

SECRETARY OF LABOR,

Complainant,

v.

MIDWEST MASONRY, INC.,

Respondent.

OSHRC DOCKET NO. 96-1462

APPEARANCES:

For the Complainant:

Tobias B. Fritz, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:

Dean G. Kratz, Esq., McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska

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, Midwest Masonry, Inc. (Midwest), at all times relevant to this action maintained a place of business at 3801 Avenue A, Kearney Nebraska, where it was engaged in masonry construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 6, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Midwest's Kearney work site. As a result of that inspection, Midwest was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Midwest brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On March 27, 1997, a hearing was held in Omaha, Nebraska. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1926.451(a)(13)

Repeat citation 1, item 1 alleges:

29 CFR 1926.451(a)(13):

3801 Avenue A, Kearney, NE: Access ladder or equivalent safe access to the scaffold was not provided. Employees were climbing scaffold frame.

Midwest Masonry, Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.451(a)(13), which was contained in OSHA inspection number 109326876, citation number 1, item number 4, issued on August 24, 1994, and became a Final Order effective May 19, 1995.

Facts

Compliance Officer (CO) Matthew Gaines testified that he was driving by Midwest's Kearney work site on September 6, 1996 when he observed apparent safety violations (Tr. 13). Gaines stopped, videotaped the work in progress, and proceeded to the site to conduct an inspection (Tr. 13; Exh. C-6).

Gaines testified that he observed a scaffold consisting of two 6 foot 7 inch scaffold tiers, and an outrigger located between the scaffold and the masonry wall under construction (Tr. 20-21, 52-54; Exh. R-3). Bricklayers worked from the outrigger, which was approximately 10 feet high, and from the top of the second scaffold tier, which Gaines estimated was 13 feet 6 inches high (Tr. 21). The scaffold was 13 sections, or 91 feet long (Tr. 25).

CO Gains videotaped four Midwest employees climbing down the frame of a masonry scaffold; at least one started climbing from the top (Tr. 14, 21-22, 28, 58; Exh. C-6 through C-8). The employees climbed rungs on the scaffold frame which were between 19" and 22" apart (Exh. R-3).

CO Gaines testified that in order to comply with the with the cited standard, the employer must provide a ladder, or equivalent safe access. Scaffold rungs can be no more than 16" apart and must be at least 10" long to constitute "equivalent" access (Tr. 86; Exh. C-5a).

During the course of the inspection, Midwest set up a ladder for its employees' use (Tr. 17, 22; Exh. C-6).

Discussion

The evidence establishes that Midwest's employees climbed the cited scaffold frame. The scaffold frame was not equivalent to a ladder, in that the rungs were too far apart. Because no ladder or equivalent safe access was provided, the violation is established.

Alleged Violation of §1926.451(d)(10)

Repeat Citation 1, item 2 alleges:

29 CFR 1926.451(d)(10):

3801 Avenue A, Kearney, NE: Standard guardrails and toeboards were not installed on scaffolds with work platforms more than 10 feet above the ground.

Midwest Masonry, Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 29 CFR 1926.451(a)(4), which was contained in OSHA inspection number 109326876, citation number 1, item number 1, issued on August 24, 1994 and became a Final Order effective May 19, 1995.

Facts

It is undisputed that at the time of the inspection, Midwest had not installed guardrails on the cited scaffold. CO Gaines observed and videotaped a bricklayer using a masonry saw to cut block on the upper level of the unguarded scaffold (Tr. 15, 19-20; Exh. C-6, C-9). At least three other Midwest employees were videotaped working on the same scaffold without any form of fall protection (Tr. 21, 96, Exh. C-10 through C-12). Doug Windhorst, Midwest's owner and operator, testified that the employees videotaped by CO Gaines were removing mortar from the mortar tub and placing it on mortar boards (Tr. 136).

Scott Daake, Midwest's foreman, told Gaines that he knew guardrails were required on the scaffold. (Tr. 69). Daake stated, on videotape, that Midwest had just erected the second tier of scaffolding that morning. Daake stated:

The guys just kind of got ahead of me. I didn't realize people were back there before I got my safety rails on. . . We have all the equipment. It's on now. We got caught up in the moment and things got ahead of me. . . Pretty much we've got the safety rails on. Most of the people are new kids who work for me; just fresh. They don't know what's going on." (Tr. 24; Exh. C-6).

Gaines testified that Daake told him Midwest's employees had been working off the completed scaffold for approximately 30 minutes prior to his arrival on the site (Tr. 66).

As Gaines conducted his opening conference, Doug Windhorst, Midwest's owner and operator, arrived on site with guardrails, which were immediately installed (Tr. 17, 22, 65; Exh. C-6). Windhorst confirmed that the second layer of scaffolding was constructed the morning of the inspection (Tr. 109). Windhorst stated that he knew the guardrails, posts, toeboards and ladder would be needed on the second layer (Tr. 108-10). Windhorst testified that he intended to arrive on site by the time the work day started, but that he was delayed by phone calls at the office (Tr. 110).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited standard applies. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991). Midwest argues that the cited standard is not applicable to the cited scaffold.

Applicability. CO Gaines admits that the cited OSHA standard does not require the employer to erect guardrails until scaffold assembly is complete (Tr. 66). Midwest argues that its scaffolding was still being assembled at the time of the OSHA inspection, rendering the standard inapplicable. In essence, Midwest contends that its scaffold was not complete because no guardrails had been installed (Testimony of Windhorst; Tr. 132). Stripped to its essentials, Respondent's interpretation limits OSHA's application of the cited standard to completely assembled scaffolds, *i.e.* those *with* guardrails, an absurd result.

It is the Secretary's position is that assembly is complete, and the standard applicable once employees begin working from the scaffolding. The Secretary's interpretation distinguishes between pure scaffold assembly and the use of the scaffold for its ultimate purpose. It is well settled that the interpretation of a standard by the promulgating agency 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). The Secretary's position is reasonable and is adopted.

It is undisputed that masonry work was taking place on the cited scaffold at the time of the OSHA inspection. The cited standard is applicable

The Secretary's *prima facie* case is not otherwise disputed. Midwest, however, raises the affirmative defenses of infeasibility and greater hazard.

Infeasibility. Midwest argues that, in this case, it was infeasible to install the guardrails before the blocks to be used by its masons were loaded onto the scaffold. At the hearing, Windhorst stated that the guardrails block its forklift's access to the scaffold (Tr. 118).

Windhorst testified that the cement blocks to be used by its masons must be loaded onto the scaffold by a forklift, which lifts a 4' x 4' pallet of blocks to the top of the scaffold (Tr. 114). Normally, a single set of guardrails is removed to allow forklift access to the scaffold platform. Windhorst, however, testified that at this site an excavation 24-25 feet behind the scaffold forced the forklift operator to approach the scaffold from an angle (Tr. 118, 125, 140; Exh. R-1). Windhorst stated that the pallet of blocks would not fit between the guardrail posts, which are set 7 feet apart, where the forklift could only approach the scaffold

at an angle (Tr. 118). Midwest argues that the installation of the guardrails would, thus, unduly interfere with the performance of its work.

Gaines videotaped guardrail members being loaded onto the scaffold by the forklift once the guardrail posts were in place (Tr. 25; Exh. C-6). The video shows that there was, in fact, adequate room between the scaffold and the excavation for the forklift to access the scaffold head on; allowing the loaded forks of the lift to pass easily between two guardrail posts (Exh. C-6).

The evidence fails to support Midwest's affirmative defense.

Greater Hazard. Windhorst admitted that it was feasible to guard those portions of the scaffold where no loading was taking place (Tr. 135), but argued that partial guarding of the scaffolding posed a greater hazard than leaving the entire scaffold unguarded. Windhorst testified that the fall hazard from the unguarded platform is easily identifiable, while partial guarding is confusing to the laborers on the scaffold (Tr. 138). In addition, Windhorst argued that a tripping hazard is created when rails and accessories are removed from the rail posts to allow the forklift access to the scaffold (Tr. 148).

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Midwest's greater hazard defense states Windhorst's bare opinion and is completely without support in the record. It seems clear to this judge that partial guarding is preferable to none, and that rails and accessories removed from the rail posts can and should be stored away from foot traffic. In addition, Midwest had no valid explanation for its failure to apply for a variance from the requirements of the cited standard (Tr. 142). The Commission has held that an employer's greater hazard defense cannot be considered where it fails to show that its application for a variance would have been futile. *See; Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1991 CCH OSHD ¶29,313 (No. 86-521, 1991).

Midwest failed to establish the greater hazard defense. The violation is established.

Penalties

Penalties of \$1,600.00 and \$2,000.00, respectively, were proposed.

Midwest is a small company with approximately 25 employees (Tr. 31). CO Gaines testified that an employee climbing the scaffold was exposed to falls from 2 to 13 feet, but that the likelihood of an accident occurring was low (Tr. 30). A fall from the top of the scaffold could cause more serious internal injuries, broken bones or death (Tr. 34). Gaines testified that the probability of that accident occurring was

also low (Tr. 34). Both violative conditions were of short duration, approximately 30 minutes (Tr. 34). Gaines testified that he could have provided up to 25% percent credit for good faith, based on Midwest's written safety and health program (Tr. 31-32, 74, 106-107). No credit was accorded, however, because the violation was deemed repeated (Tr. 31-32, 78).

The violations were properly deemed as repeated, based on Midwest's 1994 citation for substantially similar violations (Tr. 28-29, 34, 70). I find, however, that Midwest did demonstrate good faith in that it had every intention of providing an access ladder and of erecting guardrails, and was delayed only by Windhorst's late arrival on the work site on the day of the inspection. The mere fact that a similar violation had occurred two years prior to this one does not obviate that showing.

The proposed penalties are deemed excessive. Penalties of \$1,000.00 and 1,250.00, respectively will be assessed, reflecting partial credit for good faith.

ORDER

1. Citation 1, item 1, alleging violation of §1926.451(a)(13) is AFFIRMED, and a penalty of \$1,000.00 is ASSESSED.
2. Citation 1, item 1, alleging violation of §1926.451(d)(1) is AFFIRMED, and a penalty of \$1,250.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: