

SECRETARY OF LABOR,

Complainant,

v.

GROESBECK MASONRY, INC., and its  
successors

Respondent.

OSHRC DOCKET NO. 99-0187

**APPEARANCES:**

For the Complainant:

David Q. Jones, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

James Groesbeck, President, Groesbeck Masonry, Inc., San Antonio, Texas

Before: Administrative Law Judge: Benjamin R. Loye

**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, Groesbeck Masonry, Inc. (Groesbeck), at all times relevant to this action maintained a place of business at 12810 IH-10 West, San Antonio, Texas, where it was engaged in construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent is, therefore, an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 8, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Groesbeck’s San Antonio work site. As a result of that inspection, Groesbeck was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Groesbeck brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 18, 1999, a hearing was held in San Antonio, Texas. Oral closing arguments on the issues were made at the hearing, and this matter is ready for disposition.

Facts

Antonio Sanchez, an OSHA Compliance Officer (CO), testified that on December 8, 1998, as he drove by Groesbeck's San Antonio work site, he observed employees working on a scaffold without proper guardrailing. As a result, he initiated an inspection of the site (Tr. 19).

Sanchez testified that upon his arrival on the site, he identified two Groesbeck employees, Roland Munoz and Ricardo Guzman, washing down a brick wall with acid from a 10 to 12 foot scaffold without fall protection (Tr. 21, 28-29, 80, 88; Exh. C-4, C-5). A third Groesbeck employee, Juan Zertuche, worked on the roof above, dismantling the top level of scaffolding, and handing the scaffold components down to Munoz and Guzman (Tr. 33, 42, 83, 120-21; Exh. C-4, C-5). Sanchez stated that the scaffolding where the employees were working was not completely planked; the employees were photographed straddling two single planks, which constituted the only scaffold decking (Tr. 22-26; Exh. C-1, C-2).

Sanchez testified that he interviewed the employees, who told him they had worked for Groesbeck for a month or two, but in that time had not been trained to recognize or eliminate fall hazards associated with scaffolding (Tr. 30, 88). Sanchez stated that Groesbeck's foreman, Kenny Extine, admitted that the employees had not been trained (Tr. 37). Sanchez testified that the foreman identified himself as the competent person, but could not explain why there were no guardrails on the scaffold (Tr. 40, 69).

Ricardo Guzman testified that the boards on which he and Munoz were standing were left on the lower levels as they built the scaffold up (Tr. 84). Guzman admitted that they normally replace the decking on the lower levels with planks from the upper levels as the planks are dropped down during dismantling (Tr. 85-86). Guzman stated, however, that he was not specifically told that the scaffold must be completely decked before he began to work from it (Tr. 85). Guzman stated that on the day of the inspection, the only specific instructions he received were from Zertuche, and were in Spanish (Tr. 87). Guzman does not speak Spanish (Tr. 93).

Guzman testified that as a bricklayer's helper with Groesbeck, he was often required to be on scaffolds (Tr. 74-75). Guzman testified, however, that he received no formal training in fall protection, or the hazards associated with working from scaffolds (Tr. 75, 79, 92). Guzman

stated that he was not trained by his foreman until after the OSHA inspection, did not attend any safety meetings, and did not receive a copy of Groesbeck's safety manual (Tr. 75-77, 82, 89).

James Groesbeck testified that Groesbeck does hold safety meetings once a week, and that all employees are expected to attend. Job foremen's meetings are held once a month (Tr. 107, 117).

Groesbeck stated that Roland Munoz and Guzman were assigned to work with Juan Munoz, who had been trained in scaffolding, and who, according to Groesbeck, was the competent person for scaffold erection (Tr. 107-08, 117; Exh. R-3). Groesbeck testified that it was Munoz' responsibility to provide the inexperienced workers with on-the-job training in erecting and dismantling the scaffolding, though Munoz did not hold a supervisory position (Tr. 107, 122, 128). Groesbeck stated that neither Munoz nor Guzman should have been washing brick until the scaffold guardrails were re-installed, and the decks fully planked (Tr. 109, 112). Groesbeck admitted that he had not personally instructed the employees in the proper work sequence, and did not know whether Juan Munoz, whose responsibility it was, had told Munoz and Guzman not to wash the wall until after the scaffold level was decked and guarded with the components from the level above (Tr. 110).

### **Alleged Violations**

Citation 1, item 1 alleges:

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports:

(a) At 12810 IH-10 West, the scaffold being used by employees on the east side of the building was not fully planked. Employees were on the second-level platform washing down the wall.

Citation 1, item 2 alleges:

29 CFR 1926.451(g)(1): Standard guardrails and toeboards were not installed at all open sides and ends on scaffolds more than 10 feet above the ground or floor:

(a) At 12810 IH-10 West, the employer did not ensure that employees working on a scaffold greater than 10 feet in height were provided with fall protection by means of a guardrail system, nets, or personal fall arrest system.

Citation 1, item 3a alleges:

29 CFR 1926.454(a): The employer did not have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated

with the type of scaffold being used and to understand the procedures to control or minimize those hazards:

(a) At 12810 IH-10 West, the employer did not train employees on how to recognize hazards associated with scaffolds and/or how to reduce or eliminate those hazards.

Citation 1, item 3b alleges:

29 CFR 1926.454(b): The employer did not have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question:

(a) The employer did not have employees involved in the erecting or dismantling of the scaffold trained to recognize hazards associated with falls from scaffold.

### Discussion

Guzman does not dispute the existence of the violative physical conditions at the work site, but argues that the exposed employees had received on the job training from a competent person and were working contrary to established work procedures.

Employee misconduct is only a defense to an established violation where the employer can establish that it had specific work rules designed to prevent the violations that were adequately communicated to its employees, and where the employer shows it took 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).

In this case, Groesbeck claimed only that its employees' failure to install guardrails or plank the scaffold level from which they were working was contrary to normal work practices. Groesbeck did not assert that it had a specific safety rule forbidding the employees' conduct; nor did Groesbeck establish that it effectively communicated the work practice to the employees. Ricardo Guzman testified that he was never told of the need for fall protection generally, or, specifically, of the requirement that the guardrails and planking be re-installed before work was performed on the lower levels of the scaffold. Groesbeck admitted that he did not instruct the employees on proper work practices, and did not know whether Juan Munoz, the alleged competent person on site, had provided such instruction.

The Secretary has made its *prima facie case*; Groesbeck failed to show that its employees violation of the OSHA standards was either unforeseeable, or unpreventable. The cited violations are established.

Penalty

The Secretary has proposed penalties of \$1,225.00 each for items 1 and 2 of citation 1. A combined penalty of \$525.00 is proposed for items 3a and 3b.

Sanchez testified that a fall from as little as 10 feet could result in broken bones, concussion, and/or cuts and bruises (Tr. 38). The cited items were, therefore, properly classified as "serious." I find that the likelihood of a fall to the ground, however, was moderated by the presence of the scaffold crossbracing. Respondent's company is small. The Secretary introduced no evidence as to any history of prior violations. James Groesbeck testified to his company's good faith, stating Groesbeck's concern with safety, and with training its employees to work safely (Tr. 106-07).

Taking into account the relevant factors, I find that the gravity of the violations, and the proposed penalties are overstated. Penalties shall be assessed as noted in my Order, below.

**ORDER**

1. Citation 1, item 1, alleging violation of §1926.451(b)(1) is AFFIRMED, and a penalty of \$750.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of \$750.00 is ASSESSED.
3. Citation 1, item 3a, alleging violation of §1926.454(a) is AFFIRMED, and a penalty of \$200.00 is ASSESSED.
4. Citation 1, item 3b, alleging violation of §1926.454(b) is AFFIRMED, and a penalty of \$200.00 is ASSESSED.

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Benjamin R. Loye  
Judge, OSHRC

Dated: