UNITED STATES OF AMERICA
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SECRETARY OF LABOR
Complainant,
v.
JOHN J. SMITH MASONRY CO.
Respondent.

OSHRC DOCKET
NO. 92-2583

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 August 5, 1993. The decision of the Judge will become a final order of the Commission on September 7, 1993 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 August 25, 1993 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:

Daniel J. Mick, Esq.
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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: August 5, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-2583

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. JOHN J. SMITH MASONRY CO., Respondent.	OSHRC DOCKET NO. 92-2583

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Evert H. Van Wijk, Esq., Office of the Solicitor,
U. S. Department of Labor, Kansas City, Missouri

For the Respondent:

W. Dudley McCarter, Esq., St. Louis, Missouri

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, John J. Smith Masonry Co. (Smith), at all times relevant to this action maintained a worksite and place of business at the Cervantes Convention Center, St. Louis, Missouri, where it was engaged in masonry contracting. Smith admits it is an employer

engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 11).

On June 8, 1992, an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) conducted an inspection of Smith's Cervantes Center worksite (Tr. 20). Following the inspection, Smith was issued "serious" citation 1 alleging violations of 29 CFR §§1926 *et seq.* together with proposed penalties. Smith filed a timely notice of contest to all items cited, bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

On May 5, 1993, a hearing was held in St. Louis, Missouri on the contested items. At the hearing, item 1 of the citation was withdrawn (Tr. 7). Remaining at issue are alleged violations of §1926.451(a)(3), (e)(5) and (e)(10). The time permitted for submission of briefs has elapsed, and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 2 states:

2
29 CFR 1926.451(a)(3): Each scaffold was not erected, moved, dismantled, or altered under the supervision of competent persons.

(a) At the site; a mason frame manually propelled scaffold four sections high; the frame sections were not fastened to the coupling pins.

Serious citation 1, item 3 states:

3
29 CFR 1926.451(e)(5): A ladder or stairway affixed or built into manually propelled mobile scaffold(s) was not provided for proper access and exit:

(a) At the site, where employees accessed the working platform of a mason frame scaffold by climbing the end frames of the scaffold: the end frames were not arranged in such a way that they formed a continuous series of steps from the scaffold's top to its bottom.

Serious citation 1, item 4 states:

4
29 CFR 1926.451(e)(10): Standard guardrails and toeboards were not installed at all open sides and ends on manually propelled mobile scaffold(s) more than 10 feet above the ground or floor:

(a) At the site, for a mason frame manually propelled scaffold; no end rails or toeboards were installed for employees on the working platform, approximately 17 feet above the ground.

Facts

On June 8, 1992, from 1:22 p.m. to 1:23 p.m., OSHA CO Robert Mercer observed and videotaped two Smith employees, Corey Corcoran and Rod Gilmore, working from a scaffold at Smith's Cervantes worksite replacing a limestone sill on a window (Tr. 40-41, 81, 152-53, 160; Exh. C-1). At 1:47 p.m. and 1:56 p.m. Mercer again photographed the employees standing on the scaffold (Tr. 26-27, 37; Exh. C-2, C-8). The material platform of the scaffold was approximately 18 feet, 6 inches high; the work platform 17 feet 3 inches (Tr. 51). The employees were observed moving about both platforms (Exh. C-1).

Alleged Violation of §1926.451(a)(3)

The cited standard requires that "no scaffolds shall be erected, moved, dismantled, or altered except under the supervision of competent persons."

The Secretary bases its contention that no competent person supervised the erection of the cited scaffolding on Smith's failure to lock the panels of the scaffold together vertically. Section 1926.451(d)(6) requires that pins or other equivalent suitable means be used to secure scaffold sections vertically "where uplift may occur."[1]

It is undisputed that locking pins located at the corners of each frame section were not affixed to the adjoining section above (Tr. 42, 44, 48; Exh. C-3). CO Mercer testified that uplift may be caused by high winds, or by the boom or load of hoisting machinery nearby, which might pull a section of the scaffolding off the lower segments (Tr. 43; *see also*, testimony of Edward Thomure, Tr. 240).

Mercer admitted that there was no wind, and that the weather did not pose a lifting hazard on the day of the inspection (Tr. 121-23). A Lull lift was operating at the time of the inspection, lifting stone over the scaffold to the sill (Tr. 50, 119, 164-65, 250; Exh. C-5). Corcoran testified that "it was kind of tight back there," and that the boom would come within three to four feet of the scaffold (Tr. 165). Arthur Siebert, Smith's foreman, testified,

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1 Smith was not charged with violation of §1926.451(d)(6).

however, that the boom cleared the scaffold by six or seven feet and that he did not believe that there was any realistic probability or likelihood that the arm of the lull could uplift any portion of the safety platform (Tr. 216, 222).

Siebert testified that he is familiar with the safety rules for steel frame shoring and scaffolding (Tr. 190), and that he has attended a number of scaffold seminars conducted by the mason contractors of St. Louis and John Smith Masonry, as well as OSHA's certification program (Tr. 191).

The record fails to disclose whether Mr. Siebert supervised the erection of the cited scaffold.

Discussion

The Secretary, on this issue, failed to set forth evidence necessary to make out her prima facie case.

At the hearing, the Secretary introduced evidence of Smith's alleged violation of §1926.451(d)(6). A perceived violation of the scaffolding erection standards, however, does not, in itself, prove a violation of the competent person requirement. The alleged violation is only some evidence tending to show that the employer's supervisory personnel was "[in]capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." *See,* §1926.32(f) *Definitions.*

In this case, the Secretary did not identify the supervisor in charge of scaffold erection. This judge cannot pass on the competence of person or persons unknown. Citation 1, item 2 will, therefore, be vacated.

Further, this judge finds that even if Foreman Siebert's responsibility for scaffold erection could be inferred from the record, the evidence does not show that Siebert was not "competent" under the cited standard. The testimony establishes only that Siebert disagreed with the CO as to the probability of uplift occurring under the existing conditions, and not

hazards or that he was unfamiliar with OSHA scaffolding regulations or accepted safety practices in the masonry industry.[2]

Alleged Violation of §1926.451(e)(5)

The cited standard provides that for manually propelled mobil scaffolds:

> A ladder or stairway shall be provided for proper access and exit and shall be affixed or built into the scaffold and so located that when in use, it will not have a tendency to tip the scaffold. A landing platform must be provided at intervals not to exceed 35 feet.

It is admitted that the third section of the scaffold was erected upside down so that the built-in ladder on that section did not line up with the rest of the ladder (Tr. 68; Exh. C-5). The scaffold was originally set up in that manner so that the rungs would not interfere with a beam protruding from the wall at the earlier location (Tr. 157, 161, 177). There was no reason the third section could not have been turned over when the scaffold was moved from the original location (Tr. 187, 231-32).

Mercer observed and photographed a Smith employee climbing straight down the scaffold, reaching with his leg past the third section to the top rung on the second section 44 inches below (Tr. 69; Exh. C-6). Section 1926.1053, *et seq.*, dealing with ladder specifications, requires that rungs on fixed ladders shall be spaced not more than 14 inches apart.

Smith employees admitted that they used the scaffold to ascend to, and to descend from, the sill they were working on, but testified that they moved across the side of the scaffold to the next segment of built-in rungs before continuing their climb (Tr. 162, 166-67).

Discussion

The Secretary has established that the cited ladder failed to provide "proper access and exit" to and from the cited scaffold.

The Commission has held that the cited standard is not met merely by meeting the ladder specifications contained in §1926.1053 *et seq.* In *Bechtel Power Corporation*, 10 BNA

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[2] CO Mercer also testified that there were no horizontal diagonal bar, end rails, or secured planking on the scaffold (Tr. 136). The Secretary did not question Seibert on his knowledge of OSHA standards or industry safety practices concerning these deficiencies (Tr. 220-226). Mercer also noted that improper ladder access was provided (Tr. 136). Seibert was aware of the 18 inch requirement for rung spacing (Tr. 226).

OSHC 2003, 1989 CCH OSHD ¶26,261 (No. 77-3222, 1982), the Commission found that "the plain meaning of the standard is that safe access must be provided at all points between the lower elevation and the scaffold." *Id.* at 2006-07.

The offset rungs on the cited scaffold do not provide safe access for employees using it for access to and egress from their work area. An employee climbing quickly down the rungs might easily miss his footing, not remembering that the rungs on one side of the scaffold end halfway down. In addition, employees might be tempted to take the 44 inch gap in the rungs in one step, as the employee in Complainant's Exhibit 6, rather than crossing over to the other side of the scaffold.

This judge finds that the offset rungs did not provide safe access to the scaffold and that the Secretary therefore, has shown a violation of the cited standard. Citation 1, item 3 will be affirmed.

Alleged Violation of §1926.451(e)(10)

The cited section provides:

> Guardrails made of lumber, not less than 2x4 inches (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.

Arthur Siebert, Smith's foreman, testified that he advised Corcoran and Gilmore that the cited scaffolding was erected solely to provide fall protection, and that they were to work from the sill area itself, not from the platform (Tr. 203; Exh. R-6). Siebert had not seen the Corcoran and Gilmore working from the platform of the scaffold (Tr. 209).

Corcoran testified that he was not instructed to work from the scaffold (Tr. 153, 174), while Gilmore stated that he was specifically instructed not to work from the scaffolding (Tr. 184). Both felt that there was adequate room, 26 inches (Tr. 206), on the sill itself to perform the work required (Tr. 154, 175). Both stated that they worked from the sill, only using the scaffold platform for brief seconds to go around the other worker (Tr. 155, 167, 176).

Mercer testified that Siebert and Corcoran told him the sill job took approximately two hours (Tr. 129). Corcoran testified that he had been on the sill approximately an hour and a half at the time of the inspection (Tr. 164).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991)

Smith argues that the guardrail provisions of §1926.451(e)(10) are not applicable to the cited scaffold because the scaffold was not a working platform, but was placed below the sill solely as fall protection. Smith does not state a cognizable defense. The Commission has found that scaffolds used solely as fall protection remain subject to the fall protection provisions contained in §1926.451 *et seq.;* any other result would be anomalous. *National Industrial Constructor, Inc.*, 9 BNA OSHC 1871, 1981 CCH OSHD ¶25,404 (No. 76-891 & 76-1535, 1981). The cited standard, therefore, is applicable to Smith's scaffold, regardless of its intended use.

Complainant's videotape establishes that Smith's employees had access to the scaffold, i.e., that employees:

> "while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to the assigned workplaces, will be, are, or have been in a zone of danger."

Giles & Cotting, Inc., 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448 (No. 504, 1975). Smith's employees admitted they used the scaffold to access the sill, and, despite their assertions to the contrary, clearly used the cited scaffolding as a platform from which to perform their work, however briefly.

It is undisputed either that the cited scaffold was without guardrails or toeboards, or that Smith was aware of the scaffold's condition. The Secretary has thus established her prima facie case.

Employee Misconduct

Smith argues that the presence of its employees on the cited scaffolding was contrary to effectively communicated work rules and so was the result of unpreventable employee misconduct. Smith's contention is without merit.

Smith does not argue, and the record is devoid of any evidence that employees were instructed not to use the scaffold for access, or that any alternative means of reaching the sill was available. Corcoran's and Gilmore's presence on the scaffold, therefore, was not contrary to instructions and cannot be classified as misconduct. Moreover, because the absence of guardrails constituted a violation, regardless of whether the scaffold was a working space or a protective measure, Smith's intention to use the scaffold solely as a safety device cannot constitute a defense to the citation.

Penalty

Penalties of $700.00 for each violation were proposed. Smith is a small to medium size company, with 40 employees (Tr. 64). Smith has a good history with OSHA, with no "serious," "repeat," or "willful" citations in the prior three years (Tr. 65). Smith received a 15% reduction in the proposed penalty for its good faith, based on its formal safety and health program (Tr. 64). The gravity of the violation is moderately high. A fall from 17 to 18 feet from the top of the scaffold, or 10 to 14 feet from the ladder, could result in broken bones (Tr. 91)[3]; however, only two employees were exposed, and the length of exposure was brief. Moreover, CO Mercer felt that the working conditions were good and would not contribute to a fall (Tr. 92).

Taking into consideration the relevant factors, the undersigned finds that the proposed penalties are appropriate. A penalty of $700.00 per violation will be assessed.

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*

[3] The undersigned finds CO Mercer's testimony credible. Contrary to the assertions of Respondent, expert medical testimony is not necessary to establish the effect of a fall from a height.

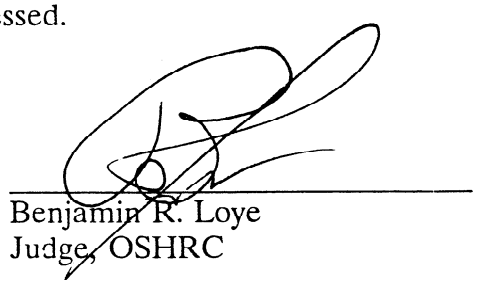
Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact or Conclusions of Law that are inconsistent with this decision are denied.

Order

1. Serious citation 1, item 2, alleging violation of §1926.451(a)(3) is VACATED.

2. Serious citation 1, item 3, alleging violation of §1926.451(e)(5) is AFFIRMED, and a penalty of $700.00 is ASSESSED.

3. Serious citation 1, item 4, alleging violation of §1926.451(e)(10) is AFFIRMED, and a penalty of $700.00 is assessed.



Benjamin R. Loye
Judge, OSHRC

Dated: July 30, 1993