



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.  
AFRICO MANUFACTURING, INC.,  
Respondent.

OSHRC DOCKET NO. 07-0689

Appearances:

Christine Eskilson, Esquire  
U.S. Department of Labor  
Boston, Massachusetts  
For the Complainant.

Nick Africo, President  
Africo Manufacturing, Inc.  
Pawtucket, Rhode Island  
For the Respondent, *pro se*.

Before: Covette Rooney  
Administrative Law Judge

**DECISION AND ORDER**

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 a work site of Respondent, Africo Manufacturing, Inc., located in Pawtucket, Rhode Island, on March 9, 2007. As a result, OSHA issued to Respondent a Citation and Notification of Penalty alleging a serious violation of 29 C.F.R. 1926.451(g)(1) and proposing a penalty of \$2,000.00. Respondent contested the citation, and this matter was designated for the Commission’s simplified proceedings. The hearing in this matter was held in Providence, Rhode Island, on August 29, 2007. Only the Secretary has filed a post-hearing brief.

### **Background**

On February 23, 2007, OSHA's Providence, Rhode Island area office received a non-formal four-item complaint about Respondent's work site; the complaint alleged the site had no toilets or running water, that no fire extinguishers or fire alarms were provided, that there was no emergency eye wash, and that a scissor lift had missing rails.<sup>1</sup> That same day, OSHA wrote to Respondent, advising that a complaint had been filed and setting out the specific alleged hazards. OSHA also advised that it would not inspect the site at that time but requested that Respondent investigate the allegations and make any necessary corrections; OSHA further requested that Respondent provide a written account of its investigation and any actions taken by March 2, 2007. OSHA received Respondent's written response on March 2, 2007; the response explained each of the complaint items and OSHA, finding the response satisfactory, closed out the complaint.<sup>2</sup> Two days later, the OSHA area office received a written and signed formal complaint alleging the same four conditions as before. The OSHA area office assigned Compliance Officer ("CO") Charles DeMello to inspect the site, and John Fahey, another CO, accompanied CO DeMello. (Tr. 6-13, C-1-3).

CO's DeMello and Fahey arrived at the site, which was a storage facility under construction, between 10:15 and 10:30 a.m. on March 9, 2007. The CO's held an opening conference with Tina Africo, Nick Africo's daughter, in the office at the site; Ms. Africo said her father was in the back of the building, and, after a few minutes, Mr. Africo arrived. The CO's held an opening conference with Mr. Africo and told him about the second complaint; they then asked to see the scissor lift, which was in the back of the building where Mr. Africo had just been.<sup>3</sup> Upon arriving in that area with Mr. Africo, the CO's observed two employees on a scissor lift installing sprinkler piping; C-4-6 are photographs depicting the lift, the employees, and the piping they were installing. The platform of the lift was about 20 feet from the concrete floor, and the front side and one end of the lift had no

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<sup>1</sup>A non-formal complaint is one made by an individual who does not want to give his name and sign the complaint. (Tr. 7).

<sup>2</sup>As to the scissor lift, the response stated that it was "not missing any rails." *See* C-3.

<sup>3</sup>During the inspection, the CO's also looked into the first three items; those particular complaint items were found to be without basis. (Tr. 24).

guardrails; however, the CO's saw the guardrails leaning against the wall on the floor.<sup>4</sup> CO DeMello asked the two employees to come down, and they did so. The employees, Joe Viera and Ray Kelly, told the CO that they worked for Mr. Africo, that they had been working since about 7:00 a.m. that morning, and that they had removed the guardrails because it was easier for them to perform their work without them. CO DeMello asked the employees to reinstall the guardrails before resuming their work, and they agreed to do so. Following the inspection, CO DeMello held a closing conference with Mr. Africo; the CO advised Mr. Africo that the first three complaint items were not violations but that the scissor lift without all of its guardrails in place was a violation. (Tr. 12, 21-31, 37-43). *See also* Joint Pretrial Statement, Section A, Agreed Statement of Facts.

### **Jurisdiction**

The parties have stipulated that the Commission has jurisdiction over this matter. They have also stipulated that Respondent is engaged in a business affecting interstate commerce and that Respondent is an employer within the meaning of Section 3(5) of the Act. *See* Joint Pretrial Statement, Section A, Agreed Statement of Facts. I find, accordingly, that the Commission has jurisdiction over the parties and the subject matter in this case.

### **Discussion**

The cited standard, 29 C.F.R. 1926.451(g)(1), provides as follows:

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.

To prove a violation of a specific OSHA standard, the Secretary must demonstrate that (1) the cited standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Robert Sestito, the Assistant Area Director ("AAD") of the Providence, Rhode Island OSHA office, testified that he reviewed the citation in this case before it was issued. He further testified that the above-noted standard was cited because OSHA defines a scaffold as any temporary elevated

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<sup>4</sup>CO DeMello testified that he and CO Fahey measured the wall behind the lift up to the point where the wall was parallel to the lift platform. (Tr. 28-29).

work platform. (Tr. 58-59). OSHA does, in fact, define a scaffold as the AAD described; the full definition of scaffold, set out at 29 C.F.R. 1926.450(b), states as follows:

*Scaffold* means any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both.

Based on the foregoing definition, I find that the Secretary has shown that the cited standard applies in this case. Moreover, Respondent does not really dispute the essential facts in this matter, as set out above. I further find, therefore, that the Secretary has also shown that the terms of the standard were not met and that employees had access to the violative condition.

In regard to the knowledge element, Mr. Africo testified that he did not know the employees were using the cited lift. He said that when he was in the back of the building where the employees were working, they were up on another smaller scissor lift; he also said that he had told the employees not to use the cited lift that day because there were problems with it.<sup>5</sup> Mr. Africo stated that in the ten to 15 minutes it took him to go to the front of the building to meet with the OSHA CO's and to return to the back with them to show them the lift, the employees had set up the cited lift in their work area and had then gotten up on that lift to continue their installation work. Mr. Africo noted that the employees did not have permission to use the cited lift. (Tr. 69-72, 78).

CO DeMello testified that there was in fact another smaller lift in the back of the building.<sup>6</sup> He further testified that Mr. Africo had stated, when he and CO Fahey saw the cited lift, that the employees were using the wrong lift. CO DeMello noted, however, that the smaller lift was a battery-operated lift and that it was plugged in and being charged when he saw it; he also noted that only five to ten minutes had passed between the time when he and CO Fahey met with Mr. Africo and when they all went to the back of the building to see the lift. CO DeMello stated that the cited lift was the one he had seen the employees using. (Tr. 30, 33-36).

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<sup>5</sup>Mr. Africo's statement that there were problems with the cited lift is set out in his April 16, 2007 and May 22, 2007 letters to the Commission. His testimony, however, also indicated that there were problems with the lift. (Tr. 70).

<sup>6</sup>The CO said the smaller lift was 50 to 60 feet away from the cited lift. (Tr. 30).

CO Fahey also testified about the smaller lift in the back of the building.<sup>7</sup> He said that when he asked the employees about that lift and if they were using it, they told him it was being charged; he noted that when he went to look at it, he saw it was about half charged. He also said that he had been a plumber for 30 years and had used scissor lifts almost daily, that it takes about eight hours to fully charge a scissor lift, and that the smaller lift had possibly been charging for about four hours. The CO noted he had done sprinkler pipe installation work from a scissor lift many times, and he estimated it would have taken the employees 20 to 25 minutes to switch the lifts; they would have had to lower and move the smaller lift and plug it in to be charged, move the pipe, wrenches and other materials to the cited lift, and then move that lift to their work area and raise it to the proper height. The CO further noted that five to ten minutes elapsed between the time he and CO DeMello met with Mr. Africo and the time they all went to the back of the building, and he stated that there was “no way” the employees could have switched lifts in that amount of time. (Tr. 37-53).

It is clear from the foregoing that Mr. Africo’s testimony is inconsistent with the testimony of the two CO’s. I find the two CO’s to be the more reliable witnesses, for the following reasons. First, both CO’s spoke to the employees who had been working on the cited lift, and neither CO mentioned the employees saying anything about changing lifts; rather, the employees said they had removed the guardrails as it was easier to work without them. (Tr. 29-31, 41). Second, both CO’s testified that the smaller lift was being charged when they saw it, and CO Fahey specifically testified that the employees told him that that lift was being charged; he also testified that the smaller lift was only about halfway charged and that it could have been charging for about four hours as it takes around eight hours to fully charge a scissor lift. (Tr. 30, 35, 42-43). Third, both CO’s testified that only five to ten minutes passed between the time when they met with Mr. Africo and when they all went to the back of the building to see the lift. (Tr. 34, 49, 53). CO Fahey said there was “no way” the employees could have switched the lifts in that amount of time; he testified, in fact, that it would have taken 20 to 25 minutes for the employees to change the lifts. (Tr. 49-52). Fourth, given the complaints OSHA received about the lift, it is reasonable to infer the employees had been working on the lift without all the guardrails being in place for some period of time. It is also reasonable to

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<sup>7</sup>CO Fahey said the smaller lift was about 10 feet away from the cited lift. (Tr. 42).

infer that Mr. Africo knew this was the case, and he essentially admitted he had seen employees using the lift without all the guardrails in place. (Tr. 75). Finally, I observed the demeanor of the CO's and Mr. Africo as they testified, including their body language and facial expressions, and while I found the CO's to be credible and convincing, I found Mr. Africo to be a less than reliable witness. The testimony of the two CO's is thus credited over that of Mr. Africo, and I find that the Secretary has met her burden of proving both actual and constructive knowledge in this case.

Based upon the foregoing, the Secretary has established the alleged violation. She has also established that the violation was serious, in light of the evidence that a fall of 20 feet onto a concrete floor would most likely result in a very severe injury. (Tr. 59-60). Item 1 of Citation 1 is accordingly affirmed as a serious violation.

The Secretary has proposed a penalty of \$2,000.00 for this item. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. AAD Sestito testified that the cited condition was given high severity, due to the injury that could have resulted, and greater probability, due to the fact the lift platform was a small work area and the two employees were working with piping and other equipment on the lift. The AAD also testified that while the gravity-based penalty of \$5,000.00 was reduced by 60 percent, due to the employer's small size, no reductions were given for good faith or history. He noted that CO DeMello had learned the company had no safety and health program; in addition, in the previous three years the company had had violations at this same site and at another site.<sup>8</sup> (Tr. 59-63).

In light of the above, I find that the proposed penalty is appropriate. The proposed penalty of \$2,000.00 is accordingly assessed.

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<sup>8</sup>CO DeMello specifically testified that he asked Ms. Africo if the company had a safety and health program and that there was no written program. (Tr. 31).

**ORDER**

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

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1926.451(g)(1), is AFFIRMED as a serious violation, and a penalty of \$2,000.00 is assessed.

/s/ \_\_\_\_\_  
Covette Rooney  
Judge, OSHRC

Dated: October 18, 2007  
Washington, D.C.