United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Georgia Carolina Stucco, Inc., Respondent.	OSHRC Docket No. 14-1024

Appearances:

Melanie Paul, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia
For the Complainant

Mark A. Davison, Owner, Georgia Carolina Stucco, Inc., Augusta, Georgia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Georgia Carolina Stucco, Inc., (Georgia-Carolina) engages in stucco work activities. It was performing stucco work activities on a construction jobsite located at 950 Ronald Reagan Drive and 680 Industrial Park Drive, Evans, Georgia, where an assisted living facility was being constructed. An inspection of that jobsite was initiated on May 8, 2014, by OSHA Safety and Health Compliance Officer Linston Maurice Starks (Starks or CSHO). As a result of the inspection, a Citation and Notification of Penalty (Citation) was issued to Georgia-Carolina alleging violations of 29 C.F.R. §§ 1926.451(b)(1), 1926.451(e)(1) and 1926.451(g)(1), and proposing penalties in the total amount of $18,480.00. Georgia-Carolina timely contested the Citation. A hearing was held on January 12, 2015. Georgia-Carolina was represented *pro se* by Mark Davison. Both parties filed post-hearing briefs.

For the reasons that follow, Items 1, 2 and 3 of the Citation are affirmed and a penalty in the total amount of $18,480.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 9). Georgia-Carolina also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8-9). Based upon the parties' stipulations and the record, the Court finds Georgia-Carolina is a covered business and the Commission has jurisdiction under the Act.

Background

Georgia-Carolina is a company which engages in stucco work activities and uses scaffolds to perform its work at various jobsites. As a part of the work it performs, Georgia-Carolina maintains scaffold equipment for its employees to use on its projects (Tr. 82). However, on May 7 and 8, 2014, it did not have its scaffold equipment onsite at 950 Ronald Reagan Drive and 680 Industrial Park Drive, Evans, Georgia, for the stucco work it was installing on the assisted living facility under construction (Tr. 26-27). Georgia-Carolina instead had an agreement with a subcontractor onsite to use the masonry contractor's scaffolds which were onsite (Tr. 40, 41-42, 46, 75, 80). When Georgia-Carolina's employees were ready to use the borrowed scaffolds, the foreman discovered they were not compliant. He testified the owner of Georgia-Carolina told him to use the brick masons' scaffolds (Tr. 104). He also testified the superintendent of the general contractor instructed him to use the scaffolds onsite (Tr. 104).

Pursuant to OSHA's construction targeted inspection procedures, CSHO Stark arrived at the assisted living facility jobsite on May 8, 2014, to conduct an inspection of the jobsite (Tr. 26).[1] The jobsite was a multi-employer worksite where stucco, framing, electrical, and heating and air conditioning work activities were being performed (Tr. 27). Cameron General Construction[2] was the general contractor on the jobsite (Tr. 56). In addition to Georgia-Carolina, other contractors on the jobsite included Metro Masonry

[1] A construction targeted inspection consists of a list of construction sites at various locations with different programs ongoing. The list is provided to CSHO to conduct inspections of employers on the list with a focus on struck by and fall hazards since they result in a high number of fatalities (Tr. 26).

[2] This company also was referred to as Cameron Construction during the hearing. For clarity and consistency, the Court will refer to Cameron General Construction when referring to the general contractor.

and Quality Masonry (Tr. 57). Georgia-Carolina was engaged in stucco work on the site at the time of the inspection (Tr. 34; Exhs. C-1, C-2, C-6). The day of the OSHA inspection was the second day Georgia-Carolina employees were applying stucco on the assisted living facility under construction (Tr. 26-27, 93).

When CSHO Stark drove up to the jobsite, he observed employees working from a scaffold, and saw an employee climbing on the scaffold's frame (Tr. 27). Once onsite, Stark met with Randy Lilen, superintendent for Cameron General Construction (Tr. 27). Stark presented his credentials, explained the purpose of his visit, and informed Lilen employees were working from an improper scaffold (Tr. 28). He and Lilen walked to the area where the scaffold system consisting of two separate scaffolds was located (Tr. 28, 91-92). Neither scaffold was fully planked; there were no guardrails on the third levels where employees were working; and no ladder was attached to either scaffold (Tr. 31-34, 91-93; Exhs. C-1, C-2). There were no other means of fall protection in use at the time of the inspection (Tr. 54; Exhs. C-1, 2, 5, 6, 7, 8). CSHO Stark measured the scaffold and determined it was 20 feet, 9 inches in height (Tr. 29, 48; Exhs. C-1, C-2, C-6). He also discovered employees accessed the upper levels of the scaffolds by either climbing the scaffold frame or by going through the windows of the building adjacent to the scaffold (Tr. 37).

CSHO Stark determined two employers had employees working from the scaffold system. The employees working from the scaffolds were employees of Georgia-Carolina and Justo Mena d/b/a Quality Masonry (Tr. 28-29). Although both companies were cited, this matter only addresses the Citation issued to Georgia-Carolina, which had three employees working from the scaffolds at the time of the inspection (Tr. 29, 57).

Francisco Lara was identified as the foreman for Georgia-Carolina (Tr. 29, 35, 87, 88; Exhs. C-4, C-5). When he first drove up to the jobsite, CSHO Stark had observed Lara climbing up the frame of one of the scaffolds (Tr. 29, 35, 87; Exhs. C-4, C-5). In addition to being the foreman, Lara told CSHO Stark he was the competent person onsite and he had received scaffold training (Tr. 39, 40).

Foreman Lara informed CSHO Stark the scaffolds onsite did not belong to Georgia-Carolina (Tr. 40, 41-42, 46). According to Lara, the scaffolds belonged to Metro Masonry and were erected by Quality Masonry who employed the brick masons (Tr. 40, 41-42, 46, 75, 80). Georgia-Carolina had an arrangement with Metro Masonry for

Georgia-Carolina employees to use the Metro Masonry scaffolds which were onsite (Tr. 41-42, 46, 63).

At the time of the inspection, the Georgia-Carolina employees were finishing the stucco work on the building, and had performed stucco work on the building the day before (Tr. 37-38, Exhs. C-6, C-7, C-8). The employees had been working approximately 45 minutes at the time CSHO Stark arrived at the jobsite for his inspection (Tr. 37; Exh. C-7). Foreman Lara testified they were in the process of dismantling the scaffolds on the day of the inspection (Tr.105). However, the evidence fails to substantiate dismantling was occurring at 8:45 a.m. when the OSHA inspection began. (Exhs. C-2, C-5, C-6, C-7, C-8, C-9).

As a result of his inspection findings, CSHO Stark recommended the issuance of the three-item Citation at issue alleging scaffold violations for insufficient planking, lack of guardrails, and the absence of a ladder.

The Citation

The Secretary issued the three-item Citation to Georgia-Carolina on June 8, 2014, alleging Georgia-Carolina violated OSHA's standards found in *Subpart L-Scaffolds*. In Item 1, the Secretary alleges "On or about 5/8/14 at the front and side of the building; Employees engaged in stucco work on a scaffold system at up to 20 feet 9 inches from the ground level without being fully planked or decked."

The cited standard, § 1926.451(b)(1), provides in pertinent part:

> Each platform on all working levels of scaffolds shall be fully planked or decked between the front, uprights and the guardrail supports[.][3]

For Item 2, the Secretary alleges "On or about 5/8/14 at the front side of the building; Employees engaged in stucco work on a scaffold system at up to 20 feet 9 inches from the ground level were exposed to a fall hazard. The employer failed to install a ladder for the employees to access the scaffolding."

The cited standard, § 1926.451(e)(1), provides in pertinent part:

> When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair

[3] The standard found at § 1926.451(b)(1) provides an exception to providing full planking or decking when platforms are used solely as walkways, or solely by employees performing scaffold erection or dismantling. This exception is not applicable here, as the employees were not using the scaffolds as walkways. Further, the credible evidence reveals they were not erecting or dismantling the scaffold either. Instead, the scaffolds were used as working platforms to install stucco (Exhs. C-2, C-6, C-7, C-8, C-9).

> towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated 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.

The Secretary alleges in Item 3 that "On or about 5/8/14 at the front and side of the building; Employees engaged in stucco work on a scaffold system at up to 20 feet 9 inches from the ground level without guardrails or personal fall arrest systems."

The cited standard, § 1926.451(g)(1), provides in pertinent part:

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

Burden of Proof

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.,* 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000). Georgia-Carolina disputes only the knowledge element of the Secretary's case. Although not in dispute, for context, the Court will briefly discuss the remaining elements of the Secretary's case.

Applicability

Georgia-Carolina was engaged in work activities on a construction site where its employees used scaffolds to perform stucco work on the assisted living facility under construction (Tr. 26-29). *Subpart-L* applies to all scaffolds used by workplaces covered by Part 1926 of the standards, except for crane or derrick suspended personal platforms.[4] § 1926.450(a). As the photographs admitted into evidence show, the scaffolds used by Georgia-Carolina were not the types excluded from coverage (Exhs. C-1, C-2, C-5, C-6, C-7). Applicability of the cited standards is established.

Noncompliance with Standards

Although Georgia-Carolina does not dispute that the cited scaffolds did not comply with the requirements of the standards in that they were not fully planked, had no guardrails and were missing ladders, it contends the noncompliant scaffolds did not belong to it (Georgia-Carolina brief, p. 1). Evidence adduced at the hearing reveals

[4] The criteria for aerial lifts are set out exclusively in § 1926.453.

Metro Masonry owned the scaffolds at issue. Ownership of the noncompliant condition is not controlling in assessing whether the terms of the standard are in compliance. Here, a preponderance of the testimonial and photographic evidence establish the scaffolds were not in compliance with the requirements of the standards, and they were used by employees to perform their work activities.

Access to Violative Condition

Employee access to the violative condition also is established. The photographs admitted into the record show all three Georgia-Carolina employees working from the scaffolds (Exhs. C-2, C-6, C-7, C-8, C-9). Forman Lara admits he worked from one of the noncompliant scaffolds and was the employee observed climbing the frame of the scaffold (Tr. 80-81; Exh. C-8). The other two employees depicted on the other noncompliant scaffold were identified during the hearing as employees of Georgia-Carolina, and the testimony reveals they were performing work activities while on the scaffold which was not fully planked, and was missing guardrails and a ladder (Tr. 90-93; Exhs. C-2, C-6, C-7, C-9).

Knowledge

The only element of the Secretary's case left for determination is knowledge. In order to establish a violation of an OSHA standard, the Secretary must show the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986).

Here, the Secretary contends Georgia-Carolina had actual knowledge of the cited violative conditions through its supervisory employee, foreman Lara, who worked on one of the scaffolds. He worked alongside the two subordinate employees who were on the other scaffold. The Secretary contends Lara's knowledge is imputed to Georgia-Carolina (Secretary's brief, p. 6). Georgia-Carolina asserts it was not aware of the violative conditions and had no knowledge its employees worked from the "incomplete" scaffold, until CSHO Stark informed Davison of the violations at the time of the OSHA inspection (Respondent's brief, p. 1, 2). The evidence adduced at the hearing belies this assertion. A preponderance of the evidence shows Lara, a Georgia-Carolina supervisor, was on the jobsite, performed work activities along with two subordinate employees, and had knowledge of the cited conditions.

Under Commission precedent a supervisor's knowledge of violative conduct may be imputed to the employer. *Dover Elevator Co.,* 16 BNA OSHC 1281 (No. 91-862, 1993). An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992). It is the Secretary's burden to adduce sufficient evidence to establish the knowledge element of his case. As set forth below, the Court finds he has.

The Court of Appeals for the Eleventh Circuit addressed the knowledge element in *ComTran Group Inc.*, 722 F.3d 1304, 1307-1308 (11th Cir. 2013). In that decision, the Eleventh Circuit specifically addressed the issue regarding imputing a supervisor's knowledge of his own misconduct, setting forth the requirements necessary to prove knowledge in such circumstances. In *ComTran,* the court held for the first time in the Eleventh Circuit that "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id. at* 1318.

Prior to *ComTran*, a supervisor's actual or constructive knowledge of a violation could be imputed to the employer. "[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof 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).

The *ComTran* case addressed imputing a supervisor's knowledge of his own misconduct when acting alone to the employer. *ComTran* did not alter the ordinary case which involves imputing the supervisor's knowledge of a subordinate employee's

misconduct.[5] The Eleventh Circuit explained that it is reasonable to impute a supervisor's knowledge of a subordinate's misconduct to the employer because:

> [T]he supervisor acts as the "eyes and ears" of the absent employer. That makes his knowledge the employer's knowledge. However, a "different situation is presented" when the misconduct is the supervisor's own. [*Mountain States Telephone & Telegraph Co. v. OSHRC,* 623 F.2d. 155, 158 (10th Cir. 1980)]. In that situation, the employer has no "eyes and ears." It is, figuratively speaking, blind and deaf. To impute knowledge in this situation would be fundamentally unfair.

Id. (footnote omitted).

The facts here establish that this is an ordinary case. It is not the situation presented in *ComTran* which involved imputing a supervisor's knowledge of his own misconduct when acting alone. The supervisor here was not acting alone. The evidence adduced at the hearing reveals Lara was the Georgia-Carolina foreman on the jobsite, was in charge of the employees who worked with him, and was responsible for their safety (Tr. 29, 88). After observing the condition of the brick mason's scaffolds to be used by him and his crew, Lara called Davison and reported the scaffold was improper and was instructed by Davison and, according to Lara, the superintendent to use them anyway (Tr. 104; Exh. C-10). Lara's statement reveals that Davison instructed him to use the scaffolds until they could get the proper equipment to them (Exh. C-10). Lara then worked from the noncompliant scaffolds alongside the other two employees whom he supervised as foreman (Tr. 88, 91-93; Exhs. C-2, C-6, C-7, C-8, C-9). Lara testified he knew the scaffolds were not fully planked and were missing guardrails and he was aware the two subordinates were working from one of the scaffolds in that condition (Tr. 92, 93, 100). He further testified that because there was no ladder, he climbed the scaffold frame and his subordinates climbed through an adjacent window to access the work platform

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[5] In Footnote 2 of the decision, the court states:

> We say that a supervisor's knowledge is "generally imputed to the employer" because that is the outcome in the ordinary case. The "ordinary case," however, is where the supervisor knew or should have known that subordinate employees were engaged in misconduct, and not, as here, where the supervisor is the actual malfeasant who acts contrary to the law. *W.G. Yates & Sons, Constr. Co., Inc. v. Occupational Safety and Health Review Comm'n,* 459 F.3d 604, 609 n.7 (5th Cir. 2006) (noting same). As will be seen, that important factual distinction is ultimately what this case is all about.

Id. at 1308, n.2.

(Tr. 91, 92, 93; Exh. C-7, C-8). The Secretary has established knowledge of the violative conditions for all three cited standards, and therefore has proven all four elements of his prima facie case.

An employer may rebut the Secretary's prima facie showing of knowledge with evidence that it took reasonable measures to prevent the occurrence of the violation. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Aquatek Systems, Inc.*, 21 BNA OSHC 1400, 1401-1402 (No. 03-1351, 2006). Here, Georgia-Carolina alleges employee misconduct as a defense to the Secretary's prima facie case.

Employee Misconduct (Isolated Incident)

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove that it has: (1) established work rules designed to prevent the violation; (2) adequately communicated these rules to its employees; (3) taken steps to discover violations; and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co*., 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997); *e.g.*, *Danis Shook Joint Venture XXV,* 19 BNA OSHC 1497, 1502 (No. 98-1192, 2001)*, aff'd* 319 F3d 805 (6th Cir. 2003)*; Precast Services, Inc*., 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). *Oil Well Serv.,* 15 BNA OSHC 1809, 1816 (No 87-692, 1992). Also *see Nooter Construction Co.* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

An employer may defend on the basis that the employee's misconduct was unpreventable. In order to establish the defense, the employer must show the action of its employee represented a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.,* 9 BNA OSHC 1230, (No. 76-4627, 1981); *Merritt Electric Co.*, 9 BNA OSHC 2088 (No. 77-3772, 1981); *Wander Iron Work*, 8 BNA OSHC 1354 (No. 76-3105, 1980), *Mosser Construction Co.* 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991).

In support of its employee misconduct defense, Georgia-Carolina contends it repeatedly informed its employees not to use incomplete scaffolding and to do so was a violation of company policy. It further asserts the employees had been trained, the company has a safety program, and it disciplines employees who violate the policies (Georgia-Carolina brief, pp. 1-2).

Despite these assertions, the only evidence adduced at the hearing in support was the uncorroborated testimony of Lara that he had been trained and that the company disciplined him for violations (Tr. 81, 86). Lara's discipline only consisted of him being talked to about the violations because the company did not want OSHA violations on its record (Tr. 94). He was not suspended or terminated (Tr. 94). Lara's testimony reveals the company posted pictures on the wall to demonstrate unsafe conditions (Tr. 86, 96). Even considering this testimony in the light most favorable to Georgia-Carolina, the fact that three employees, including a supervisory employee, worked from an improper scaffold at the direction of the owner of the company shows Georgia-Carolina placed expediency over employee safety in this instance, and suggests the company condoned safety violations. Such misplaced emphasis undermines Georgia-Carolina's defense that this was an isolated instance of employee misconduct. Further, "[w]here all employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *Gem Industrial Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996) *aff'd* 149 F.3d 1183 (6th Cir. 1998).

The Court finds the evidence fails to support the alleged employee misconduct defense. Georgia-Carolina has failed to rebut the Secretary's prima facie case as to the three items alleged in the Citation.

Darden Doctrine

Georgia-Carolina also argues as a defense that Lilen, superintendent for Cameron General Construction, instructed Lara to use the scaffolds cited in this matter. Georgia-Carolina appears to be arguing that by doing so, Lara was under the direction and control of Cameron General Construction and not Georgia-Carolina (Georgia-Carolina brief, p. 1). To the extent Georgia-Carolina is arguing it was not the employer of the employees engaged in the violative conduct at the time of the conduct, the Court finds the evidence fails to support this argument.

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.,* 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). In determining whether the Secretary has satisfied this burden, the Commission applies the *Darden* doctrine set forth in *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 316 (1992):

> To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to the hiring party's right to "control the manner and means by which the product [was] accomplished." Factors pertinent to that issue include "the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party." *Darden*, 503 U.S. at 322, citing *Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989). While no single factor under Darden is determinative, the primary focus is whether the putative employer controls the workers. See *Don Davis*, [19 BNA OSHC 1477 (No. 96-1378, 2001)].

Allstate, 21 BNA at 1035.

Focusing here on "whether the putative employer controls the workers" results in a determination that Cameron General Construction did not control Lara. Although a general contractor has general oversight and control of a jobsite, there is no evidence in the record to show Cameron General Construction had the authority to direct employees of Georgia-Carolina in their daily work activities.

Lara's testimony regarding who told him to use the masonry contractor's scaffolds is confusing at best. By the time of the hearing, Lara's testimony appeared to mirror exactly the arguments made by Georgia-Carolina's owner. Yet, his written statement at the time of the inspection was less confusing and more candid (Exh. C-10). During his testimony, Lara attempted to discredit the accuracy of his statement by indicating he did not understand what he had signed, suggesting his lack of understanding of English. The Court observed Lara during his testimony and noted Lara had no difficulty understanding or speaking English. To the extent Lara claims he could not read the statement very well, this too is undermined by CSHO Starks' testimony he read portions of the statement to Lara before he signed it (Tr. 110). The Court credits Lara's statement over his testimony at trial as being more reliable.

It is undisputed in the record the three employees worked for Georgia-Carolina and it had control over them. The evidence reveals Lara received training and discipline from Georgia-Carolina, a company he testified he has been employed with for approximately 18 years, leading crews on various projects (Tr. 88, 89). The undersigned

determines Georgia-Carolina was the sole employer of Lara and its other two employees working on the scaffolds.

Repeat Classification

The Review Commission has long considered a violation as a repeated violation under § 17 of the Act, if at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 7 BNA OSHRC No.1061, 1063 (No. 16183, 1979). Georgia-Carolina does not dispute it was issued a serious Citation on September 16, 2011, for violations of §§ 1926.451(b)(1), 1926.451(e)(1), and 1926.451(g)(1) at a worksite at 1128 Robert Toombs Avenue, Washington, Georgia, where employees were working on the third platform of a three-buck scaffold 20 feet above ground level (Tr. 50-52; Exh. C-11).

This prior citation was resolved by a Formal Settlement Agreement reflecting only a change in the proposed penalty. It became a final order of the Review Commission on October 26, 2012 (Tr. 50-52; Exh. C-11). As in the instant case, the employees in the prior citation also were working from the third level of the scaffold, with no ladder, missing guardrails, and not fully planked (Tr. 52-53; Exh. C-11). The repeat classification of the Citation for violations of §§ 1926.451(b)(1), 1926.451(e)(1) and 1926.451(g)(1) is established. Citation 1 is affirmed as a Repeat Citation.

Penalty Determination

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

A gravity based penalty of $7,000.00 for each item was arrived at by a determination that the violations were of high severity because broken bones or death could result from a fall, and because it was determined that the probability of an accident occurring was greater due to the fact that three employees were exposed while working on the edge of the not fully planked scaffolds for two days (Tr. 49, 53, 54, 55). The employees worked unprotected from scaffolds at a height of 20 feet 9 inches (Tr. 48-49).

The possibility of employees slipping and falling when climbing out of the window to the scaffold platform or climbing the frame was also a basis for the greater probability assessment (Tr. 53-54). The evidence further reveals the employees were exposed to the conditions for approximately 45 minutes at the time of the inspection (Tr. 37). No safety measures were in place to protect the employees from the hazardous conditions. The gravity based penalty considerations and assessments are appropriate.

Approximately 40 employees work for Georgia-Carolina (Tr. 84, 100).[6] Three employees worked on the jobsite at the time of the inspection (Exhs. C-2, C-6, C-7, C-8, C-9). CSHO Stark testified that a 60% reduction in the penalty was applied to the gravity based penalty in consideration of the size of Georgia-Carolina (Tr. 54). In his brief, the Secretary contends the penalty reduction for size was actually 20% and that the penalty proposed was actually calculated at that percentage reduction and not the 60% testified to by the CSHO (Secretary's brief, pp. 11-12; Tr. 54).

No good faith reduction was permitted because of the high greater assessments of the violations. A 10% increase to the penalty was calculated because the company had been previously cited within the past five years (Tr. 54-56; Exh. C-11). The Court agrees with the Secretary's penalty considerations. Upon due consideration of the statutory factors under § 17(j) of the Act, the Court assesses a penalty of $6,160.00 for each of the three items in the Citation issued to Georgia-Carolina, for a total penalty of $18,480.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation 1 is affirmed and a penalty in the amount of $6,160.00 is assessed.
2. Item 2 of Citation 1 is affirmed and a penalty in the amount of $6,160.00 is assessed.

[6] CSHO Stark testified Georgia-Carolina employed 10 employees (Tr. 56). The Court credits the testimony of Georgia-Carolina's supervisor Lara, as to the number of employees, over the CSHO because he is in a better position to know, due to his position with the company. Lara testified the company has 40 employees (Tr. 84-100).

3. Item 3 of Citation 1 is affirmed and a penalty in the amount of $6,160.00 is assessed.

SO ORDERED.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: July 7, 2015
Atlanta, Georgia