UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
SOMMERS BUILDERS, INC.
Respondent.

OSHRC DOCKET
NO. 93-2277

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 5, 1995. The decision of the Judge will become a final order of the Commission on February 6, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 25, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Review Commission
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: January 5, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-2277

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SECRETARY OF LABOR, Complainant, v. SOMMER BUILDERS, INC., Respondent.	OSHRC DOCKET NO. 93-2277

APPEARANCES:

For the Complainant:

Matthew L. Vadnal, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, WA

For the Respondent:

Richard C. Boardman, Esq., Boise, ID

DECISION AND ORDER

Loye, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Sommer Builders, Inc. (Sommer), at all times relevant to this action maintained a worksite at 805 West Franklin, Boise, Idaho, where it was engaged in masonry construction. Sommer admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 12).

On June 22-24, 1993, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Sommer's Boise worksite (Tr. 112). As a result of the inspection, Sommer was issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 9, 1994, a hearing was held in Boise, Idaho. The parties have submitted briefs and this matter is ready for disposition.

Alleged Violations

Willful citation 1, item 1a states:

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

> (a) West Side of Building: On or about June 22, 1993 and at times prior thereto, employees were working on the fifth deck of the scaffold and the 2nd floor window openings were not provided standard guardrails. The employees were exposed to a fall of approximately 17 feet.
>
> (b) West Side of Building: On June 23, 1993 an employee was installing mason block off the tubular welded frame scaffold and the scaffold was not equipped with guardrails. The employee was exposed to a fall of approximately 38 feet.
>
> (c) North Side of Building: On June 24, 1993 employees were pumping grout into the masonry wall from the tubular welded frame scaffold and the scaffold was not provided with guardrails. The employees were exposed to a fall of approximately 38 feet.
>
> The cited standard provides:
>
> Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

Item 1(a) - June 22, 1993

Facts

The underlying facts in this matter are not disputed.

On June 22, 1993, CO David Mahlum observed and videotaped Sommer's employees, including Mike Sommer, its president, working on a tubular steel scaffold approximately 38 feet high, and 17 feet above the metal second floor deck (Tr. 47, 64, 128, 132; Exh. C-2). Three employees were working on the west side third story window openings, and were exposed to fall hazards to the interior of the building through those windows (Tr. 123, 138; Exh. C-2, R-3 through R-5).

The west side windows were guarded with a single piece of No. 6 or No. 7 rebar (Tr. 103, 122, 363; Exh. R-3). CO Mahlum testified that the rebar would bend under a man's weight (Tr. 174-75, 225, 365). In addition, the rebar was not secured but was merely laid on the cinderblock resting against the vertical rebar (Tr. 366). The horizontal rebar could be lifted out, or in some cases simply roll out of place (Tr. 122-23, 367). No mid-rail or toe boards were in place (Tr. 123). Frank Clary, safety coordinator for the Association of General Contractors, testifying as a safety expert for Sommer (Tr. 249-57), agreed that the rebar did not comply with the requirements of §1926.451(d)(10) (Tr. 269, 273).

Guardrails were feasible, and had been placed in windows on the south side (Tr. 92, 136, 138, 364; Exh. C-2; Exh. R-6). Completed windows were braced with "window bucks," wooden supports which Mahlum felt provided adequate fall protection (Tr. 75-77, 91, 124-26).

Following CO Mahlum's inspection, a closing conference was held, during which Mahlum informed Sommer that they would be cited for failing to provide interior fall protection in the window openings prior to installation of the window bucks (Tr. 48, 72, 170). Mahlum told Sommer at that meeting that his scaffolds were otherwise well installed and guarded (Tr. 186). Mahlum testified that Sommer was not cited for guardrail violations on June 22 because on that date the materials platform appeared to be 18 inches or more higher than the outrigger platform, i.e. above knee level (Tr. 191-92, 357). Mahlum believed the materials platform was sufficient protection against falling (Tr. 194).

Discussion

Sommer admits that no guardrails were installed in, and that employees were exposed to, the cited window openings. Sommer argues, however, that the rebar was "equivalent material" for purposes of the standard.

The testimony, including that of Sommer's own safety expert, establishes that the rebar neither met the guardrail specifications set forth in the cited standard, nor provided meaningful fall protection for workers exposed to the cited window openings. Sommer has failed to show that the rebar it placed in the third floor window openings satisfies the exception for equivalent materials set forth in the cited standard. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1993 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993); *StanBest Inc.*, 11 BNA OSHC 1222, 1983-84 CCH OSHD ¶26,455, (No. 76-4355, 1983)[When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception.]

The Secretary has established the violation.

Items 1(b), 1(c), June 23-24, 1993

Facts

On June 23, 1993, Ed Banberry, business representative for the ironworkers local union, observed and photographed Sommer employees working on the outrigger of the west side scaffolding (Tr. 17-18, 23, 51; Exh. C-1). No guardrail had been erected on the outrigger (Tr. 24, 52, 82, 139; Exh. C-1).

On June 24, 1993, CO Mahlum returned to Sommer's worksite and observed and videotaped three Sommer employees on the north side third floor outrigger, grouting the masonry with a concrete hose (Tr. 148; Exh. C-2 through C-7). Guardrails were up on the outrigger along the south and east sides, none on the north and west (Tr. 152).

The outrigger is a platform four planks wide, two of which extend past the main scaffold frame in towards the building wall (Tr. 158). A plank behind the outrigger serves a materials platform, but was, on June 24, level with the outrigger platform (Tr. 196. 221). Six feet below the outrigger, the main scaffold platform was solidly decked, its sides guarded with four foot high plywood sheets except where two sections were used as material loading stages (Tr. 28, 64, 142, 157-59; Exh. C-1, R-7). The main platform, which is five feet wide total, extends approximately 30 inches beyond the outrigger's materials platform to the building's exterior (Tr. 142, 221).

Both Clary and James Stubbs, the managing superintendent for Sommer's general contractor (Tr. 42), testified that a worker falling from the outrigger would land on the

scaffold platform (Tr. 84, 263). Matthew Jones, Sommer's mason safety manager (Tr. 333), stated that an employee would have to jump over the main scaffold platform to clear it (Tr. 337). CO Mahlum disagreed, stating that a falling employee would typically tumble out away from the vertical (Tr. 142), and could either strike the plywood siding, or fall outside the scaffold decking (Tr. 151).

Discussion

Respondent admits that no guardrails were installed on the outriggers of the cited scaffolding, but argues that no guardrails were required because the outrigger was less than 10 feet above the guarded scaffold platform. Complainant maintains that the scaffold platform is not a floor, but a catch platform, which Sommer relied upon as fall protection in lieu of installing the required guardrails. Complainant argues that the cited standard is a specifications standard, and that the acceptable means of compliance are limited to those provided for in the standard.

The undersigned agrees. The approximately 30" of planking which extended beyond the edge of the outrigger and materials platform is clearly not a floor, as that term is commonly understood. Sommer was, therefore, required to install guardrailing specifically meeting the criteria set forth in the cited standard. Sommer's installation of a catch platform as an alternate means of fall protection is inadequate to comply with the cited standard. The Commission has held that an employer's use of impermissible alternate protective measures is relevant only in determining the proper characterization or appropriate penalty for the violation.[1] *See Pyramid Masonry Contractors, Inc.*, 16 BNA OSHC 1461, 1993 CCH OSHD ¶30,255 (No. 91-0600, 1993).

In addition to its argument on the merits, Sommer objects to OSHA's conduct in issuing a citation under these circumstances, based on the OSHA CO's failure to advise Sommer of problems with its guardrailing during the June 22 closing conference. It is well settled, however, that OSHA's failure to detect a violation during a prior inspection does not

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[1] The evidence also establishes that the scaffold platform was inadequate in that it did not completely eliminate the exterior fall hazard. The scaffold platform did not extend beyond the open southwest end of the outrigger (Tr. 35; Exh. C-1). Employees walking around the corner of the outrigger at that point (Tr. 38-39) were exposed to the full 38 foot fall.

grant the employer immunity from later enforcement of applicable standards. *Seibel Modern Manufacturing & Welding*, 15 BNA OSHC 1218, 1991-93 CCH OSHD ¶29,442 (No. 88-821, 1991).

Nothing in the record indicates that the CO directly addressed the sufficiency of using catch platforms in lieu of guardrails at the June 22 closing conference. The hazard, as it was cited, did not exist on June 22. The photographs from the first inspection are all interior views showing the physical barrier of the materials platform between the employees and any exterior fall hazard. The evidence establishes that the outriggers were configured differently during the second inspections; on June 24, the materials platform was level with the outrigger deck, exposing employees to the exterior fall.

This judge cannot find that the CO made any affirmatively misleading statements to Sommer regarding the use of catch platforms, and that no misrepresentations by OSHA preclude enforcement of the cited standard.

Willful

Facts

Sommer is a masonry contractor with extensive experience with scaffolding (Tr. 210). Sommer was previously cited by OSHA for violation of the standard at issue here (Tr. 210, 231).

Kevin and Mike Sommer, Sommer's vice president and president, respectively, testified that they were familiar with §1926.451 from reading the standard, and from encounters with OSHA (Tr. 283, 289, 387). Both Sommers stated, however, that they believed the standard requires that guardrails be installed only where employees worked more than ten feet above any surface (Tr. 293, 382). Both testified that they believed the planking on the main scaffold provided fall protection, and eliminated employee exposure to the fall hazard the standard was intended to address (Tr. 285, 290). Nonetheless, Sommer's published policy was to erect guardrails on all openings, open sides and ends of every working platform six feet above the adjacent floor or platform (Tr. 293, 422-23; Exh. C-9).

James Stubbs testified that on the afternoon of June 23 he directed Mike Sommer to get guardrails up on the north side outrigger platform, where employees would be

working next (Tr. 49-51, 55). Railing was installed on the north side (Tr. 56). M. Sommer testified, however, that he did not believe Stubbs was relying on OSHA regulations (Tr. 375), and that it was merely company policy to provide additional protection against the 6 foot fall (Tr. 396).

Sommer had only enough guardrails to guard the scaffolding on two sides of the building (Tr. 57, 378). On June 24, Mike Sommer instructed Dave Glissmeyer, the Sommer employee supervising the crew (Tr. 153) to move the guardrails from the east side around to the areas where work was being performed (Tr. 304-06, 377). This was never done. Glissmeyer told CO Mahlum that he was concerned with the grout setting up before it was applied and decided not to take the time to move the guardrails (Tr. 154-55). At hearing, however, Glissmeyer stated that he initially intended to move the guardrails around as instructed, but in the press of work didn't get around to it (Tr. 310). Glissmeyer testified that he was not familiar with the cited standard (Tr. 319).

Discussion

The Commission has held that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). A violation is not willful, however, if the employer had a reasonable good faith belief that the violative conditions conformed to the requirements of the Act. The test of good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances. *Id.* Based on Sommer's previous citation for violation of the same standard, its experience in the industry, the fact that the scaffold platform did not eliminate the exterior fall hazard, and looking to the unambiguous language of the standard itself, the undersigned finds that Sommer's position, that it need not comply with the standard where its employee's work platform was less than 10' above a catch platform, is unreasonable.

This judge finds that Sommer's unreasonable interpretation of the cited standard is, however, insufficient, in and of itself, to establish a pattern of willful conduct. Sommer's stated policy was to guard each of the fall hazards cited, and the evidence establishes that guarding was intended, and partially provided in all three of the instances cited.

Complainant failed to produce any additional evidence tending to show that Sommer's failure to guard the hazards cited in items 1(a) and 1(b) resulted from Sommer's intentional disregard for either the requirements of the Act or for employee safety. The undersigned cannot, therefore, find that those instances were "willful."

In regard to item 1(c): The undersigned finds the evidence of Glissmeyer's contemporaneous, signed statement compelling, and credits the evidence establishing that on June 24, despite admonitions from his employer to move the guardrails around to the side where employees would be grouting, Dave Glissmeyer, Sommer's supervising employee, made a conscious decision not to do so. His decision was based on the possibility that Sommer's grout delivery would harden before the guardrails could be moved.

The Commission has held that an employer is responsible for the willful nature of its supervisors' actions where preventable. *Secretary of Labor v. Tampa Shipyards, Inc.* 15 BNA OSHC 1541, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). Sommer failed to demonstrate that it made any efforts to familiarize its supervisory personnel with the OSHA standards governing the work they were performing. Supervisor Glissmeyer's conduct is, therefore, imputed to Sommer, and that cited instance is deemed willful.

Penalty

Three employees were exposed to the inadequately guarded window openings for approximately 30 to 40 minutes (Tr. 369). Mahlum testified that a 17 foot fall would most likely have resulted in fractures, and possibly death (Tr. 132-33). At least three employees were exposed to the 38 foot exterior fall hazard on June 23 and 24 (Exh. C-1, C-3 through C-7). Mahlum testified that the likelihood of an employee tripping and falling is greater where the employee is walking backwards with a grout hose over his shoulder and trailing at his feet (Tr. 235). The exterior fall hazard was substantially mitigated, however, by the presence of Sommer's scaffold platform six feet below the outrigger platform.

Taking into account the relevant factors, the undersigned finds that the proposed penalty of $50,000.00 is excessive. Complainant based its penalty on three instances of willful conduct; the evidence establishes that only one of the instances was, in fact, willful. Moreover, Complainant failed to take into account the substantial alternative protective

measures installed by Sommer, and so considerably overstates the gravity of the cited violation. A penalty of $7,500.00 is deemed appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

Order

1. Serious citation 1, item 1, alleging violation of §1926.451(d)(10) is AFFIRMED as a "willful" violation, and a penalty of $7,500.00 is ASSESSED.

Benjamin R. Loye
Judge, OSHRC

Dated: December 16, 1994