UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Era-Valdivia Contractors, Inc., Respondent.	OSHRC Docket No. 10-1384

Appearances:

Lisa Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois
For Complainant

Robert Brown, Esq., Laner, Muchin, Dombrow Law Firm, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of an Era-Valdivia Contractors, Inc. ("Respondent") worksite in Morton Grove, Illinois on April 20, 2010. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging three violations of the Act. Respondent timely contested the Citation. The trial was conducted in Chicago, Illinois on April 22, 2011. Each party filed timely post-trial briefs.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). See *Complaint* and *Answer*; *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Applicable Law

To establish a *prima facie* violation of a specific regulation promulgated under Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Section 5(a)(1) of the Act (a/k/a the "General Duty Clause") states that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. §654(a)(1). To establish a *prima facie* violation of Section 5(a)(1), Complainant must prove by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Kokosing Constr. Co*., 17 BNA OSHC 1869, 1995-96 CCH OSHD ¶31,207 (No. 92-2596, 1996). In addition, the evidence must show that the employer knew, or with the exercise of reasonable diligence, could

have known of the hazardous condition. *Otis Elevator Company*, 21 BNA OSHC 2204, 2007 CCH OSHD ¶32,920 (No. 03-1344, 2007).

A violation was serious if there was a substantial probability that death or serious physical harm could have resulted from the condition. 29 U.S.C. 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident had occurred, serious physical harm or death could have resulted. *Whiting Turner Contracting Co*., 13 BNA OSHC 2155, 1989 CCH OSHD ¶28,501 (No. 87-1238, 1989). If the possible injury addressed by the cited regulation is death or serious physical harm, a violation of that regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072, 1993 CCH OSHD ¶29,942 (No. 88-0523, 1993).

Stipulations

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act. (*Complaint and Answer*).

2. Respondent is, and at all times hereinafter mentioned was, a corporation with an office and place of business at 1909 South Avenue O, Chicago, Illinois 60053, and at all times hereinafter mentioned, it was engaged in commercial construction and related activities. (*Complaint and Answer*).

3. Respondent, at all times hereinafter mentioned, had a workplace at 8820 National Avenue, Morton Grove, Illinois 60053, where it was engaged in commercial construction and related activities. (*Complaint and Answer*).

4. Respondent, at all times hereinafter mentioned, was engaged in a business affecting

commerce in that Respondent was engaged in handling goods or materials which had been moved in commerce. (*Complaint and Answer*).

5. Respondent, at all times hereinafter mentioned, was an employer employing employees in said business at the aforesaid workplace. (*Complaint and Answer*).

6. One of Respondent's employees, Juan Valdivia, was not tied off to an independent lifeline. Rather, he was tied off to the support cable for the Spider scaffold. (Tr. 12).

Discussion

On April 20, 2010, OSHA Compliance Safety and Health Officer ("CSHO") Larken Akins was driving by Respondent's jobsite in Morton Grove, Illinois when she observed suspected fall hazard violations. (Tr. 25-26). CSHO Akins pulled her vehicle over, then observed, photographed, and video-taped Respondent's employees working on a water tower for approximately 45 minutes. (Tr. 26). The employees were in the process of re-painting the tower and were working approximately 80 feet above the ground. (Tr. 26, 65; Ex. C-11). CSHO Akins then entered the jobsite and obtained permission to conduct an inspection from Senior Project Manager Greg Bairaktaris. (Tr. 32-33).

Two painters, Juan Valdivia and Heriberto Valdivia, were each suspended on the side of the tower inside a Spider basket, a type of suspension scaffold enclosure. (Tr. 28; Ex. C-1, p. 1). Before entering the jobsite, CSHO Akins observed one of Respondent's painters, Juan Valdivia, climb out of his Spider basket to access certain areas.[1] (Tr. 28; Ex. C-1, pp. 2, 9, 10). During these times, Mr. Valdivia was secondarily protected from falling through his use of a body harness and lanyard, which was secured to the Spider basket's suspension line. (Tr. 27-29, 35; Ex. C-1, p. 2, C-11; Stipulation No. 1). CSHO Akins explained that being secured to the Spider

[1] CSHO Akins vaguely asserted exposure of the second painter, Heriberto Valdivia, to the cited conditions. However, during trial, there was no specific evidence that Heriberto Valdivia engaged in any of the conduct, or was exposed to any of the conditions, which served as the basis for the three purported violations.

basket suspension line, rather than an independent lifeline, violated the plain language of 1926.451(g)(3)(i) and exposed Mr. Valdivia to the possibility of being pulled down by the scaffold itself if it failed. (Tr. 50). Securing himself to an independent anchorage point or lifeline would have ensured that, had the Spider basket and its suspension line failed, Mr. Valdivia would have still been protected. (Tr. 72).

CSHO Akins further testified that by securing himself to the Spider basket suspension line, Juan Valdivia also failed to comply with 29 C.F.R. §1926.502(d)(15) which requires that an anchorage point or lifeline be capable of supporting 5,000 pounds. (Tr. 36, 53). CSHO Akins later acknowledged that she did not actually know the capacity of the Spider basket suspension line to which Juan Valdivia was secured. (Tr. 70). In contrast, Respondent's Project Manager, Greg Bairaktaris, provided undisputed testimony that the suspension lines for the Spider baskets were rated to support 10,000 pounds. (Tr. 120).

During the time when Juan Valdivia was observed outside of his Spider basket, he periodically stood on the basket railing. (Tr. 34; Ex. C-1). CSHO Akins asserted that standing on that railing constituted a General Duty Clause violation because there was a manufacturer's label on the Spider basket which stated: "Do Not Stand on Rails." (Ex. C-6). She did not clearly articulate how standing on the railing exposed employees, who were secondarily tied-off with harnesses and lanyards at the time, to serious hazards. Complainant apparently concluded that the mere existence of the manufacturer's label alone, with no further explanation, was sufficient to establish a General Duty Clause violation.

Respondent's Foreman, Carlos Gonzalez, was working both on top of the water tower and on the ground at various points during OSHA's off-site observations and on-site inspection. (Tr. 31, 60-61, 152; Ex. C-1, p. 10). At one point, while Foreman Gonzalez was on the ground,

CSHO Akins photographed him looking up and watching the two painters. (Tr. 31, 60; Ex. C-1, p. 10). Foreman Gonzalez also told CSHO Akins that he knew that the Spider baskets had a label which recommended not standing on basket railings, but explained that employees occasionally needed to stand on them to perform their painting work. (Tr. 47; Ex. C-6). CSHO Akins categorized all three of the proposed violations as serious because they all related to fall hazards, which from a height of eighty feet, could have resulted in serious injuries or death. (Tr. 85).

Citation 1 Item 1

Complainant alleged a serious violation of Section 5(a)(1) of the Act in Citation 1, Item 1 as follows:

> *The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to fall hazards: (a) Employees were exposed to fall hazards while working from the railings of a single point suspension scaffold (Spider Basket: Model # ST-17R). Among others, one feasible method to correct the hazard is to (1) comply with the Spider Operator's Manual for the Spider basket: Model # ST-17R and do not stand on the rails.*

The only evidence presented concerning either employer or industry recognition of a hazard was CSHO Akins' testimony explaining the presence of a "Do Not Stand on Rails" label, and a comment from Foreman Gonzalez during the inspection which indicated that he had seen

the label. No further explanation was offered concerning how standing on the rail itself constituted a serious hazard, especially for employees who were secondarily tied-off with harnesses and lanyards. The existence of the manufacturer's label alone, without further explanation, was insufficient to affirmatively prove employer and/or industry recognition of a serious hazard, especially in light of the fact that employees were secondarily tied-off with harnesses and lanyards.

Even if Complainant had presented sufficient information to establish that standing on the rail exposed employees to a serious fall hazard, abatement of the violative condition in Citation 1 Item 2a would have eliminated the hazard in Citation 1 Item 1. In other words, if Juan Valdivia had been properly tied-off to an independent lifeline, and worst case scenario, the Spider scaffold experienced a complete collapse as a result of his standing on its rail, Juan Valdivia would have been protected from falling.[2] (Tr. 183). The Commission has long held that citation items are duplicative if the same abatement action would correct the violative conditions alleged in both citation items. *E. Smalis Painting Co., Inc*., 22 BNA OSHC 1553, (No. 94-1979, 2009); *Capform, Inc*., 13 BNA OSHC 2219, 1989 CCH OSHD ¶28,503 (No. 84-556, 1989).

Complainant failed to introduce sufficient evidence to establish employer or industry recognition of the hazard, or that the act of standing on the Spider basket railing, in and of itself, by employees who were secondarily tied-off with harnesses and lanyards, exposed employees to a serious hazard. Since both are required elements for prosecution of a General Duty Clause violation, Citation 1, Item 1 will be VACATED.

[2] The court notes the language of 29 C.F.R. §1926.451(g)(1)(ii) which requires employees on adjustable suspension scaffolds to be protected by personal fall arrest systems *and* guardrails. However, that standard was not cited. Instead, OSHA elected to prosecute Respondent under Section 5(a)(1) for the purportedly serious hazard associated specifically with standing on the Spider box railing, yet failed to prove by a preponderance of the evidence how that action, in and of itself, constituted a serious hazard. Respondent's expert witness discussed the double fall protection requirement during his testimony in regard to a preemption argument. (Tr. 178, 184, 197). Since Complainant failed to prove the required elements for the alleged Section 5(a)(1) violation, Respondent's preemption argument need not be addressed.

Citation 1 Item 2a

Complainant alleged a serious violation of the Act in Citation 1, Item 2a as follows:

> *29 CFR 1926.451(g)(3)(i): Vertical lifelines were not fastened to a fixed safe point of anchorage independent of the scaffold and protected from sharp edges and abrasion. Safe points of anchorage include structural members of buildings, but do not include standpipes, vents, other piping systems, electrical conduit, outrigger beams, or counterweights: (a) Employee working from the single point suspension scaffold (Spider Basket: Model # ST-17R) was tied off to the scaffold's suspension line. Employee did not have an independent lifeline.*

The cited standard provides:

> *29 C.F.R. §1926.451(g)(3)(i): When vertical lifelines are used, they shall be fastened to a fixed safe point of anchorage, shall be independent of the scaffold, and shall be protected from sharp edges and abrasion. Safe points of anchorage include structural members of buildings, but do not include standpipes, vent, other piping systems, electrical conduit, outrigger beams, or counterweights.*

The cited regulation applies to suspension scaffolds, which the record clearly established were being used by Respondent's employees at this jobsite. (Tr. 25, 28, 158, 163-164, 201; Ex. C-1); *see also* 29 C.F.R. §1926.450(b). The parties also stipulated that Juan Valdivia secured his lanyard to the scaffold suspension line rather than an independent lifeline. Therefore, the court

finds that the standard applies, was violated, and that Juan Valdivia was exposed to the violative condition.

As CSHO Akins explained, the purpose of the independent lifeline requirement is to ensure that if the suspension scaffold were to fail, the employee would not be connected to the scaffolding and dragged down with it. Undoubtedly, such a fall from eighty feet above the ground would have resulted in serious injuries or death. The violation was properly characterized as serious.

Foreman Gonzalez testified that he did not know Juan Valdivia had secured his lanyard to the Spider basket suspension line rather than the independent lifeline provided to him. (Tr. 158-159). However, the court rejects that assertion, and at a minimum finds that with the exercise of reasonable diligence Foreman Gonzalez could have known because: (1) the condition was open, obvious, and in plain view to CSHO Akins, who was much further away from Juan Valdivia than Foreman Gonzalez while taking investigative photographs and video, (2) Foreman Gonzalez was photographed standing on the ground, looking up, and watching Juan Valdivia just before CSHO Akins entered the jobsite, and (3) Juan Valdivia's independent lifeline was still coiled up in the Spider basket at the time, and Foreman Gonzalez should have at least noticed that his independent lifeline had not even been set up for use. (Tr. 127, 163-166). Accordingly, Complainant established constructive knowledge of the violative condition. As all of the elements required to prove a *prima facie* violation of the Act were established, Citation 1, Item 2a will be AFFIRMED.

Citation 1 Item 2b

Complainant alleged a serious violation of the Act in Citation 1, Item 2b as follows:

> *29 CFR 1926.502(d)(15): Anchorages used for attachment of personal fall arrest equipment were not independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds per employee attached, or were not designed, installed and used: (a) Employee working from the railings of the water tank was tied off to the single point scaffold's suspension line. Employee did not have an independent lifeline.*

The cited standard provides:

> *29 C.F.R. §1926.502(d)(15): Anchorages used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2kN) per employee attached, or shall be designed, installed, and used as follows: [two factor alternative to 5,000 pound requirement].*

Respondent presented testimony that the suspension line for the Spider basket, to which Juan Valdivia was tied-off, was capable of supporting 10,000 pounds. Complainant failed to present evidence to the contrary. Therefore, Complainant failed to meet its burden of proving that the terms of the cited regulation were violated. Accordingly, Citation 1, Item 2b will be VACATED.

Affirmative Defenses

Respondent contended that Citation 1, Item 2a should be vacated because the violation resulted from unpreventable employee misconduct. In order to establish this affirmative defense, an employer is required to prove that it: (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) took steps to discover violations of the rules, and (4) effectively enforced the rules when violations were discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087, 1995-97 CCH OSHD ¶31,451 (No. 91-2494, 1997).

Respondent had a written fall protection policy, on which Juan Valdivia had been trained, and conducted periodic safety meetings and re-training sessions. (Tr. 96-97, 100-102, 111-113, 154; Ex. R-2, R-3, R-4, R-9, R-10). Respondent's policy was to tie-off at all times when working more than six feet above the ground. (Tr. 94; Ex. R-4, R-9). Respondent's Project Manager, Greg Bairaktaris, visited Respondent's jobsites 1-2 times each week and typically spoke to job foremen by telephone 2-3 times each day. (Tr. 92). In addition, every Spider basket on Respondent's jobsite, including Juan Valdivia's, was provided with an independent lifeline for employees to use. (Tr. 126-127). Respondent also disciplined Juan Valdivia after OSHA's inspection, through a written warning for failing to tie-off properly. (Tr. 126; Ex. R-12).

While Respondent had implemented a written fall protection program and conducted frequent training, the fatal flaw in Respondent's assertion of the employee misconduct defense with regard to Citation 1, Item 2a is that Foreman Gonzalez was at the jobsite, directly observing Juan Valdivia, whose attachment to the Spider basket suspension line rather than an independent lifeline, was open, obvious, and in plain view. *Jones Co.*, 11 BNA OSHC 1529, 1983-84 CCH OSHD ¶26,516 (No. 77-3676, 1983). Despite these facts, the condition was not corrected until

CSHO Akins entered the jobsite. Therefore, the court concludes that compliance with Respondent's fall protection policies was not adequately monitored nor effectively enforced. Respondent's assertion of unpreventable employee misconduct with regard to Citation 1, Item 2a is rejected.

Penalty

In calculating the appropriate penalty for affirmed violations, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶29,964 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995).

For penalty calculation purposes, CSHO Akins characterized Citation 1, Item 2a with a high probability of a serious accident actually occurring, and then reduced the proposed grouped penalty for Items 2a and 2b by forty percent based on Respondent's status as a small employer. (Tr. 53). CSHO Akins conceded that in assessing the probability of an actual accident, she would have categorized Citation 1 Item 2a (being secured to the scaffold suspension line rather than an independent lifeline) with the same high probability if Juan Valdivia had completely failed to tie-off at all. (Tr. 70-71). The court rejects CSHO Akins conclusion that the probability

of an actual accident occurring for an employee tied-off to the suspension line, as compared to an employee not tied-off at all, were the same.

Respondent is a relatively small employer, with 50-60 employees during its busiest time of the year. (Tr. 90). One employee was exposed to the violative condition described in Citation 1, Item 2a for approximately 45 minutes. The likelihood of an actual injury was low. Respondent promptly abated the condition by requiring Juan Valdivia to secure his lanyard to an independent lifeline. Considering the totality of the circumstances, the court will reduce the penalty proposed for Citation 1, Item 2a to $2,000.00.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is hereby VACATED;

2. Citation 1, Item 2a is hereby AFFIRMED and a penalty of $2,000.00 is ASSESSED; and

3. Citation 1, Item 2b is hereby VACATED.

/s/
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: October 18, 2011
Denver, Colorado