

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 01-1587
	:	
S. A. Storer and Sons Company,	:	
Respondent.	:	

Appearances:

Linda Hastings, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Roger L. Sabo, Esquire
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

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

DECISION AND ORDER

S. A. Storer and Sons Company (Storer) is a masonry contractor. In June 2001, Storer was installing concrete block walls for Farmer Jack's grocery store in Toledo, Ohio. Based on the observations of the worksite by Occupational Safety and Health Administration (OSHA) Compliance Officers (COs) Todd Jensen and Walter Visage on June 14, 2001, an inspection was conducted that day. As a result of this inspection, Storer was issued a repeat citation on August 1, 2001. Storer timely filed a notice of contest.

Citation No. 1, Item 1, alleges a repeat violation of 29 C. F. R. § 1926.451(g)(1) for failing to provide fall protection for employees working on scaffolding more than 10 feet above the ground. The total proposed penalty for the repeat violation is \$6,000.00.

The hearing was held on March 1, 2001, in Toledo, Ohio. Jurisdiction is admitted by Storer (see Answer). Storer is an employer engaged in a business affecting interstate commerce.
See

Clarence M. Jones d/b/a C. Jones Co., 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983). Both parties filed posthearing briefs.

Storer denies that it violated the standard. Storer asserts that it was exempted from compliance with the standard because its employees were performing overhand bricklaying and because it established a controlled access zone around its work area on the scaffold.

For the following reasons, the violation is affirmed and a total penalty of \$3,500.00 is assessed.

Background

Storer is a masonry contractor doing business in northwestern Ohio and southern Michigan. The company has been in business for over forty years (Tr. 104). It has approximately eighty to ninety employees (Tr. 109). In May 2001, general contractor Bostleman Corporation (Bostleman) hired Storer as a subcontractor to perform masonry work for construction of a Farmer Jack's grocery store at the corner of Cherry and Bancroft Streets in Toledo, Ohio (Exh. R-6). The work involved installation of the building's concrete block walls and installation of brick veneer in the front of the building (Tr. 120). The finished building was 191 feet wide and 291 feet long requiring the use of approximately 32,000 concrete blocks (Tr. 120,123).

Storer's foreman for the job was Jason White who supervised four masons and three mason tenders (mason's helpers) (Tr. 181). At the time of the OSHA inspection, the employees were on a scaffold laying concrete block on the southwest side of the building (Tr. 189). The scaffold, which was two frames (12 feet) high, was inside the building on top of the mezzanine (Tr. 190). The mezzanine was 14 feet above ground and was approximately 24 to 26 feet wide and 30 feet long (Tr. 122). The scaffold could not be set up outside the building as there were power lines approximately 14 feet from the outside wall on the southwest side (Tr. 127, 236). Because the scaffold was inside the building, the crew had to reach over the wall to tool or face the joints of the blocks.

On June 14, 2001, COs Jensen and Visage were driving by the Farmer Jack's construction site while on their way back to the office from another inspection and observed potential fall hazards (Tr. 12-13). They stopped the car on a side street about 50 yards from the site and videotaped workers who were not tied off working on scaffolding without guardrails (Exh. R-5; Tr. 14, 49). There were two areas of potential fall hazards: the first area was a window opening, and the second area was an opening at the materials staging area and immediately to the left of this area (Tr. 17). Under OSHA's national emphasis program for fall protection, COs Jensen and Visage initiated an inspection of the site (Tr. 13).

An opening conference was held with Bostleman's superintendent who told them that they could not enter the area until a Bostleman representative, Terry Romey, arrived (Tr. 33).

Terry Romey is the safety director for the northwest Ohio division of Associated General Contractors (AGC) (Tr. 159-160). Bostleman is a member of AGC. Romey represented Bostleman during the OSHA inspection (Tr. 176). While the Cos waited for Romey, they spoke with employees of the steel subcontractor, Gertzweiler Steel (Tr. 74). Romey arrived on site as did Robert Dixon, Sr., vice-president of Storer, and Robert Dixon, Jr., safety director of Storer. The COs spoke with all of them. CO Jensen stated that Storer wanted a management representative present when its employees were interviewed (Tr. 15, 35). The COs would not agree to this request and did not interview any of Storer's crew.

The COs took measurements of the two areas pertaining to the alleged violations. The window opening measured 19.5 feet from the ground. The materials staging area was estimated to be 20 feet above ground based on 13.9 feet measured from the ground to the second story plus an estimated 6-foot height of the scaffold (Tr. 18).

DISCUSSION

Alleged Violation

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving:

(a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Part 1926 construction standards apply to Storer's masonry work. Storer does not dispute the applicability of these standards. It is clear that employees were exposed to the hazard of falling 19 to 20 feet to the ground from the scaffold.

Storer's knowledge of the violative condition is imputed to it through its foreman, Jason White. White was the foreman on this jobsite and was responsible for directing the work activities of a crew of seven employees (Tr. 181). White testified that there was no guardrail in front of the window opening and the materials staging area opening (Tr. 195, 197). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). "[W]hen a supervisory employee has actual or constructive knowledge of the violative

conditions, that knowledge is imputed to the employer.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). Additionally, the window opening and the materials staging area opening were in plain view (Tr. 12, 37).

Alleged Repeat Violation of 29 C. F. R. § 1926.451(g)(1)

The citation alleges that Storer’s “employees working from a scaffold were not protected from falling 19.5 feet to the ground.” Section 1926.451(g)(1) provides:

(g) *Fall Protection.* (1) 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.

It is undisputed that there were no guardrails on the scaffold in front of a window opening and a materials staging area opening (Exh. R-5).

Storer contends that there was no guardrail because the employees were engaged in overhand bricklaying, which is exempt from use of fall protection at the wall being laid.

“Overhand bricklaying” is defined in § 1926.450 as:

. . . the process of laying bricks and masonry units such that the surface of the wall to be jointed is on the opposite side of the wall from the mason, requiring the mason to lean over the wall to complete the work.

In support of its argument Storer cites §1926.451(g)(1)(vi) which states:

(vi) Each employee performing overhand bricklaying operations from a supported scaffold shall be protected from falling from all open sides and ends of the scaffold (except at the side next to the wall being laid) by the use of a personal fall arrest system or guardrail system (with minimum 200 pound toprail capacity).

The burden of proof is on Storer to show that fall protection was not required. The Commission holds that “the party claiming the benefit of an exception bears the burden of proving that its case falls within that exception.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181 (Nos. 89-2883 & 89-3444, 1993) (consolidated).

The exception allows employers to avoid using a personal fall arrest or guardrail system for employees performing overhand bricklaying operations from a scaffold at the side next to the wall being laid. Although CO Jensen would not concede that a concrete block is a masonry unit, I find that a concrete block is a masonry unit and that Storer employees were engaged in overhand bricklaying. Since Storer was engaged in overhand bricklaying, it is entitled to the exemption. However, Storer’s employees were not engaged in overhand laying of concrete blocks at the window opening or the materials staging area opening.

The window opening was not exempt from 29 C.F.R. § 1926.451(g)(1) because employees were not laying concrete block in the window opening (Exhs. C-2, R-5). CO Jensen observed an employee standing in the window opening and an employee walking by the opening (Tr. 19-20). The videotape clearly shows an employee standing in the window opening (Exhs. C-2, R-5). There is nothing to prevent that employee from falling through the opening to the ground below, a height of 19.5 feet. Some type of fall protection should have been utilized at the window opening.

The materials staging area opening was not exempt from 29 C.F.R. § 1926.451(g)(1) because employees were not laying concrete block in the materials staging area opening (Exh. R-5). The materials staging area was located on the scaffold on the mezzanine and held the cube of concrete blocks. This area and the area directly to the left of this (between the cube and the mortar box) were open to the ground below (Exhs. C-3, C-4, C-5, R-5). The videotape shows an employee standing at the edge of the scaffold between the cube and the mortar box (Tr. 26, 150; Exh. C-5). Employees in that area getting blocks or mortar were exposed to a fall of 19.9 feet to the ground (Tr. 18).

Storer contends that the cube of concrete block and the mortar box are sufficient barriers to prevent a fall. The cube of concrete block ranged in size from 32 inches to 4 feet wide (Tr. 248). CO Jensen stated that a cube of concrete block would act as a barrier (Tr. 27). Yet, as the blocks are taken away, the cube becomes smaller and would not be a barrier. The mortar box

was approximately 5 feet long, 2 feet wide, and 30 inches tall (Tr. 243). However, the mortar box would not be a barrier and does not meet the requirement that a guardrail system have a toprail and midrail to prevent employees from falling. 29 C.F.R. § 1926.450(b).

The materials staging area was required to be unguarded while a cube of concrete blocks was unloaded onto it by a forklift (Tr. 155, 198). Even so, the staging area and the area to its left could have been guarded at all other times, and the guardrails could be removed to allow materials to be brought up to the staging area.

Storer's vice-president, Robert Dixon, Sr., admitted that the materials staging area should have been guarded. He testified that it was Storer's practice to use a 2-by-4 as a guardrail to block off the materials staging area (Tr. 154, 156, 158). He further stated that there should have been a 2-by-4 guardrail in the area to the left of where the cube of concrete blocks was coming in (Tr. 157). Nonetheless, foreman White stated that no guarding was used in the materials staging area (Tr. 211).

In *D. Harris Masonry Contracting, Inc.*, 13 BNA OSHC 1911 (No. 88-517, 1988), a case similar to the instant case, involving employees engaged in laying a cinder block wall using the overhand bricklaying method, the judge disallowed the overhand bricklaying exemption because employees did not intend to lay block at a permanent wall opening. The judge found a violation of 29 C.F.R. § 1926.451(a)(4), which then required that guardrails be installed on open sides and ends of platforms more than 10 feet above ground, because employees were exposed to a fall hazard when they picked up materials near the door opening. While not a controlling decision, I find the judge's reasoning persuasive.

Storer has failed to prove that the window opening and the materials staging area opening are exceptions to the cited standard.

Controlled Access Zone. Storer further contends that it complied with the standard since it erected a controlled access zone on the mezzanine. Section 1926.500(a) defines controlled access zone as:

Controlled access zone (CAZ) means an area in which certain work (e.g., overhand bricklaying) may take place without the use of guardrail systems, personal fall arrest systems, or safety net systems and access to the zone is controlled.

There was a CAZ around the mezzanine which was open to the ground level (Tr. 77, 129-130, 187). However, employees who are performing bricklaying operations on scaffolds are regulated by "Subpart L - Scaffolds" and not "Subpart M - Fall Protection" of the construction standards. 29 C.F.R. §§ 1926.500(a)(2)(i)¹ and 1926.501(b)(9)². Even if Subpart M applied to

¹ § 1926.500(a)(2)(i) provides: "Requirements relating to fall protection for employees working on scaffolds are provided in subpart L of this part."

this case, employees working at wall openings must have fall protection beyond a controlled access zone. Section 1926.501(b)(9) states that “Except as otherwise provided in paragraph (b) of this section,” fall protection for employees performing overhand bricklaying includes guardrail systems, safety net systems, personal fall arrest systems, or shall work in a controlled access zone. Paragraph (b) (14) of § 1926.501 provides:

(14) *Wall openings.* Each employee working on, at, above, or near wall openings including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.”

The use of a CAZ as an alternative means of fall protection is not applicable in this case. Accordingly, the cited standard applies and, as Storer admits, its terms were not met because no fall protection was provided at the window opening and materials staging area opening.

The violation of 29 C. F. R. § 1926.451(g)(1) is affirmed.

Infeasibility Defense

Storer asserts that it is infeasible to comply with this standard.

To prove the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection.

Beaver Plant Operations, Inc., 18 BNA OSHC 1972, 1977 (No. 97-0152, 1999).

The Commission’s Rules of Procedure require the employer to raise an affirmative defense in its answer. 29 C. F. R. § 2200.34(b)(3). Storer did not plead the affirmative defense of infeasibility in its answer. It is too late for Storer to raise this issue.

Nevertheless, even assuming that Storer had properly raised the infeasibility defense, it did not prove this defense. Storer failed to show that a guardrail would be technologically or economically infeasible to install. The only evidence presented by Storer was Robert Dixon, Jr.’s testimony. In response to a question regarding installation of a guardrail in front of the window opening, he stated, “I don’t know how you would do it” (Tr. 266-267). Storer did not show that it even attempted to use any type of guard.

² § 1926.501(b)(9) NOTE provides: “Bricklaying operations performed on scaffolds are regulated by subpart L-Scaffolds of this part.”

Storer failed to show that there was no feasible alternative means of protection. The employer “must show that it has explored all possible alternate forms of protection.” *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1161 (No. 90-1620, 1993). Indeed, an employer is expected “to exercise some creativity in seeking to achieve compliance.” *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995). Storer did not present any alternative means of protection and has not shown whether or not it could be used.

Therefore, Storer’s infeasibility defense fails.

Repeat Classification

Under the Commission’s long-stated test, a repeat violation under § 17(a) of the Act, 29 U.S.C. § 666(a), occurs if the Secretary shows “a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The “principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards.” *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990). The Secretary establishes substantial similarity “by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing.” *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The repeat classification is based on a citation issued to S. A. Storer and Sons Company on May 31, 2000, for a serious violation of 29 C.F.R. § 1926.451(g)(1) because an employee was working on a scaffold more than 10 feet above the ground without personal fall protection on a worksite in Toledo, Ohio (Exh. C-6). A guardrail was missing from the scaffold (Exh. R-3; Tr. 71, 140). The parties entered into a settlement agreement, which reclassified the violation as “other than serious” (Exh. C-7). Storer paid an amended penalty. The citation became a final order on March 22, 2001 (Exh. C-8).

Storer contends that the instant violation is not repeat because the previous citation was reclassified as “other than serious” and the instant citation is “serious.” Also, the missing guardrails in the previous citation were on the outside of the scaffolding, and the missing guardrails were on the inside of the scaffolding in the instant case.

These arguments are without merit. The reclassification of the previous citation to “other than serious” and the location of the guardrails do not alter the fact that the citations were issued to the same employer (Storer) and were both based on the same standard [§ 1926.451(g)(1)] under similar circumstances (failure to have guardrails on scaffolding) for substantially similar hazards (hazard of falling from scaffold). See *Hudson Wood Recycling, Inc.*, 17 BNA OSHC 1635 (No. 91-1597, 1996) (prior violation for failure to have midrail was substantially similar to current violation for failure to have guardrail in that both violations involved same standard and dealt with same hazard of falling); *Capform, Inc.*, 16 BNA OSHC 2040 (No. 91-

1613, 1994), *aff'd*, 901 F.2d 1112 (5th Cir. 1990) (employer found to have previously violated the same standard is enough to characterize current violation as repeated); and *Stone Container* (citations involving the same standard and applied to similar conditions of employee exposure to similar falls are repeat violations).

In addition to similar hazards, these two violations have the same means of abatement: installation of guardrails. *See Centex-Rooney Construction Co.*, 16 BNA OSHC 2127 (No. 92-0851, 1994) (hazards and means of abatement were the same in previous and current citations so current violation is repeated). In this case, the similarity of abatement further supports the conclusion that the present violation is properly classified as repeat.

Therefore, the violation of 29 C.F.R. § 1926.451(g)(1) is affirmed as a repeat violation.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must 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 prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Storer is a small company with eighty to ninety employees. In this case, only eight employees were involved in the masonry work. Storer is entitled to credit for its size.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation “depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case, the gravity is moderate. The violations involved limited areas of the scaffold, one employee exposed to the window opening, and one employee exposed to the materials staging area opening. The likelihood of falling was not great; however, the likelihood of serious injury or death from falling from a height of 19 to 20 feet was substantial.

Storer exhibited good faith. Storer was cooperative during the inspection. Although CO Jensen stated that Storer would not let employees talk to the COs without a company representative present, he also testified that one employee told him that he would not talk to him without Dixon present (Tr. 88).

Storer has a prior history of OSHA violations for lack of fall protection; therefore, no credit is given for good history.

Based on these factors, a penalty of \$3,500.00 is reasonable for Citation No. 1.

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 on the foregoing decision, it is ORDERED:

1. Citation No. 1, Item 1, alleging a repeat violation of 29 C. F. R. § 1926.451(g)(1), is affirmed and a penalty of \$3,500.00 is assessed.

/s/

STEPHEN J. SIMKO, JR.
Judge

Date: July 9, 2002