

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

SECRETARY OF LABOR,

Complainant,

v.

RAPID MASONRY COMPANY, and its
successors,

Respondent.

OSHRC DOCKET NO. 00-1603

APPEARANCES:

For the Complainant:

Susan Meyercord, Esq., Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor,
Dallas, Texas.

For the Respondent:

Debbie Bowen, Robert Bowen, David Bowen, *pro se*, Rapid Masonry Construction, Abilene, Texas.

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Rapid Masonry Company, and its successors (RMC), at all times relevant to this action maintained a place of business at 2150 S. Highway 121, Lewisville, Texas, where it was engaged in cutting and laying masonry block (Tr. 114, 144). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 2, 2000, the Occupational Safety and Health Administration (OSHA) conducted a program inspection of RMC's Lewisville work site. As a result of that inspection, RMC was issued a citation alleging violations of the Act together with proposed penalties. By filing a timely notice of contest RMC brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 14, 2000, an E-Z Trial hearing was held in Abilene, Texas. The Secretary's motion to amend citation 1, item 1, to correct a typographical omission and to allege a violation of

§1916.451(e)(1), was granted (Tr. 10-11, 46). No briefs are required in E-Z proceedings, and this matter is ready for disposition.

Alleged Violation of §1926.451(e)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.451(e)(1):

- a) At the job site, employee was not provided access ladder in area where he was working in. Employee was climbing up scaffold on structure.

Facts

OSHA Compliance Officer (CO) Ignacio Guerra testified that he conducted the inspection of RMC's Lewisville work site on May 2, 2000 (Tr. 36-37). Guerra stated that as he drove onto the site he observed and photographed an employee climbing RMC's scaffolding; he also saw employees working on the scaffolding in areas where the guardrails had been removed (Tr. 36-37, 39; Exh. C-1, C-2). Guerra went to the job trailer, where he spoke with Don Bowen, RMC's foreman (Tr. 44). As he and Bowen walked toward the scaffolding where the men were working, Guerra took additional pictures of a worker standing on a mud tub in front of an unguarded section of the scaffold (Tr. 41-43, 55-56, 81; Exh. C-3, C-4).

According to Guerra, Bowen identified the employee who had been climbing the scaffold as Javier Gutierrez, an RMC employee (Tr. 44-45). Bowen identified the man on the mud tub as Freddy Grajales (Tr. 81). Bowen brought both men over to speak with Guerra (Tr. 44-45, 80-82).

Gutierrez, a Spanish speaker, told Guerra that he had been working as a laborer for RMC for about four weeks, supplying block for the masons (Tr. 49, 52; Exh. C-7). Gutierrez admitted that he had been climbing the scaffold (Tr. 48). Guerra's photographs show that RMC had a ladder set up at the other end of the scaffold, approximately 50 feet away from the cross braces Gutierrez was seen climbing (Tr. 47, 87; Exh. C-4). Gutierrez told Guerra that he didn't use it because it was too far away from the area where he was working (Tr. 48, 85). Guerra testified that he faithfully translated Gutierrez's statement into English, and had the laborer sign the written statement (Tr. 48-50; Exh. C-7).

David Bowen, a superintendent with RMC, and Don Bowen's brother, testified that he did not believe the laborer Guerra saw climbing the scaffold was an RMC employee. Bowen believed the worker seen climbing the scaffold was also pictured in Complainant's Exhibit C-3, wearing a white shirt and dark pants (Tr. 156-57). According to Bowen, none of his employees wore hard hats like that

worn by the laborer in Exh. C-3 (Tr. 156-57). Bowen believed that the employee pictured was a plumber who was working on some copper piping, scuppers and drains for the roof line (Tr. 158; *See also* testimony of Robbie Bowen, RMC's project manager, Tr. 224, 231).

CO Guerra, however, testified that the worker in the white shirt pictured in Exh. C-3 was not Javier Gutierrez. Guerra stated that while he was in the job trailer with Don Bowen, they both saw Gutierrez climb down the scaffold in the same way he went up (Tr. 212-13). When Don Bowen went to get Gutierrez for the interview, Gutierrez was on the ground (Tr. 214). Guerra testified that the worker pictured in C-3 was on the scaffold platform when he arrived on the site, and can be seen in Exh. C-1, to the right and above Gutierrez (Tr. 212-16).

Neither David nor Robbie Bowen was on the Lewisville work site on a daily basis; Robbie was not familiar with the employees on the site, and David could not identify the workers in the Secretary's photographs, except by their clothing (Tr. 15, 160, 174, 227). David Bowen admitted that his brother Don, the foreman on site, probably knew RMC's employees, and would not have introduced non-employees to CO Guerra (Tr. 175). Robbie Bowen testified that when Don called him during the inspection he seemed upset that his employees were climbing the scaffolding behind his back, whenever he was in the job trailer (Tr. 218, 220, 238).

Discussion

1926.451(e)(1) states:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated scaffold access, or direct access from another scaffold, structure personnel hoist, or similar surface *shall be used*. *Crossbraces shall not be used as a means of access*. [emphasis added].

Because the cited standard requires that employees use means of access other than cross braces, a violation of the standard has been established.¹ RMC argues that the Secretary failed to prove that any of *its* employees were exposed to the cited hazard. If one of its employees is found to have been exposed, RMC argues that any infraction was the result of employee misconduct.

¹ CO Guerra testified that he believes the cited standard requires RMC provide ladder access at each end of their scaffold (Tr. 90), stating that it would be difficult for an employee working at the opposite end of the scaffold to get from the ladder to his work area because of the number of employees actually working on the scaffolding (Tr. 132). This judge notes that nothing in the cited standard prescribes, either expressly, or by implication, the number or proper spacing of access points. Because a violation of the standard has been otherwise established, however, this point need not be resolved.

Employee exposure. While RMC introduced testimony tending to show that one of the workers pictured in Complainant's Exhibit C-3 was not an RMC employee, the testimony failed to identify the worker in the photograph as the worker named by CO Guerra as the exposed employee. Guerra specified that Javier Gutierrez was the RMC employee he saw climbing the scaffolding. Guerra did not believe that the worker in Exh. C-3 was Gutierrez.

Because of the contradictory testimony, and the limitations of the photographic evidence, this judge cannot determine, with any certainty, the identity of the employee pictured in Exh. C-3. However, given the totality of the evidence, this judge finds that it is unnecessary to do so. Don Bowen introduced a worker identifying himself as Javier Gutierrez as one of his employees. Gutierrez confirmed that he was an RMC employee. Bowen had the authority to direct Gutierrez to meet with CO Guerra. Bowen was concerned over Gutierrez's alleged violation of OSHA standards. There is ample evidence in the record establishing that Javier Gutierrez was an RMC employee.

Because Gutierrez admitted climbing the cross braces of RMC's scaffolding to access the work area, a violation is established.

Employee misconduct. RMC argues that it provides initial training for its employees, as well as hands on training, based on the individual's experience. RMC also conducts safety meetings every Friday, during which OSHA hazards are discussed (Tr. 162, 247-52; Exh. R-2, R-3). RMC introduced written safety materials dealing with hazard analysis, and the Hazard Communication Standard (Exh. R-2, R-3). No safety materials specific to the scaffolding standards were introduced. Neither David nor Robbie Bowen could recall being present during any safety meetings at the Lewisville site (Tr. 164, 257). Neither had first hand knowledge of the topics discussed during Don Bowen's Friday safety meetings; their testimony was based entirely on their prior experience with Don Bowen's habits (Tr. 198, 257-58). David Bowen testified that Don Bowen was very strict about safety, and would have fired any employee who did not demonstrate an understanding of the rules after four weeks of safety meetings (Tr. 195).

It is well settled, that in order to establish an employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995). Though RMC showed that it was concerned about employee safety, and that it did have a safety program, RMC did not produce either its safety program in its entirety, or evidence

that it had a work rule specifically prohibiting climbing the cross braces of the scaffolding. RMC did not show that employees were trained not to climb the cross braces. On this record, this judge cannot find that RMC has made out a case of employee misconduct. The citation will, therefore, be affirmed.

Penalty

A penalty of \$1,600.00 was proposed for this item. Guerra testified that though the likelihood of an accident occurring was lesser, an employee falling from the 18-foot scaffold could suffer serious injuries including multiple fractures (Tr. 53). CO Guerra stated that he calculated the duration of Gutierrez's exposure as four weeks, four to five hours a day. There is no evidence, however, that Gutierrez climbed the scaffold on a regular basis. The Secretary showed only a single exposure lasting a few minutes. CO Guerra testified that the penalty was reduced based on RMC's small size, but that no adjustments were made for either history or good faith (Tr. 54). Guerra stated that RMC had received other "serious" citations within the past three years (Tr. 54). Moreover, Guerra did not believe that RMC's foreman acted expeditiously to eliminate the cited hazards (Tr. 54). Guerra admitted that he did not ask for a copy of RMC's safety program, though he would normally take that into consideration in determining good faith (Tr. 138).

This judge finds that the CO overstated the gravity of the violation, to which Gutierrez was exposed for only a few moments out of his work day on the day of the inspection. Moreover, the CO erroneously denied RMC good faith credit for having a safety program. In addition, unlike many masonry contractors, RMC used new scaffolding in top condition (Tr. 267-69; Exh. R-4). Taking into account the relevant factors, I find a penalty of \$200.00 is appropriate.

Alleged Violation of §1926.501(b)(1)

Serious citation 1, item 2 alleges:

29 CFR 1926.501(b)(1):

- a) At the job site, employee working on scaffold was not protected from falls.

Facts

After Bowen called him down from the scaffolding, Freddy Grajales provided Guerra with identification, and told Guerra that he had been working for RMC for approximately two and a half months (Tr. 59, 83; Exh. C-9). Grajales confirmed, in Spanish, that he was working in an unguarded area of the third scaffold level, telling employees not to walk or stand under the load that he had up there (Tr. 137). Guerra translated Grajales' statement into English before Grajales signed it (Tr. 58-59; Exh. C-9).

David Bowen testified that there was a skytrack on the Lewisville site, which was used to load pallets of block onto the scaffold (Tr. 145); moreover, he stated, it takes approximately 10 to 20 minutes for the masons to use up the mortar, or mud, in the mud tub (Tr. 148). The skytrack is used to replace the mud tub (Tr. 149). Guardrails must be removed in order for the skytrack to load pallets or to remove the mud tub (Tr. 148). David Bowen believed that CO Guerra photographed the scaffold during loading operations, when guardrails had been properly removed (Tr. 148). Bowen further stated that, after the inspection, his brother Don told him that the guardrails had been removed because “there was a mud tub being moved in and out” (Tr. 170-71).

Robbie Bowen testified that, based on Grajales’ position in the loading area, he believed the employee was waiting for the forklift to approach (Tr. 236). R. Bowen thought there could have been a delay in the delivery of the load, but admitted that it was impossible to tell, from the photographs, exactly what was going on at the site (Tr. 237). He admitted that the only witness in the courtroom who had first hand knowledge of conditions on the work site on May 2, 2000 was CO Guerra (Tr. 244).

CO Guerra testified that he was told that the guardrail had been removed in the mud tub area in order to facilitate loading (Tr. 57, 79). Guerra stated, however, that he did not see any loading going on at the work site (Tr. 57); he saw only the two employees setting blocks and Grajales, standing looking toward the masons, with his back to the open side (Tr. 57). Though he walked the entire site and had a clear view of the area around RMC’s scaffold, Guerra did not see a forklift in the loading area, or hear one elsewhere on the site (Tr. 79, 110-12). Guerra stated that the guardrails should have been replaced immediately after the last product was offloaded (Tr. 79), and not removed again until the forklift returned with the next load (Tr. 108).

Discussion

1926.501(b)(1) states:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

CO Guerra stated that this item deals only with the exposure of Freddy Grajales, who is pictured in Complainant’s exhibit C-3 (Tr. 116-17). The evidence establishes that the guardrail in front of the mud tub was removed, exposing Mr. Grajales to the cited fall hazard. RMC argues that loading was ongoing in the area, and that the removal of the guard rail in that area was justified. The Secretary, however, interprets the standard as requiring that guardrails be in place *at all times*, unless the guardrails would interfere with loading operations actually in progress. The Secretary’s interpretation

of an OSHA standard is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). *See; Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994). This judge cannot find that the Secretary's interpretation in this case is unreasonable. CO Guerra, who was the only witness testifying at the hearing with first hand knowledge of the conditions at the Lewisville work site, stated that there were no loading operations actually in progress at any time during his inspection. His testimony is supported by the photographic evidence, which shows Freddy Grajales talking with the masons behind the wall rather than attending to any incoming load. On this record, there is no basis to conclude that RMC was engaged in loading operations at the time of the CO's inspection.

The Secretary has established the cited violation.

Penalty

A penalty of \$1,600.00 was also proposed for this item. As in the preceding item, Guerra believed that, though the likelihood of an accident occurring was lesser, an employee falling from the 18-foot scaffold could suffer serious injuries including multiple fractures (Tr. 59, 61-62). Guerra testified that he spent approximately 30-40 minutes at the work site, 20 minutes of which he was watching the RMC crew on the inadequately guarded scaffold (Tr. 46, 79). For the reasons stated above, Guerra made no adjustments for either history or good faith (Tr. 63).

As noted, the record indicates that the time of exposure was approximately 20 minutes. RMC's management established that RMC is a safety conscious company, which supplied new equipment on its numerous job sites, and provided general safety training to its employees. Taking into account the relevant factors, I find that a penalty of \$400.00 is appropriate.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.451(e)(1) is AFFIRMED, and a penalty of \$200.00 is ASSESSED.
2. Serious citation 1, item 2, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of \$400.00 is ASSESSED.

_____/S/_____
Stanley M. Schwartz
Judge, OSHRC

Dated: January 8, 2001