenance, Engineering controls).
   - C. Action taken to address hazards.
   - D. Safety Committee, where appropriate.
   - E. Technical Reference Materials available.
4. Training and Education
   - A. Supervisors receive basic safety and health training.
   - B. Specialized training taken when needed.
   - C. Existence of an employee training program, which is ongoing and effective.
5. Recordkeeping and Hazard Analysis
   - A. Records maintained of employee illnesses/injuries and posted.
   - B. Supervisors perform accident investigations, determine causes, propose corrective action.
   - C. Injuries, near misses and illnesses are evaluated for trends, similar causes; corrective action initiated.
6. First Aid and Medical Assistance
   - A. First aid supplies and medical services available.
   - B. Employees informed of medical results.
   - C. Emergency procedures and training, where necessary.

a) 655 Main, Ouray, Co.: The employer did not develop or implement a safety and health program to include the above listed items *as a minimum*.

Discussion

The cited standard requires employers "to initiate and maintain such programs as may be necessary to comply with this part," *i.e.* Part 1926--SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION. At the hearing CO Nelson testified that the numerous alleged deficiencies contained in the citation did not apply to Respondent (Tr. 118). Nelson stated that the citation was issued solely on the grounds that no training was provided in the recognition and avoidance of fall hazards associated with open-sided floors, platforms, or in the proper erection and use of scaffolds (Tr. 118).

Section 9(a) of the Act requires that all citations "shall describe with particularity the nature of the violation." The citation for this item is comprised of two pages of "minimum requirements for a safety program." The CO testified this is the basic citation for safety programs. The CO further testified the citation was designed to help employees formulate their own (minimum) safety program (Tr. 118-19). The Respondent did not learn until the testimony of the CO, of the alleged specific shortcoming OSHA was concerned with. It is clear the citation in this case is nothing more than OSHA's own idealized minimum safety program and does not describe with particularity a violation by Rasmussen. By failing to tailor its citation to describe deficiencies in *Rasmussen's* safety and health program the Secretary failed to comply with the "particularity" requirement of §9(a).

Citation 2, item 1, being deficient is vacated.[3]

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.451(a)(13), is AFFIRMED and a penalty of $50.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.451(d)(4), is VACATED.

3. Serious citation 1, item 3, alleging violation of §1926.451(d)(10), is AFFIRMED and a penalty of $400.00 is ASSESSED.

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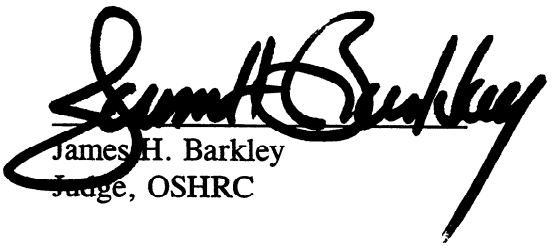
[3] In addition, I believe that the 22 specific elements set forth in Citation 2, item 1 constitute an impermissible attempt to expand the cited standard beyond its intended meaning, insofar as they are used as the criteria against which the conduct of all employers cited under §1926.20(b)(1) is measured. Such an expansion amounts to rulemaking without the benefit of statutory notice and comment required under Section 6 of the Act.

4. Serious citation 1, item 4, alleging violation of §1926.500(d)(1), is AFFIRMED and a penalty of $100.00 is ASSESSED.

5. Other than serious citation 2, item 1, alleging violation of §1926.20(b)(1), is VACATED.



James H. Barkley
Judge, OSHRC

Dated: October 20, 1995