United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. LEE BUILDERS, INC, Respondent.	OSHRC Docket No. 10-1510

APPEARANCES:

Willow Fort, Attorney; U.S. Department of Labor, Nashville, TN
For Complainant

C. Sean Lee, *pro se*, Project Manager; Lee Builders, Inc., Huntsville, AL
For Respondent

REMAND ORDER

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

On review is a decision of Administrative Law Judge Stephen Simko, affirming one item of a two-item citation issued to Lee Builders, Inc. ("LBI") under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78.[1] Under that item, the Secretary alleged that LBI failed to provide a personal fall arrest or guardrail system on the platform of a scaffold at an LBI worksite in Albertville, Alabama, in violation of 29 C.F.R. § 1926.451(g)(1)(vii). During the hearing, LBI did not deny that it failed to provide fall protection. Rather, it argued that because the cited provision does not pertain to scaffold erectors, and the exposed employee was erecting a scaffold, the cited provision does not apply to the condition at issue. The judge agreed with LBI and noted that another standard, 29 C.F.R. § 1926.451(g)(2), addresses fall protection for

[1] The judge's vacatur of the second citation item is not on review.

employees who are erecting supported scaffolds. Although the judge then analyzed the facts of the case under § 1926.451(g)(2), he nonetheless affirmed a violation of § 1926.451(g)(1)(vii), the cited provision.

Our review of the record shows that the Secretary did not seek to amend her citation to allege a violation of § 1926.451(g)(2), nor did the judge *sua sponte* amend to allege a violation of that provision. The Commission has recognized in similar circumstances that a *sua sponte* amendment may be appropriate. *See A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1997, 1994 CCH OSHD ¶ 30,554, pp. 42,272-273 (No. 92-1022, 1994) (holding *sua sponte* amendment after hearing permissible); *Lancaster Enter. Inc.*, 19 BNA OSHC 1033, 1036 n.13, 2000 CCH OSHD ¶ 32,181, p.46,635 n.13 (No. 97-0771, 2000) (holding *sua sponte* amendment appropriate where parties tried different provision by consent); *see also McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129, 1984 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984) (stating that amendment under Federal Rule of Procedure ("FRCP") 15(b)(2) "is proper only if two findings can be made—that the parties tried an unpleaded issue and that they consented to do so.").[2] Accordingly, we remand this case to the judge for reconsideration of his decision on this issue, including whether amending the citation *sua sponte* to allege a violation of § 1926.451(g)(2) is appropriate here.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Horace A. Thompson, III
Commissioner

/s/
Cynthia L. Attwood
Commissioner

Dated: February 2, 2010

[2] FRCP 15(b) governs the amendment of pleadings in Commission proceedings. *See Nuprecon LP*, 22 BNA OSHC 1937, 1938, 2009 CCH OSHD ¶ 33,034, p. 58,384 (No. 08-1037, 2009). That rule provides, in pertinent part, that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."

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. Lee Builders, Inc., Respondent.	OSHRC Docket No. **10-1510**

Appearances:

Willow Fort, Esquire, Nashville, TN
For Complainant

C. Sean Lee, Huntsville, AL
For Respondent

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

DECISION AND ORDER

Lee Builders, Inc., is engaged in construction contracting. On April 22, 2010, the Occupational Safety and Health Review Administration (OSHA) conducted an inspection at the Respondent's jobsite in Cincinnati, Ohio. As a result of this inspection, OSHA issued a citation to respondent on June 3, 2010. Respondent timely filed a notice contesting the citation and proposed penalties. A hearing was held, pursuant to simplified proceedings in Birmingham, Alabama, on October 22, 2010.

At the close of the hearing, the parties made oral arguments in lieu of filing post-hearing briefs. A bench decision was entered following the hearing. For the reasons that follow the alleged violation of 29 CFR § 1926.451(b)(1) is vacated. The alleged violation of 29 CFR § 1926.451(g)(1)(vii) is affirmed and a penalty of $1,500.00 is assessed.

Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, finding of facts and conclusions of law (Tr.213-226) are included in this decision as follows:

All right. Back on the record. I heard all the testimony today and the closing arguments by both sides. All documentary evidence has been submitted into the record, and I'm ready to make a decision on both of these items.

This case arose initially as a result of an inspection by the Occupational Safety and Health Administration which began on April 22, 2010 and extended through June 10, 2010 of Lee Builders, Incorporated. The job site was at 600 McDonald Avenue, Albertville, Alabama.

As a result of that inspection a citation was issued alleging violations of two standards. I'll address these separately.

The first was an alleged violation of 29 CFR § 1926.451(b)(1) alleging that each platform on working levels of scaffolds was not fully planked or decked between the front uprights and guardrail supports. Specifically, on or about 4/22/2010 at the job site located at 600 McDonald Avenue in Albertville, Alabama, an employee was exposed to a fall hazard 13 feet inches 2 inches to the ground below.

The standard at 29 CFR § 1926.45(b)(1) reads as follows: "Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows: "And a description of how the planking shall be done follows that first paragraph.

There's been no dispute at this time that the scaffold platform was not fully planked. One employee was exposed to a fall of 13 feet 2 inches while working on that platform, and that was during the first visit on April 22, 2010.

On the follow-up visit on June 10, 2010, there were no employees working on the scaffold, and the evidence shows there was no work being done and no employee exposure.

On April 22, 2010, the Respondent, through its site superintendent, had knowledge of the conditions and the employee exposure; therefore, the violative conditions were known by the company.

The dispute here arises around the applicability of the standard, whether the standard applies or an exemption or exception to the standard applies. Here an employee was drilling into the plywood, which was on the platform of the planking of the scaffolding shown in Exhibit C4. The guardrails to be installed on that scaffolding, as shown in C7, were leaning against the scaffold. Also the scaffolding outriggers, which were later to be put in place on the scaffolding, are shown in C7, the photograph showing these outriggers on the ground.

Now, we've heard what the standard requires. In Respondent's Exhibit R1, and also in the standards themselves, which is a copy of the standard which I am bound to follow whether it's in the record or not, but it is in the record. The paragraph following 29 CFR § 1926.451(b)(1)(ii), provides an exception to paragraph (b)(1) as follows: "The requirement in paragraph (b)(1) to provide full planking or decking does not apply to platforms used solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions is required." At issue is the question of whether this exception applies.

The Government cited a case involving Smoot Construction, and the Citation is 21 BNA OSHD 1555, a case decided on June 9, 2006. In that case, the company conceded that the scaffold in question was not fully planked as required by the standard but argued that it was exempt from the full planking requirement because the scaffold was under construction as it raised its form work.

Now, in the *Smoot* case, the Commission found that the key phrase upon which all this turned was "employees performing scaffold erection were solely performing scaffold erection." In that case they were performing form work as well as scaffold erection.

In this case, what was being done was it appears to be an employee was drilling in a plywood platform on top of the planking on the scaffolding. I find that the employee here, was drilling the plywood onto the platform which is part of the scaffolding itself. This was the sole work being done. I find that the exception to paragraph (b)(1) applies, and the Respondent has established that it provided the planking necessary to provide safe working conditions, that is, a safe surface for employees to walk and work on while erecting the scaffold itself, and I find that the platform was used solely for the employee to erect the scaffolding. Therefore, Item I of Citation 1 is vacated and no penalty is assessed.

Now we turn to Item 2, which is a little more detailed. In Item 2, the Secretary alleges that the Respondent violated 29 CFR § 1926.451(g)(1)(vii). Specifically, for all scaffolds not otherwise specified in paragraphs (g)(1)(i), through (g)(1)(vi) of this section, each employee was not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

It goes on to say, "On or about 4/22/2010, at the job site located at 600 McDonald Avenue, Albertville, Alabama, an employee working on the deck placed on top of the scaffolding was exposed to a fall 13 feet 2 inches to the ground below."

There appears, once again, to be no dispute that Respondent's employee on April 22, 2010 was working on the scaffold platform without a personal fall arrest system or guardrails. This employee was exposed to a fall of 13 feet 2 inches. The site superintendent had knowledge of the volative condition and the employee exposure, as we discussed earlier. And as previously discussed I found that the Respondent was engaged solely in erecting the scaffolding system.

Now, 29 CFR § 1926.451(g)(2) reads as follows; "Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard."

Here the Respondent argues that it was infeasible to provide either a personal fall arrest system, harness and lines, or guardrails for the employee while he was erecting the scaffold. It also argues that to provide such a system, personal fall arrest, would create a greater hazard.

As discussed earlier, the standard at1926.451(g)(2) states in part that the employer shall have a competent person determine the feasibility and safety of providing fall protection for its employees erecting scaffolds. So there has to be, first, a determination by the competent person as to the feasibility and the safety of this. It also goes on to require employers to provide fall protection which is in fact feasible and does not create a greater hazard than the hazard at hand.

Now, Mr. Pettit testified with regard to ladders and the compliance officer testified with regard to ladders. The compliance officer claimed ladders could be used. Mr. Pettit explained that he felt that a ladder against a vertical member, while trying to string a cable capable of supporting five thousand pounds, would in fact create a greater hazard.

I don't know if that's a greater hazard or the same hazard as one created by having this individual working on this platform without fall protection. It might be greater in that more employees might be exposed.

Mr. Redifer testified that he has used lifts in the past, and he said that there was no cable used here, that he was not prepared to use a cable or provide a cable like that, that he needed a man lift to get up there, and the Respondent did not have a man lift on the site on that date.

Mr. Campbell testified that in order to bolt onto or clamp onto these vertical steel members that were right next to the scaffolding to string a cable, a structural engineer must give his permission to string such a cable over the five thousand pound capacity to the vertical steel due to the varying stresses and loads that might be placed on these vertical members. He further testified that the vertical members are designed to accept vertical loads and this might create additional varying types of loads. But Mr. Campbell also testified that you should always, always check with a structural engineer to determine feasibility.

Here the Respondent's competent person did not check with a structural engineer to determine the feasibility of using or not using the cable to tie off or even installing such a cable. The Respondent was the general contractor on this site with the ability to contact such engineers. The Respondent also did not consider the use of lifts to protect its employees that might be able to string cables from lifts if that would be approved by the engineer.

Now, checking with the engineer and getting the lifts on site would be inconvenient. It would be a delay, but it would not be infeasible or impossible to bring in appropriate lifts or other equipment to string that cable or to check with the appropriate sources as to whether such a cable could be strung.

In sum, the competent person here did not take the necessary steps to determine whether a fall arrest system was feasible or created a greater hazard. He may have found that such attempts were in fact not feasible had he checked, and they might have in fact created a greater hazard, but he didn't take the steps to make such a determination. Making such a determination doesn't necessarily mean that you are going to have to put in such a system. It means you have to go through the steps to make such a determination.

The employer designated a competent person to make such a determination but that determination, by the competent person is not the final word. It has to be measured against objective standards. Insufficient steps were taken here to make that determination.

The Respondent failed to meet its burden under the standard, and the Secretary has met her burden to show the employee was not protected by either a personal fall arrest system or a guardrail system. I'm affirming Item 2 of Citation Number I and assessing a penalty of fifteen hundred dollars.

FINDINGS OF FACTS 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 on the foregoing decision, it is hereby ORDERED:

1. Citation No. 1 Item 1, alleging a serious violation of 29 CFR § 1926.451(b)(1) is vacated and no penalty is assessed.

2. Citation No. 1, Item 2 alleging a serious violation of 29 CFR § 1926.451(g)(1)(vii) is affirmed and a penalty of $1,500.00 us assessed..

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: December 10, 2010