



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

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SECRETARY OF LABOR, :  
 :  
Complainant, :  
 :  
v. : OSHRC DOCKET NO. 08-0785  
 :  
ORLOWSKI COMPANY, INC., :  
 :  
Respondent. :

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Appearances:

|                                 |                                |
|---------------------------------|--------------------------------|
| Denise C. Hockley-Cann, Esquire | Todd A. Miller, Esquire        |
| U.S. Department of Labor        | Allocco, Miller & Cahill, P.C. |
| Chicago, Illinois               | Chicago, Illinois              |
| For the Complainant.            | For the Respondent.            |

Before: Chief Judge Irving Sommer

**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”) inspected a work site of Respondent, at 1010 West Monroe, Chicago, Illinois, on November 16, 2007. As a result, OSHA issued a one-item serious citation and a two-item willful citation. Respondent contested the citations, bringing this matter before the Commission. Prior to the hearing, Respondent filed a Partial Notice of Withdrawal, that is, it withdrew its notice of contest with respect to the “standard violated and the classification of the standard violated” as to all three of the citation items; however, it continued to contest the proposed penalties for the three items. Also prior to the hearing, the parties filed joint stipulations. The hearing took place on November 5, 2008, in Chicago, Illinois. Both parties have filed post-hearing briefs.

**The Parties’ Joint Stipulations**

The parties' joint stipulations, identified as Exhibit C-35 at the hearing, are summarized as follows:

1. The Commission has jurisdiction of this proceeding; Respondent is a corporation with a place of business at 2524 West Huron Street, Chicago, Illinois, and is engaged in the construction business; on November 16, 2007, Respondent had a workplace at the cited address in Chicago, Illinois, and was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. (Stip. Nos. 1-4).
2. Respondent was in serious violation of 29 C.F.R. 1926.1052(c)(1)(i), as alleged in Serious Citation 1, Item 1; Respondent was in willful violation of 29 C.F.R. 1926.451(g)(4)(i), as alleged in Willful Citation 2, Item 1; Respondent was in willful violation of 29 C.F.R. 1926.501(b)(3), as alleged in Willful Citation 2, Item 2. (Stip. Nos. 5-10).
3. Orlowski Company, Inc., is a successor to Orlowski Construction, Inc., a dissolved Illinois corporation; Wieslaw Orlowski was president of Orlowski Construction and was engaged in supervisory duties for that corporation; on or about November 16, 2007, Wieslaw Orlowski was an employee of Orlowski Company, Inc., engaged in supervisory duties at the cited location in Chicago, Illinois. (Stip. Nos. 11-14).
4. Orlowski Construction was issued multiple citations that became final orders of the Commission and related to the following inspections, which included violations of fall protection and/or scaffold fall protection and/or stairways: Inspect. No. 309025781; Inspect. No. 309211050; Inspect. No. 307995340; Inspect. No. 307366740; Inspect. No. 307107144; Inspect. No. 304688450; Inspect. No. 303201404; Inspect. No. 303201040; Inspect. No. 300038031; Inspect. No. 122152200.<sup>1</sup> (Stip. No. 15).
5. The following are true and accurate copies and may be received and entered into evidence without objection: C-1, the citation regarding the subject inspection; C-2, Complainant's Requests to Admit to Respondent, OSHRC Docket No. 08-0785; C-3, OSHA Intranet inspection history of Orlowski Construction. (Stip. Nos. 16-18).
6. The following are true and accurate copies and may be received and entered into evidence without objection: C-4, Consent Judgment as to Orlowski Construction, Inc., and its Successors, Orlowski Company, Inc., Wieslaw Orlowski and Ewa Orlowski, received in the U.S. Court of Appeals for the Seventh Circuit on July 31, 2008, and filed on August 18, 2008 (Case No. 05-2647); C-5, Seventh Circuit Order entering and enforcing Consent Judgment in *Elaine Chao v. Orlowski Construction, Incorporated* (Case No. 05-2647). (Stip. Nos. 19-20).

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<sup>1</sup>Two of the inspections occurred in Oak Park, Illinois; the rest were in Chicago, Illinois.

7. The following are true and accurate and may be received and entered into evidence without objection: C-6 through C-32, photos depicting conditions at the subject site on November 16, 2007; C-33 and C-34, Records Authentication Certificates, dated September 25, 2008, and September 23, 2008, respectively, attaching documents in the official custody of the U.S. Department of Labor.<sup>2</sup> (Stip. Nos. 21-23).

**The Secretary's Evidence**

As indicated above, the only matter contested in this case is the penalty amount proposed for each item.<sup>3</sup> In determining an appropriate penalty, 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, 2214 (No. 87-2059, 1993) ("*J.A. Jones*"). The gravity of the violation is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). Further, the gravity of a violation depends on matters such as the number of employees exposed and the duration of the exposure, precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones*, 15 BNA OSHC at 2214. The Secretary's evidence with respect to each citation item follows.

**Serious Citation 1, Item 1**

This item alleges a violation of 29 C.F.R. 1926.1052(c)(1)(i), which requires stairways having four or more risers or rising more than 30 inches, whichever is less, to be equipped with at least one handrail. Brad Becker, the OSHA Compliance Officer ("CO") who inspected the site, testified that he initiated the inspection upon driving by the site and witnessing employees "hanging from the building exposed to fall hazards." He identified C-8 and C-9 as photos of stairwells that employees were using to access the second and third floors at the site; the stairs had more than four risers and no handrails, and there was only natural light in the stairwells. The CO determined that two to three employees used the stairs "minutes throughout the day" and that no precautions had been taken to reduce the hazard of falls from the stairs. He also determined that the severity of the

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<sup>2</sup>C-33 and C-34 are authenticated copies of the citations resulting from the inspections set out in paragraph 4, *supra*, and contained in Stip. No. 15 of the Joint Stipulations.

<sup>3</sup>Respondent states in its brief that it does not contest liability but asks, rather, that the two willful items be reduced to serious or, in the alternative, that the penalties be reduced for gravity or good faith. This decision will address the proposed penalties but will not address classification of the violations, in view of Respondent's withdrawing its contest in that regard.

hazard was very low and that any injuries that might result would be minor. CO Becker noted that the gravity-based penalty for this item was \$1,500.00 and that that amount was reduced by 60 percent as the employer had less than 25 employees. He further noted that no adjustments to the penalty were made for good faith, due to the willful items issued in this case, or history, due to the citations the predecessor company had received in the previous three years.<sup>4</sup> (Tr. 8-13).

Willful Citation 2, Item 1

This item alleges a violation of 29 C.F.R. 1926.451(g)(4)(i), which requires guardrail systems to be installed along all open sides and ends of scaffolding platforms. CO Becker testified that this item was issued because employees were working from scaffolding and were exposed to falls. He identified C-22 as a photo of Respondent's foreman at the site, Evan Dawson, who was doing masonry work from a tubular welded scaffold without fall protection. He also identified C-23 as a photo of the measurement from the ground to where Mr. Dawson was working and C-25 as a closeup of the measurement, showing a fall distance of over 12 feet. The CO noted Mr. Dawson was exposed to the hazard of falling for "minutes" and that no precautions were taken to prevent the hazard; in fact, when the CO held an opening conference with Mr. Dawson and questioned him, Mr. Dawson asked him what he was supposed to do when guardrails were not sent to the site. He further noted the severity of the condition was high, in that a fall could have caused death or severe injury, and that the likelihood of an injury was high. CO Becker said the gravity-based penalty for this item was \$70,000.00, which was reduced by 60 percent for the employer's size; however, no reductions were made for good faith, in view of the willful items issued, or for history, based on the serious and repeat citations the predecessor company had received in the past three years. (Tr. 13-17, 22).

Willful Citation 2, Item 2

This item alleges a violation of 29 C.F.R. 1926.501(b)(3), which requires each employee in a hoist area to be protected from falling 6 feet or more to lower levels by guardrail systems or personal fall arrest systems. CO Becker testified that this item was issued because employees were working on the third floor of the building in material handling areas with no fall protection. He identified C-26 through C-32 as photos of the condition showing employees, including Mr. Dawson,

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<sup>4</sup>The CO said that C-3, together with C-33 and C-34, showed the OSHA history of Orłowski Construction, the predecessor company to Orłowski Company. (Tr. 12-13).

working near the edge of the building without any fall protection. The CO said that while the actual measurement to the third floor could not be discerned from the photo taken, the measurement was made with a trench rod that was fully extended to 25 feet, showing the distance from the ground to the third floor to be 24 feet.<sup>5</sup> He also said there were six employees exposed to the fall hazard, that their exposure was from “minutes to an hour,” and that no precautions were taken to protect the employees. CO Becker noted that the condition made it highly likely an accident could have occurred and that any such accident could have caused severe bodily injury or death. He further noted that the gravity-based penalty for this item was \$70,000.00 and that although a 60 percent reduction was given for size, no reductions for good faith or history were given. (Tr. 17-20).

### **Respondent’s Evidence**

Wieslaw Orłowski testified that he was responsible for the operations of Orłowski Company, a masonry business, and that he had also been the owner of Orłowski Construction, which was in business for almost 25 years. He said his company employs union bricklayers and laborers and that most of his employees have worked for him for years. He also said his employees had received union training in scaffolding and working at heights and that his company had also been providing weekly safety meetings since 1999, either in the office or at job sites. Mr. Orłowski noted that the weekly safety meetings, which addressed various construction topics, were forms with spaces for attendee signatures at the bottom. He stated that the same forms had been used several times since 1999 and that it was his practice, when holding a new meeting, to white out the old date on the form and write in the new date and then have only new employees who had not previously signed the form do so. He further stated that beginning in September of 2008, he had hired a consultant to conduct safety training at his sites; according to Mr. Orłowski, the consultant was at his sites “daily.” Mr. Orłowski indicated that there had never been any accidents at his work sites. (Tr. 24-36).

Lorna Zemar testified that she is a certified safety consultant with her own company, JLC Safety Service, that she has been in the safety consulting business since 1997, and that she had also been a safety director for a masonry construction company for five years. She further testified that in September 2008, Mr. Orłowski called her and requested that she begin providing safety services

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<sup>5</sup>The measurement with the trench rod is shown in C-24.

for his company. Her initial visit to one of Mr. Orłowski's sites was on September 22, 2008, and she described the conditions at that site as "terrible;" the employees she saw were working in shorts and did not have on shirts, safety glasses or hard hats, and, as a consequence, the first issue she addressed with the employees was safety behavior. Ms. Zemar said the conditions at Mr. Orłowski's job sites were definitely better now than they had been when she first began her training. (Tr. 37-43).

### *Discussion*

The Secretary's exhibits, that is, C-1 through C-35, were received in evidence without objection at the hearing.<sup>6</sup> (Tr. 3-4, 21). C-35, the parties' joint stipulations, describes the Secretary's other exhibits which, together with the testimony of CO Becker, demonstrates the Secretary's basis for the penalties proposed for the citation items issued in this case.<sup>7</sup> Respondent, on the other hand, did not attempt to offer into the record the evidence it had of the union training its employees had received or the safety meetings it had held.<sup>8</sup> (Tr. 26-28, 31-35, 43-44). However, even if this evidence were part of the record, it would not persuade me that the proposed penalties in this matter should be reduced. The Secretary's evidence clearly shows that Respondent's predecessor company had over a ten-year history of OSHA violations relating to fall protection, scaffold fall protection and stairways.<sup>9</sup> Moreover, the CO's testimony and photographs, which Respondent did not rebut, clearly shows the cited hazards at the subject site, that is, employee exposure to falls from stairways without handrails when accessing the second and third floors, the foreman's exposure to falling from an unguarded scaffold while working at the edge of the second floor, and the exposure of the foreman and five other employees who were working near the edge of the third floor in a hoist area without any fall protection. Finally, Respondent's own safety consultant described as "terrible" the

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<sup>6</sup>C-35 appears behind Tab C-1 in the exhibit binder.

<sup>7</sup>The joint stipulations, as well as the Secretary's documentary evidence and the CO's testimony, are adopted as my findings of fact and conclusions of law in this matter.

<sup>8</sup>Respondent had copies of records of union training in scaffolding and other safety matters employees had received both before and after the citations in this case were issued. Respondent also had copies of the weekly safety meetings held in late 2007 and early 2008.

<sup>9</sup>The record shows that the violations included serious, repeat and willful items. *See* C-3, C-33, C-34. *See also* Stip. Nos. 4, 5, 7.

conditions at the Orlowski Company work site that she visited on September 22, 2008. (Tr. 43). In view of the evidence of record, there is no basis for reducing any of the penalties due to good faith or history. I find that the penalties proposed for the three items in this case are appropriate. Those penalties are therefore assessed; that is, a penalty of \$600.00 is assessed for Item 1 of Serious Citation 1, and a penalty of \$28,000.00 each is assessed for Items 1 and 2 of Willful Citation 2.

**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. 1926.1052(c)(1)(i), is AFFIRMED, and a penalty of \$600.00 is assessed.
2. Item 1 of Willful Citation 2, alleging a violation of 29 C.F.R. 1926.451(g)(4)(i), is AFFIRMED, and a penalty of \$28,000.00 is assessed.
3. Item 2 of Willful Citation 2, alleging a violation of 29 C.F.R. 1926.501(b)(3), is AFFIRMED, and a penalty of \$28,000.00 is assessed.

/s/

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Irving Sommer  
Chief Judge

Date: March 20, 2009  
Washington, D.C.