

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 00-0034
Hollywood Pool & Spa,	:	EZ
Respondent.	:	

Appearances:

Tiffany Morris, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

Mark B. Polson, Esquire
Polson & Robbins
Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Hollywood Pool & Spa is engaged in the business of pool maintenance. On October 29, 1999, respondent was engaged in construction work on its own building in Vestavia Hills, Alabama. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite in Vestavia Hills on October 29, 1999. As a result of this inspection, respondent was issued two citations. Respondent filed a timely notice contesting the citations and proposed penalties. Prior to hearing, respondent withdrew its contest of Citation No. 2, items 1 and 2.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.451(b)(1) as follows:

Each platform on working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports.

At the Hollywood Spa, Vestavia Hills, AL., scaffolding was not fully planked, exposing employees to a fall hazard of 15 feet.

Citation No. 1, item 2, alleges a serious violation of 29 C.F.R. § 451(c)(2) as follows:

Supported scaffold poles, legs, post, frames, and uprights shall bear on base

plates and mud sills or other adequate firm foundation:

At the Hollywood Spa, Vestavia Hills, AL., scaffolding did not have base plates nor were they supported by mud sills or other firm foundations.

Citation No. 1, item 3, alleges a serious violation of 29 C.F.R. § 1926.451(e)(1) as follows:

When scaffold platforms are more than two feet (0.6 m) above a point of access, portable ladders, hookon ladder, attachable ladders, stair towers (scaffold stairways/towers), stair-type ladders (such as ladders stands), ramps, walkaways, integral prefabricated scaffold access, structure, personnel hoist or similar surface will be used.

At the Hollywood Spa, Vestavia Hills, AL., an access ladder was not provided for employees to exit scaffolding, exposing them to a fall hazard of 15 feet.

Citation No. 1, item 4, alleges a serious violation of 29 C.F.R. § 1926.451(f)(3) as follows:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

At the Hollywood Spa, Vestavia Hills, AL., scaffolding was not inspected for visible defects by a competent person before the start of the workday, exposing employees to a fall hazard of 15 feet.

Citation No. 1, item 5, alleges a serious violation of 29 C.F.R. § 1926.451(g)(1) as follows:

Each employee on a scaffold more than 10 feet (3.1m) above a lower level was protected from falling to that lower level:

At the Hollywood Spa, Vestavia Hills, AL., employee(s) were working on a scaffold that was not adequately guarded. This employee was not provided fall protection from a height of 15 feet above ground level.

A hearing was held pursuant to the EZ trial procedures in Birmingham, Alabama, on

April 6, 2000. At the conclusion of the hearing, a bench decision was issued grouping the violations for penalty purposes into one violation and renumbering the violation as Citation No. 1, items 1a through 1d. The bench decision affirmed the violations in items 1a through 1d, and a penalty of \$1,500 was assessed for those items.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

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 ORDERED:

1. Citation No. 1, items 1 through 5, are grouped and renumbered as Citation No. 1, items 1a through 1d.
2. Citation No. 1, items 1a through 1d, are affirmed as a serious violation and a penalty of \$1,500 is assessed.
3. Citation No. 2, items 1 and 2, are affirmed. No penalties were proposed and none are assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: May 17, 2000

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PROCEEDINGS

3 THE COURT: This is a case
4 of Secretary of Labor versus Hollywood
5 Pool and Spa. It's OSHRC Docket No.
6 00-0034. This is a case being held in
7 Birmingham, Alabama. I'm Judge Simko.
8 It's a case which is being tried under
9 the easy trial procedures. I ask that
10 counsel enter your appearances at this
11 time.

12 MS. MORRIS: Appearing for
13 the plaintiff, Tiffany D. Morris. I
14 represent the U.S. Department of Labor.
15 100 Centerview Drive, Birmingham,
16 Alabama, 35216.

17 MR. POLSON: Your Honor, I'm
18 Mark Polson, appearing for the defendant,
19 for Hollywood Pool and Spa. My address
20 is 2131 Magnolia Avenue South,, Suite 101,
21 Birmingham, 35205.

22 THE COURT: There was a
23 prehearing conference set on this matter

1 back on March 27. At that time there was
2 a stipulation as to the jurisdiction and
3 coverage and the fact that Hollywood Pool
4 and Spa engaged in business affecting

5 commerce within the act. The company's
6 notice of contest was timely filed and
7 that Hollywood Pool engaged in pool
8 maintenance. And that on October 29,
9 1999, however, Hollywood Pool was working
10 on completion of it's building in
11 Vestavia Hills, Alabama. Also, the
12 company has withdrawn it's contest of
13 items one and two of the other than
14 serious citation.

15 So, what I have before me is
16 citation number one; is that correct?

17 MS. MORRIS: That's correct.

18 THE COURT: Okay. Were there
19 any affirmative defenses which were
20 identified?

21 MR. POLSON: No, Your Honor.

22 THE COURT: So, what we have
23 are the issues that were stated in the

1 prehearing report?

2 MR. POLSON: Yes, sir.

3 THE COURT: And whether
4 there were violations, one through five,
5 Is that citation one? Whether respondent
6 knew or should have known of the alleged
7 violations and whether the violations
8 were serious. And if the violation is
9 found of any of these items, whether the
10 penalty is reasonable? Okay.

11 I'm going to go over how an
12 easy trial works, but it's pretty much
13 like a regular hearing, but the only
14 difference is that the federal rules of
15 evidence do not apply. I always have
16 that on the record. So, again I think
17 we can move right through to the heart of
18 the issue. I don't like to have lawyers
19 testifying for their clients when you ask
20 them their questions. However, I will
21 allow you some slack on the preliminary
22 issues. I'll ask everybody just to relax
23 and put forth their case.

1 decision.

2 (Brief recess was had.)

3 THE COURT: Back on the
4 record. I have heard all the evidence
5 today and I've heard the legal argument
6 and I'm ready to render a decision in
7 this case.

8 I'm not going to restate the
9 facts and stipulations which were stated
10 at the beginning of this hearing. The
11 burden upon Secretary in all of these
12 cases, involves four major elements and
13 that's when the standard requires the,
14 and I believe the standard. All the
15 standards apply and this was construction
16 work that was going on. The scaffolding
17 and use of the scaffolding in those
18 standards. So, there -- in terms of the
19 standards were violated.

20 It appears that the terms of
21 the standards here were not met. The
22 employees are exposed and that's the
23 third element. There was an individual

1 on the scaffolding and there were two
2 employees working close to the
3 scaffolding. So, it doesn't -- it means
4 having access to a condition here. These
5 employees also had access to the
6 scaffolding without instructions not to
7 go on the scaffolding.

8 And then the final act
9 occurred where the employer should have
10 known whether violations occurred. And I
11 find that the general contractor here,
12 the respondent, knew or should have known
13 the existence of the scaffolding on the
14 day in question. However, having said
15 that, I am going to go into a little
16 general information about the
17 contractor's responsibility and where I'm
18 coming down on the general contractor in
19 this case.

20 As a general contractor, the
21 respondent here has overall
22 responsibility for safety on a jobsite
23 here as a general contractor. The

1 conditions were created and controlled by
2 this contractor. There were four subs
3 that worked on the job. They came and
4 went and the contractor had overall
5 knowledge of the conditions and progress
6 of this work. He had the ability to hire
7 and fire as I stated before. Even though
8 his employees might not have been on the
9 scaffolding, they did have access to
10 that. Mr. Mote was on the job on a daily
11 basis. He rented the scaffolding, and
12 the company rented the scaffolding, and
13 the company directed that scaffolding on
14 construction work around the jobsite.

15 The final point is that Mr.
16 Mote was always in charge on this jobsite
17 and this general contractor had overall
18 responsibility for safety on this job.
19 During testimony Mr. Mote admitted that
20 he rented the scaffolding, there were no
21 guardrails on the scaffolding and there's
22 no evidence that the scaffolding was the
23 -- while the scaffolding was moved, there

1 was no great distinction between what the
2 conditions were on the date in question
3 or prior to that.

4 The ladder was some
5 connecting evidence there and I do find
6 that the ladder was not fully placed the
7 way it was intended on that scaffolding.
8 The question of the base plates, if fully
9 explained to me, I would have to conclude
10 that the language of the standard
11 indicated some confusion as to
12 foundation. Where it was firm or base
13 plates or mud plates, whatever they are,
14 but I have to under the law, give
15 reasonable interpretations when I have
16 to -- the Secretary of the known
17 standards.

18 Therefore, I have given
19 credence to the interpretations by the
20 Secretary. In this matter, having found
21 the conditions existed, I must look at
22 the various factors. Very small
23 employer. This small employer is very

1 cooperative, did everything he was asked
2 to do to correct these conditions and
3 there was no evidence that he was
4 (inaudible.)

5 I see there was no formal
6 written safety program. There are no –
7 there were safety meetings. There was a
8 concern for the safety shown by this and
9 has been shown. I don't think anyone has
10 indicated otherwise. There is no history
11 of violations in the last three years or
12 even before. Under the act, their
13 violations all revolved around one thing
14 and that's the scaffold. We have one
15 scaffold and five violations on one
16 scaffold.

17 While this might be proper as
18 far as proposal of penalties and alleging
19 violations, in the appropriate case, and
20 I think this is an appropriate case.
21 I find it appropriate, given all the
22 factors of this case to meld all these
23 violations into one violation, and these

1 would be subparts. So, instead of five
2 violations, we'll have one violation for
3 penalty purposes and the violations
4 remain.

5 They are affirmed as alleged,
6 but they are affirmed as one part of the
7 violation and that brings us to the
8 penalty.. I'm finding, based on
9 everything I've heard today, while the
10 penalty was calculated in accordance with
11 the guidelines set down by the
12 Government, I have to follow the
13 (inaudible) because the Government
14 proposed these penalties and I have to
15 assess them.

16 So, after the consideration,
17 I affirm one violation and assess a
18 penalty of fifteen hundred dollars.

19 Is there anything further?

20 MR. POLSON: Nothing further
21 of the respondent, Your Honor.

22 MS. MORRIS: Thank you, Your
23 Honor.