

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1244 NORTH SPEER BOULEVARD, ROOM 250  
DENVER, COLORADO 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

NORTH DALLAS ACRYLIC & STUCCO,  
INC., and its successors,

Respondent.

OSHRC DOCKET NO. 01-0727

APPEARANCES:

For the Complainant:

Tina D. Campos, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert E. Rader, Jr., Esq., Rader & Campbell, Dallas, Texas

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, North Dallas Acrylic & Stucco, Inc., and its successors (North Dallas), at all times relevant to this action maintained a place of business at a WalMart in Keller, Texas, where it was engaged in stucco application. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 1, 2001 the Occupational Safety and Health Administration (OSHA) conducted an inspection of North Dallas' WalMart work site. As a result of that inspection, North Dallas was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest North Dallas brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 7, 2001, a hearing was held in Dallas, Texas. At the hearing, Complainant withdrew citation 1, item 3 (Tr. 4). The parties have submitted briefs on the items remaining at issue and this matter is ready for disposition.

## Facts

OSHA Compliance Officer (CO) Larry Moore conducted the February 1, 2001 inspection of the construction site at the Keller WalMart (Tr. 8-9). CO Moore testified that when he arrived on the site he observed three of Respondent's employees applying stucco from a three tiered fabricated frame scaffold for 10 to 15 minutes (Tr. 10-11, 14, 27). Two men worked from a planked platform, which CO Moore measured, and found to be approximately 12 feet above the ground. A third man worked from a second platform approximately 18 feet above the ground (Tr. 15, 17; Exh. R-6).

Moore testified that the legs of the scaffold were set on cut wood planks instead of on adjustable base plates or mud sills (Tr. 15-16; Exh. C-1, C-2). Moore believed the wood blocks were insufficient to level the scaffold on the ungraded dirt, and that the scaffold seemed to tilt slightly to the left (Tr. 16, 46, 50-51). Noel Juarez, North Dallas' lead man, testified that each of the scaffold legs did have a base plate, each of which rested on a block of wood (Tr. 33, 138, 142-43, 146). CO Moore admitted that the scaffold did not seem unstable as he watched the three men working on it (Tr. 39, 54).

Moore testified that he asked Noel Juarez to have the employees dismount the scaffold (Tr. 22-23). Moore testified that the two employees on the 12 foot platform climbed down the ends of the scaffold in lieu of using a ladder (Tr. 22-23, 59; Exh. C-1). A walkway from the top level of scaffolding led to a separate tier of scaffolding where a ladder provided a means of access for the employee on the 18 foot level (Tr. 43, 138). Juarez admitted that he did not provide a ladder for accessing the 12 foot platform, though he knew one was required. Juarez stated that the stucco job to be performed from the 12 foot platform was small and could be completed within 15 or 20 minutes. He did not install a ladder because the workers would only be going up and down one time, and he didn't think anyone would notice the deficiency (Tr. 137-139)

Finally, Moore testified, the ends of the scaffold were unguarded, and no alternative methods of fall protection were in use (Tr. 27, 72-73). Noel Juarez testified that only the 12 foot platform was unguarded (Tr. 138). Complainant's exhibit C-6 confirms Juarez's assertion that there were guardrails on the top level of the scaffolding (Tr. 36, 138; Exh. C-6).<sup>1</sup> Juarez admitted that there were no guardrails on the end of the 12 foot scaffold because he thought the job would quickly be over and

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<sup>1</sup> THIS JUDGE HAS CONSIDERED, BUT DISCOUNTS CO MOORE'S TESTIMONY THAT THE TOPRAIL AND MIDRAIL VISIBLE ON THE UPPER, 18 FOOT, SCAFFOLD LEVEL WERE "SHADOWS OR SOME OTHER PHENOMENA" (TR. 64, 73).

believed that it would take longer to install the guardrails than it would take to finish the job (Tr. 146). Juarez admitted that he knew he was supposed to put up the guardrails (Tr. 147).

Moore testified that he looked, but did not see any additional base plates, ladders or other scaffold parts on the work site (Tr. 21, 26, 31, 46).

**Alleged Violations of §1926.451 et seq.**

**Serious citation 1, item 1** alleges:

29 CFR 1926.451(c)(2):

a) South exterior wall area: The supported scaffold legs of the three tiered scaffold that employees work on, did not have base plates and mud sills.

The cited standard provides:

Supported scaffold poles, legs posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.. . .

**Discussion**

This judge credits the testimony of Noel Juarez, who maintained that the scaffold legs all had base plates, which rested on an adequate foundation of wooden blocks. While the terms base plate and mud sill are not defined in the standard, North Dallas argues persuasively that the term “base plate” refers to the flat metal plates which appear to be welded to the bottom of each scaffold upright in Complainant’s Exh. C-1, C-2, and C-76.<sup>2</sup> North Dallas’ explanation of “mud sills” as a means of preventing the metal uprights from sinking into the dirt or mud, is also persuasive. Both such supports were present on the cited scaffold. There is no evidence that the base plates and wooden blocks did not provide an adequate firm foundation for the scaffold.

Complainant failed to prove that the cited standard was violated; citation 1, item 1 is vacated.

**Serious citation 1, item 2** alleges:

29 CFR 1926.451(e)(1):

a) South exterior wall area: Employees worked on a three tiered scaffold platform approximately 18 feet above a point of access. Employees did not use ladders as a means of access. Employees climbed the cross braces and frames to access the scaffold.

The cited standard provides:

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<sup>2</sup> Nothing in the standard requires that base plates be adjustable, as Complainant maintains. In it’s brief, North Dallas argues that “screw jack” is the term for an adjustable base plate, which may be required where the ground is uneven (*See*; Respondent’s post hearing brief, p. 4; Vasquez’ testimony, Tr. 123). However, based on the photographic evidence, a screw jack does not appear to have been necessary to level the scaffold in this case.

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands) ramps walkways, integral prefabricated scaffold access or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

**Serious citation 1, item 4** alleges:

29 CFR 1926.451(g)(1):

South exterior wall area: Employees worked on the three tiered scaffold platform approximately 18 feet above a lower level and were not protected from falling to that lower level while working at the platform ends.

The cited standard provides:

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

### Discussion

North Dallas admits that no guardrails were installed at the 12 foot level, nor was a ladder provided for employees working on the lower platform of the cited scaffold. North Dallas maintains that the violations were the result of unpreventable employee misconduct.

### **Employee Misconduct**

### Facts

Gary Mayfield, president of North Dallas Acrylic and Stucco (Tr. 86), testified that newly hired employees are provided with a safety handbook, in both English and Spanish (Tr. 88; Exh. R-1). Mayfield testified that the handbook is explained to the employees, and that employees also view scaffolding videos, as well as videos dealing with hazardous chemicals (Tr. 88). In addition, Mayfield maintained, employees attend weekly job site safety meetings, which are presented by the leadman at the jobsite (Tr. 88). Mayfield maintained that some of the weekly safety meetings cover scaffolding and correct erection of scaffolding (Tr. 91). Respondent introduced a single sign in sheet, dated May 4, 2001 indicating that Juarez held a toolbox meeting on that date (Exh. R-2, p. 5). In addition, Respondent submitted a form dated August 28, 1998, indicating that Noel Juarez received training in scaffold building techniques, and the OSHA requirements for scaffolding (Tr. 92; Exh. R-3).

Mayfield testified that Jose Vasquez, its superintendent is responsible for inspecting individual job sites to ensure that scaffolds are erected properly (Tr. 94). Vasquez inspects his sites approximately twice a week (Tr. 94). According to Mayfield, it was Vasquez' job to correct problems,

and to discipline lead men who do not comply with company safety rules (Tr. 95-96). Mayfield maintained that, while its safety program does not provide for any intermediate disciplinary action, if problems were repeatedly discovered on job sites under the same lead man, that lead man would be fired (Tr. 96). Mayfield admitted, however, that North Dallas had no system for keeping track of verbal reprimands (Tr. 100), though he personally recalled verbally reprimanding Alberto Gonzales, Jaime Palacio and Jose Avilos for hard hat violations, and for failing to erect end rails (Tr. 99-100). Mayfield testified that he has inspected job sites run by Noel Juarez in the past; Mayfield believed that Juarez ran a safe job (Tr. 97, 99). Mayfield stated that Juarez was reprimanded as a result of the OSHA citation (Tr. 97).

Jose Vasquez, superintendent for North Dallas (Tr. 102), testified that Respondent's lead men report to him, and that he spends most of his time inspecting job sites (Tr. 102). Vasquez' testimony regarding North Dallas' disciplinary program and Noel Vasquez' competence was identical to that of Mr. Mayfield (Tr. 102-112). Vasquez identified company safety rules specifically requiring the installation of a safe means of access and fall protection (Tr. 125-26, 128; Exh. R-1). He also read the company rule concerning safety infractions into the record: "The rule states that employees who demonstrate a repeated pattern of violating established company safety rules and regulations are subject to both disciplinary action and dismissal from the company" (Tr. 111; Exh. R-1, p. 24). Vasquez testified that the company had no specific rule on the number of infractions necessary to establish a "repeated pattern" (Tr. 112). He further testified that, though he told Gary Mayfield about verbal reprimands he did not know how, or if, a record of such reprimands was maintained (Tr. 112). Vasquez could remember two employees who were dismissed by North Dallas partially because of safety violations. Vasquez believed that insubordination was also involved in the firings (Tr. 112).

Noel Juarez denied being reprimanded, and testified that management only called the OSHA citations to his attention so that it would not happen again (Tr. 137).

### Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

The evidence establishes that North Dallas had established work rules which, if followed, would have brought the cited scaffold into compliance with OSHA regulations. The evidence further establishes that the foreman on the Keller WalMart construction site was trained in 1998 in proper scaffold erection. On this record, however, this judge cannot find that North Dallas had a program for discovering and enforcing its rules concerning scaffold construction. It is well settled that misconduct by supervisor constitutes strong evidence that safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991). Though an employer may rebut that evidence by showing that it had a progressive disciplinary plan with increasingly harsh punishment for infractions of work rules, the Commission has found that programs consisting only of pre-inspection verbal warnings are insufficient to establish the defense. *Precast Services, Inc.* 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (93-2971, 1995). North Dallas admitted that it had no means of documenting the number of infractions committed by its lead men, no system for recording the number of reprimands a lead man received. North Dallas' disciplinary system makes no provision for any punishment short of termination. Superintendent Vasquez recalled only two instances where lead men were terminated, and in both those cases, safety violations were only a part of the reason the employees were let go. Vasquez' testimony that lead men were terminated, in part for safety violations, was not supported by any documentation. Given North Dallas' lax system of enforcement, it is not surprising that lead man Juarez did not take his "discipline" seriously, denying that he had been reprimanded at all, and stating management merely "brought to his attention" the OSHA citations which resulted from his violations of the scaffolding rules.

North Dallas failed to establish the affirmative defense of affirmative employee misconduct. Citation 1, items 2 and 4 are affirmed.

#### Penalty

A penalty of \$1,050.00 was proposed for each of the cited items. Two employees were exposed to the cited hazards for 10 to 15 minutes. CO Moore testified that employees might fall from the unguarded ends, or get tangled up while climbing the scaffold and fall, resulting in serious injuries, from broken bones, up to and including death (Tr. 24-27, 30). Moore believed that there was also a danger that employees falling from the scaffold would land on and/or impale themselves on construction litter, including plastic buckets and/or boards that were lying on the ground below the scaffold (Tr. 24-26, 30, 61). Moore computed a gravity based penalty of \$3,500.00. Because, North Dallas is a small company, with approximately 50 employees (Tr. 86), the penalty was reduced by 60%

(Tr. 21). Moore testified that North Dallas had a good history with OSHA, entitling them to an additional 10% reduction in the size of the penalty (Tr. 21).

This judge believes that the gravity of the cited standard was overstated, in that only two employees were exposed to the hazard on a short term basis; the probability that an employee would fall from the scaffold was remote, and there was no real possibility of an employee being impaled. Taking into account the reduced gravity of the violation, Respondent's size and history, and, in addition, providing Respondent credit for instituting an, albeit imperfect, safety program, this judge believes that a penalty of \$250.00 is appropriate for each of the cited violations.

**ORDER**

1. Citation 1, item 1, alleging violation of §1926.451(c)(2) is VACATED.
2. Citation 1, item 1, alleging violation of §1926.451(e)(1) is AFFIRMED, and a penalty of \$250.00 is ASSESSED.
3. Citation 1, item 1, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of \$250.00 is ASSESSED.

/s/

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James H. Barkley  
Judge, OSHRC

Dated: January 28, 2002