

Secretary of Labor,  
Complainant,

v.

R. K. Construction & Development Co.,  
Respondent.

OSHRC Docket No. 97-443

#### APPEARANCES

Sharon D. Calhoun, Esq.  
Office of the Solicitor  
Co.  
U. S. Department of Labor  
Atlanta, Georgia  
For Complainant

Mr. Ramsey Khalidi, President  
R. K. Construction & Development  
Savannah, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

#### **DECISION AND ORDER**

R. K. Construction and Development Co. (RK), contests a citation issued by the Secretary on February 18, 1997. RK is a demolition and building restoration contractor located in Savannah, Georgia.

The citation alleges serious violations of: § 1926.21(b)(2) (item 1) for failing to instruct each employee in the recognition and avoidance of unsafe conditions; § 1926.100(a)(item 2) for failure to require employees to wear protective helmets; § 1926.415(a)(13) (item 3a) for failure to provide safe access to a scaffold; § 1926.451(d)(10) (item 3b) for failure to install guardrails and toeboards on the scaffolding; and § 1926.850(a) (item 4) for failure to have a written engineering survey on site.<sup>1</sup>

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<sup>1</sup> On August 29, 1996, the Secretary moved to amend item 4 to read “on or about February 5, 1997, respondent did not have in writing evidence that an engineering survey had been performed.” The original citation alleged that the “[e]ngineering survey had not been performed prior to demolition, on or about” February 5, 1997. At the hearing, RK opposed the motion claiming prejudice. The motion was granted because the Secretary made it more than 10 days prior to the hearing and it did not change the standard violated; it only more specifically identified the nature of the violation. RK was not prejudiced by the amendment.

RK, represented *pro se* by its president Ramsey Khalidi contests each item and the Secretary's proposed penalties.<sup>2</sup>

The hearing was held September 11, 1997, in Savannah, Georgia. The citation is affirmed and penalties reduced.

#### Background

On February 5, 1997, Occupational Safety and Health Administration (OSHA) compliance officer Lewis Ramirez was driving west on Oglethorpe Street in Savannah, Georgia, approaching Barnard Street. Ramirez observed a building undergoing demolition at the corner of Oglethorpe and Barnard (Tr. 52-53). Ramirez saw employees working on a scaffold on the top floor of the 3-story building, approximately 25 feet above the ground. Believing that the employees were exposed to a fall hazard, Ramirez stopped and conducted an inspection of the worksite (Tr. 53-54).

RK was incorporated in 1989 as a family-owned business engaged in renovation and demolition work on commercial and residential projects in the Savannah area (Tr. 32-33).

In January 1997, Telefair Academy of Arts, the owner of a building in question, hired RK to finish the demolition of the existing building. Telefair had initially hired another contractor to perform the demolition, but for reasons unknown had fired that contractor after a period of five or six weeks. RK had been working on the demolition of the building for approximately three weeks at the time of the inspection (Tr. 34, 38, 43-44).

The building was built in 1925 or 1926 and was used as a furniture store for most of its history. The building was abandoned and subsequently purchased by Telefair, who eventually razed the building to make way for a new museum. A 1984 survey of the building described it as "a 3-story, yellow brick building measuring 56 feet wide by 89 feet deep and 49 feet high. Each floor has a little under 5,000 square feet (gross) or about 15,000 square feet total" (Exh. R-1).

By February 5, 1997, the roof of the building had been removed and RK was in the process of knocking down the walls on the third floor. Seven RK employees were on the site. Darryl Richardson was the foreman. He was not present at the beginning of Ramirez's inspection.

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<sup>2</sup> At the hearing, the Secretary amended the proposed penalties because of OSHA's inadvertent failure to give a ten percent credit for history (Tr. 17).

William Sellers was the assistant foreman. He was observing the demolition work at the time of the inspection. Three employees were on the scaffold on the third floor, and two employees were on the ground picking up debris (Tr. 62).

### Discussion

The Secretary has the burden of proving a violation of a safety standard by a preponderance of the evidence. It must show that (1) the cited standard applies to the alleged condition; (2) the terms of the standard were not complied with; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221-22 (No. 88-821, 1991).

#### Item 1: Alleged Serious Violation of § 1926.21(b)(2)

The citation alleges that “employees had not been instructed on the hazards associated with their work, including but not limited to guardrails, scaffolds, and personal protective equipment.” Section 1926.21(b)(2) requires that:

*Employee responsibility.* (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

In determining the scope of an employer’s duty under a broadly worded standard such as § 1926.21(b), an employer may reasonably be expected to conform its safety program to any known duties and must include those measures for detecting and correcting hazards that a reasonably prudent employer similarly situated would adopt. *Northwood Stone and Asphalt, Inc.*, 16 BNA OSHA 2097 (No. 91-3409, 1994), *aff’d* 82 F.3d 418 (Sixth Cir. 1996), *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011 (No. 90-2668, 1992). Section 1926.21(b)(2) contains no additional requirement that an employer effectuate required instructions; the failure to comply with a safety rule cannot establish a violation of § 1926.21(b)(2). *Dravo Engineers and Constructors*, 11 BNA OSHC 2010 (No. 81-748, 1984). “An employer complies with section 1926.21(b)(2) when it instructs employees about the hazards they may encounter on the job and the regulations applicable to those hazards.” *L & M Lignos Enterprises*, 17 BNA OSHC 1066, 1067 (No. 92-1746, 1995). The Review Commission has held that an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent

employer would have been aware. Training by former employers does not fulfil this requirement. *Supermason Enterprises, Inc.*, 16 BNA OSHC 1446, 1448 (No. 92-2235, 1993). The standard requires training be given to all employees whether or not they are out of union halls and regardless of how experienced they are.

Ramirez determined through employee interviews that RK had a safety program, albeit an inadequate one. Employees were not trained in the recognition of hazards to which they were routinely exposed. They were not aware of OSHA's requirements for safe access to scaffolds, guardrails on scaffolds, or an engineering survey (Tr. 86-87).

RK president Ramsey Khalidi explained RK's approach to safety training (Tr. 221):

I will agree that I do not recite the hazards out of the OSHA book; but it's sort of seat of the pants. We do know the law about five and ten feet; but we cannot tell that to all the employees. We simply say you do this, you do that. This is what we want you to do. This is the safe way to do it.

RK called several of its employees as witnesses. They gave conflicting testimony regarding RK's safety program. Edward Byrd testified that he had never attended a safety meeting in the two years he had worked for RK. Byrd said that his safety training consisted of being told "to wear a hard hat. Wear gloves. And just be careful, you know, and be particular, you know, what I do" (Tr. 166).

Robert Davis, who had worked for RK for 8 to 10 years at the time of the hearing, said that he had "attended a couple" of safety meetings at RK during that time (Tr. 155). Davis's description of RK's safety program focused on the requirements for wearing hard hats, gloves, and safety goggles (Tr. 149).

Glen Roberts described himself as a "semi-supervisor" for RK (Tr. 171). Roberts stated that RK held safety meetings every other Monday during a project (Tr. 178). He could not recall specifically what was discussed during the meetings, but he did know that "OSHA was mentioned" (Tr. 181-182). When asked about RK's safety program, Roberts reiterated the requirement to wear hard hats, gloves, and boots (Tr. 178).

None of the employee witnesses mentioned safety training in the recognition and avoidance of fall hazards. The employees were unaware of OSHA's requirements regarding scaffolds. As will be discussed in the sections addressing items 3a and 3b, the scaffold was not

equipped with a ladder or guardrails. None of the employees, including Darryl Richardson, the foreman, believed the scaffold was unsafe or in noncompliance with OSHA standards (Tr. 192, 196).

The Secretary has established that RK violated § 1926.21(b)(2). RK's employees were not trained in the recognition and avoidance of falling hazards. RK's work consists of demolition and building renovation. As such, its employees are routinely exposed to falls. The violation is serious.

Item 2: Alleged Serious Violation of § 1926.100(a)

The citation alleges that employees exposed to overhead hazards were not wearing hard hats. Section 1926.100(a) requires that:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

RK stipulates that "its employees were on the job site without hard hats on, at the time of the inspection" (Jt. Prehearing Report; Tr. 13). Ramirez observed three employees on the third-floor scaffold without hard hats on. Robert Davis was on the ground picking up debris without a hard hat. Ramirez observed the employees without hard hats for 15 to 30 minutes.

Only Davis was exposed to overhead falling objects. He testified that he went back to work after lunch, not realizing that he had forgotten to put his hard hat on. When he did realize it was missing, he went to RK's van to retrieve it, but the van was gone (Tr. 151). Davis looked in RK's other van for a hard hat, but was unable to find one. Then, Davis stated, "I just went back to work" (Tr. 152). Davis worked on the ground sorting out bricks for 15 to 20 minutes without wearing a hard hat (Tr. 152).

In order to show employee exposure, the Secretary must prove that employees have been, are, or will be in the "zone of danger" either during their assigned working duties, their personal comfort activities while on the jobsite, or their movement along normal routes of ingress to or egress from their assigned workplaces. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993). The Secretary must show either actual exposure or that it was foreseeable that they would have access to the violative conditions. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995). The test for determining whether employees are exposed to a hazard is whether it is "reasonably predictable" that employees would be in the zone of danger created by

a noncomplying condition. *Kokosing Constr Co.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996); *RGM Constr Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995). The employees on the scaffolding were not shown to be in the zone of danger.

When a supervisory employee has actual or constructive knowledge of the violation conditions, knowledge is imputed to the employer and the Secretary satisfies her burden of proving knowledge without having to demonstrate any inadequacy or defect in the employer's safety program. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). See also *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928). The record establishes a serious violation. Davis was exposed to overhead falling objects. The assistant supervisor, Sellers, was watching Davis work.

Item 3a: Alleged Violation of § 1926.451(a)(13)

The citation alleges that "employees were working from a scaffold which had no ladder or stairway for access or exit." Section 1926.451(a)(13) provides that:

An access ladder or equivalent safe access shall be provided.

Ramirez observed employees leaving the scaffold by climbing down the cross-bracing (Exhs. C-6, C-7; Tr. 69-70). RK argues that the scaffold had built-in ladders. The ladder RK submits was built-in is on a separate scaffold from the one the employees were descending, and it was inaccessible due to the way the scaffolds were configured (Exh. C-10; Tr. 136-137).

No safe access was provided to the scaffold the employees were using. The Secretary has established a serious violation.

Item 3b: Alleged Violation of § 1926.451(d)(10)

The citation alleges that “standard guardrails and toeboards were not provided at the open sides of scaffolds.” Section 1926.451(d)(10) provides in pertinent part that tubular welded frame scaffolds have:

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

There is no dispute that the scaffolding did not have guardrails and employees were not protected by safety lines. Ramirez observed three employees standing on the scaffolding (Exhs. C-8, C-9, C-10; Tr. 55, 73). The three employees were standing approximately 2 to 3 feet from the edge of the building which was approximately 27 feet above the ground level (Tr. 75). The scaffolding was less than 10 feet high from the floor level (Tr. 132, 134). The scaffold was 2 to 3 feet from the wall that the employees were tearing down (Tr. 125).

RK argues that the standard does not apply because the scaffold was less than 10 feet above the floor. The standard, however, requires that all open sides be guarded on scaffolds more than 10 feet above the *ground* or floor. The scaffolding was 27 feet above the ground level and close to the edge of the building. The employees were demolishing the wall which protected them from exposure to the edge. As evident by the photographs, there were openings in the wall from the large windows. There was no protection afforded employees from possible fall to the ground. The cross bracing of the scaffolding is not sufficient protection and cannot be substituted for standard guardrails.

Therefore, a serious violation of § 1926.451(d)(10) is established.

Item 4: Alleged Violation of § 1926.850(a)

The citation alleges that RK “did not have in writing evidence that an engineering survey had been performed.” Section 1926.850(a) provides that:

Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls, and possibility of unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked. The employer shall have in writing evidence that such a survey has been performed.

The facts are not in dispute. At the time of the inspection, RK did not have an engineering survey for its demolition of the Oglethorpe and Barnard streets building (Tr. 36). After the inspection, RK contracted with Construction Consulting Services who performed a survey on February 8, 1997, three days after Ramirez conducted his inspection (Exh. R-2; Tr. 146). Upon contacting the architects of the project, RK was provided a survey on April 14, 1997, which had been performed in July 13, 1984 (Exh. R-1). There is no evidence that the July 13, 1984, document was an engineering survey as contemplated by the standard. It was over ten years old and would be deficient in identifying structural weakness in the building. RK had not consulted this document prior to beginning its demolition work.

There was no survey in the possession of RK at the time of the OSHA inspection. It was not aware of any surveys or the requirement to have such a survey. RK had been working on the demolition of the building for three weeks prior to the inspection without an engineering survey.

Accordingly, a serious violation of § 1926.850(a) is established.

#### Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give “due consideration” to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

RK employed fewer than 25 employees. RK had no history of OSHA violations for the previous 3 years. RK established its good faith at the hearing. Its president, Ramsey Khalidi, evinced a sincere willingness to provide a safe workplace for his employees. RK is a small, family-operated business with long-time employees in a business known for quick turnover.

Ramirez testified that the gravity of item 1, a violation of § 1926.21(b)(1), was of low severity and lesser probability. He based this assessment on the grounds that RK had no history of accidents and that it did have a safety program. A penalty of \$450.00 is assessed.

Item 2, a violation of § 1926.100(a), concerns the hard hats. While the Secretary alleged that 4 employees were exposed to overhead falling objects, the record establishes that only one employee was exposed for a relatively short period of time. A penalty of \$800.00 is assessed.



Items 3a and 3b are the scaffold violation, §§ 1926.451(a)(13) and (d)(10), respectively. The gravity of these violations is high. Three employees were exposed to a fall of 27 feet. Items 3a and 3b are grouped and a total penalty of \$1,500.00 is assessed.

Item 4, for a violation of § 1926.850(a), is a high gravity violation. RK had no knowledge of the structural soundness of the building it was demolishing. A penalty of \$1,500.00 is assessed.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

#### ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1, an alleged serious violation of § 1926.21(b)(2), is affirmed and a penalty of \$450.00 is assessed.
2. Item 2, an alleged serious violation of § 1926.100(a), is affirmed and a penalty of \$800.00 is assessed.
3. Item 3a, an alleged serious violation of § 1926.451(a)(13), and item 3b, an alleged serious violation of § 1926.451(d)(10), are affirmed and a penalty of \$1,500.00 is assessed.
4. Item 4, an alleged serious violation of § 1926.850(a), is affirmed and a penalty of \$1,500.00 is assessed.

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KEN S. WELSCH  
Judge

Date: May 26, 1998