United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v. OSHRC DOCKET NO. 99-1880

CORNA/KOKOSING CONSTRUCTION COMPANY,

Respondent.

APPEARANCES:

For the Complainant:
Elizabeth R. Ashley, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio

For the Respondent:
Douglas J. Suter, Esquire, Isaac Brant Ledman & Teetor, Columbus, Ohio

Before: Administrative Law Judge Ann Z. Cook

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"). Respondent Corna/Kokosing Construction Company is a corporation engaged in construction. On July 19, 1999, the Occupational Safety and Health Administration ("OSHA") conducted an inspection at Respondent's work site at a middle school in Delaware, Ohio. As a result of the inspection, OSHA issued Respondent a single serious citation. Respondent filed a timely notice of contest, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and the hearing in this matter was held in Columbus, Ohio on February 2, 2000. In accordance with Commission Rule 209(f), a decision was issued from the bench

affirming the citation as a serious violation and assessing a penalty in the amount of $750.00. Findings of fact and conclusions of law as required by Commission Rule 90(a) are set forth at transcript pages 64 to 68, which are attached hereto. All findings of fact relevant and necessary to a determination of the contested issues have been made in accordance with Federal Rule of Civil Procedure 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Serious Citation No. 1, Item No. 1, alleging a violation of 29 C.F.R. § 1926.451(g)(1)(vii), is affirmed, and a penalty in the amount of $750.00 is assessed.

Ann Z. Cook
Judge, OSHRC

Dated: 20 MAR 2000
Washington, D.C.

AFTERNOON SESSION

(12:35 p.m.)

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JUDGE COOK: On the record.

We are back on the record, and I am ready to give my oral decision in this case.

DECISION

Jurisdiction has been admitted by stipulation. So it's been established that Respondent is engaged in a business affecting commerce, and on the day of the inspection was engaged in work activity, and that the Respondent is an employer under the Act.

There's a single serious citation at issue. It arises from an OSHA inspection on September 9th, 1999, at a construction project.

It alleges that 29 C.F.R., Section .451, Subparts (g)(1)(vii) was violated. Specifically, the citation alleges: At the site on the east wall of the gymnasium, the employer did not ensure that each employee was protected by the use of a fall arrest system or closing guardrail system gates, paren, open width, five feet, paren, after material is loaded and unloaded off of a pallet from a forklift that was extended to the working platform from the ground; thereby exposing employees to a 28-feet, 2-inch fall hazard.

The cited standards provides that for all scaffolds, not otherwise specified in Paragraphs (g)(1)(i) through 2(g)(1)(vi) of this section, each employee was not protected by the – each employee was not -- mh -- protected -- each employee must be protected by the use of a guardrail or personal fall arrest system.

In order to approve the violation, the Secretary must establish the following:

1. That the cited standard applies to the work activity;

2. That the employer failed to comply with the terms of the standard;

3. That the Respondent's employees had access to the hazardous condition; and,

4. That Respondent knew or with the exercise of reasonable diligence could have known of the violation.

The Secretary must prove the violation by a preponderance of the evidence; that is, that the conclusion is more probably true than not, based upon the evidence.

The facts of this case are that the compliance officer came onto the work site, and during his walk-around observed two employees on a scaffold about 28 feet above the ground. The employees were unloading material which had been raised 23 from the ground by a forklift.

The compliance officer observed this activity for about 15 minutes, during which materials were unloaded and onto the scaffold two or three times. The workers were not using personal fall arrest equipment.

The scaffold had 2 five-foot gates, one of which opened to -- one of which was opened to permit the pallet to be introduced two or three feet inside the gate, where it unloaded. The pallet was approximately one-foot above the scaffold platform and was approximately three-feet by four-feet -- excuse me, three-feet wide by four-feet long.

The compliance officer and Respondent's safety manager, Mr. Szympruch, observed that once, when the pallet was removed, the gate remained opened a few seconds. The compliance officer on direct testified it was about 30 seconds; on cross-examination testified that it was about several -- it was several seconds. The gate remained open until a supervisor yelled up from the ground to close the gate and the gate was closed.

I find these to be the relevant facts, although counsel have elicited additional information regarding the feasibility of using personal fall arrest systems while unloading.

The citation is unambiguous in its language. It alleges that the violation occurred after the materials were loaded and unloaded. Also, there was no showing of any -- that any fall hazard existed so long as the pallet blocked the opening of the gate.

Turning to the factors that are necessary to -- the four factors which are necessary to establish -- in order to 3 establish a violation.

First of these is that the standard is applicable. I find that it is applicable, as it applies, clearly, to all work on scaffold and provides no exception for loading or unloading.

The second element is that the employer failed to comply with the terms of the standard. And I find that that has been established. For a brief few seconds the employer ---the employees, the two employees, were protected neither 12 by a guardrail or a personal fall arrest system.

The next element is exposure of the employees to the hazard, the hazard being a fall hazard. I find that that is also has been established; that the two employees were within the zone of the hazard.

Although Mr. Szympruch testified that both employees were behind the guardrail when the pallet was removed and that they remained there until the gate was closed, had either one of them slipped or been jostled, a fall might have occurred. And I agree with the compliance officer that it takes only an instant to fall.

The last element is employee knowledge. And I find that there was -- excuse me, employer knowledge. And I find that that also has been established. Respondent's

supervisors were in the area and observed the open gate on the scaffold and knew that the pallet would be removed.

Although they acted very quickly, they were clearly aware of the hazard.

I, therefore, find by a preponderance of the evidence that Respondent violated the standard as cited in the citation. Because the fall hazard was that of falling

28 feet, it clearly would have, resulted in serious injury or 9 perhaps death. I, therefore, find that the violation is serious, which takes us to the penalty amount.

Penalty amount is based upon a number of factors that were discussed by the compliance officer. The most important of these is the gravity of the violation, and this consists of three items. The severity of the resulting injury from the hazardous condition, which I have found could be quite serious; the probability of injury, and the extent of the violation.

I find both the extent and the probability to be very, very low, given the extremely short time during which the violation occurred.

I also give credit in reaching an amount of penalty to the effective safety program which Respondent's safety manager, Mr. Szympruch, testified to.

Based upon all the evidence in this case, I find that a penalty in the amount of $750 is appropriate for the violation.

This concludes the hearing. I would like to, before going off the record, thank both counsel for their cooperation and for their succinct presentation of the case and their ability to reach the stipulations.

MR. SUTER: Thank you, your Honor. JUDGE COOK-. Thank you. MS. ASHLEY: Thank you.

(Whereupon, at 12:45 p.m., February 2nd, 2000, the above matter was concluded.)