



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, :
 :
 Complainant, :
 :
 v. : OSHRC Docket No. 92-2109
 :
 LAWRENCE B. WOHL, INC. :
 :
 Respondent. :
 :

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTROYA, Commissioners.

BY THE COMMISSION:

In this case we determine an appropriate penalty for two violations of standards governing mobile scaffold safety. The Secretary proposed a penalty of \$1,750 for item 1 involving unlocked casters, and \$1,750 for item 2 involving a missing midrail. The judge assessed a penalty of \$150 for item 1 and \$250 for item 2. For the following reasons, we find the appropriate penalties to be \$250 for item 1 and \$750 for item 2.

The scaffolds in question were in use at a waste-transfer station under construction in Yonkers, New York. Employees installed lathing and sprayed on fireproofing material from 3 x 6-foot mobile scaffolds 4 feet high. An employee on the ground would move and steady the scaffold, and sometimes mix material and ready supplies as well. On one floor, several wheels of a scaffold were unlocked, in violation of 29 C.F.R. § 451(e)(8),¹ exposing

¹The standard provides:

§ 1926.451 Scaffolding

(continued...)

one employee to a 4-foot fall. On another floor, the guardrail of a scaffold consisted only of a 36-inch-high top rail, with no midrail or toeboard, in violation of 29 C.F.R. § 1926.451(e)(10),² exposing two employees to as much as a 16 foot-fall (4 feet to an open-sided concrete floor on which the scaffold stood, plus 12 feet to the floor below).

Under section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission considers four factors in determining an appropriate penalty: the gravity of the violation, size, previous history, and the good faith of the employer. Gravity is normally the most important factor. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1972). In determining the gravity of a violation, the Commission takes into account such facts as (1) the number of employees exposed, (2) the duration of exposure, (3) the precautions taken against injury, and (4) the degree of probability that any injury would occur. See *Quality Stamping Products Co.*, 16 BNA OSHC 1927 (No. 91-414, 1994).³

¹(...continued)

.....

(e) *Manually propelled mobile scaffolds.*

(8) Scaffolds in use by any persons shall rest upon a suitable footing and shall stand plumb. The casters or wheels shall be locked to prevent any movement.

²The standard provides:

§ 1926.451 Scaffolding

.....

(e) *Manually propelled mobile scaffolds.*

(10) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail, of 1 x 6 lumber (or other material providing equivalent protection, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

³The severity of an injury, if an accident were to occur, is already established in the process of characterizing the violation as a serious one. Mr. Wohl admitted that someone who fell 16 feet could be seriously hurt. The judge mentioned on the record that he believed the 4-foot fall hazard, while serious, was “not too dangerous,” but had a “certain element of danger in it.”

The Secretary's proposed penalties in this case are based largely on the opinion of a compliance officer who thought an accident was not unlikely. The compliance officer testified, however, that "there's a good likelihood" of an employee suffering fatal injuries from falling 16 feet. He also testified that "knowing the type of work, since they're working on a scaffold near an open edge on the one scaffold, the other one they're doing the spray thing, the scaffold can shimm[y] and move, the wheels being knocked[,] the probability of them losing their balance or having the scaffold move and them being pitched from it was greater"

The judge's reasons for lowering the penalties proposed by the Secretary are not entirely clear. He did not expressly hold that an accident was improbable. Nor does it appear that his determination was based on a credibility assessment in which he believed the employer over the compliance officer.

While we agree with the Secretary that the judge's decision is not as explicit as it might have been, we agree with the judge's implicit finding that an accident was relatively improbable. The first scaffolding was not high, an employee stationed below helped maintain stability, and the one locked wheel provided some measure of protection. The second scaffolding exposed two employees to a possible 16-foot fall but was equipped with a single guardrail. The preponderance of the evidence does establish that if an accident occurred it would have serious consequences, but the evidence does not support a finding that there was a high probability of an accident occurring. In light of the employer's partial compliance with the standards, the fairly technical nature of the violations, and the kind of fall hazards involved here, the probability of a serious accident occurring was slight. Based on these factors, we conclude that the gravity of the violations was low to moderate. The Secretary extended full credit for good faith, size and history and we find nothing in the record to suggest otherwise. We therefore conclude that on balance a penalty of \$250 is appropriate for item 1 and \$750 is appropriate for item 2.

ORDER

Accordingly, we affirm item 1, a violation of 29 C.F.R. § 1926.451(e)(8), and assess a penalty of \$250; and we affirm item 2, a violation of 29 C.F.R. § 1926.451(e)(10), and assess a penalty of \$750.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: December 30, 1994

Docket No. 92-2109

NOTICE IS GIVEN TO THE FOLLOWING:

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Lawrence B. Wohl, President
Lawrence B. Wohl, Inc.
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Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
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SECRETARY OF LABOR
Complainant,
v.
LAWRENCE B. WOHL, INC.
Respondent.

OSHRC DOCKET
NO. 92-2109

**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 June 4, 1993. The decision of the Judge will become a final order of the Commission on July 6, 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 June 24, 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
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

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.
Executive Secretary

Date: June 4, 1993

DOCKET NO. 92-2109

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 SECRETARY OF LABOR,

Complainant,

v.

LAWRENCE B. WOHL, INC.,

Respondent.

Docket No. 92-2109

Appearances:

Mark A. Holbert, Esq.
 U.S. Department of Labor
 New York, New York
 For the Complainant

Lawrence B. Wohl, President
 Lawrence B. Wohl, Inc.
 Port Chester, New York
 For the Respondent

Before: Administrative Law Judge Irving Sommer

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. *et seq.*, hereafter called the "Act").

Following an inspection of the Respondent's business site at Exit 6 West New York State Thruway in Yonkers, New York, the Secretary issued two citations charging violations as follows:

Citation no. 1 alleged a serious violation of 29 CFR 1926.451(e)8), and Citation no. 2 alleged a serious violation of 29 CFR (e)(10).

The Respondent filed a timely notice of contest placing in issue all items in the citations. A hearing was held in New York, New York. All parties were represented and filed post hearing briefs. No jurisdictional issues are in dispute, the parties

having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and the subject matter.

BACKGROUND

Lawrence B. Wohl, Inc. is a New York corporation with its principal office and place of business in Port Chester, New York. The corporation is engaged in the business of fireproofing and related activities. The inspection herein was conducted on May 21-22, 1992 at a waste transfer station in Yonkers, New York wherein the Respondent was a subcontractor on a job being carried out.

DISCUSSION

Alleged Violation of 29 C.F.R. 1926.451(e)(8)

The Secretary alleges that Respondent violated Section 1926.451(e)(8) by allowing employees to work on manually propelled mobile scaffolds whose wheels were not locked to prevent movement.

Section 1926.451(e)(8) provides:

(e) Manually propelled mobile scaffolds.

(8) Scaffolds in use by any persons shall rest upon a suitable footing and shall stand plumb. The casters or wheels shall be locked to prevent any movement.

In this case we have unrefuted testimony of the compliance officer that employees of the Respondent were working on mobile scaffolds at two different locations, i.e., the 2nd and 3d levels of a waste transfer station (Respondent describes the locations as the 2nd and ground levels), at which time the wheels of the scaffolds were not locked as required. Specifically, on the 3d level there was one wheel unlocked, and on the 2d level all four wheels of the scaffold were unlocked. One employee working on the 2nd level scaffold was subject to a four foot fall, and two employees on the 3d level scaffold were subject to a sixteen foot fall. The Respondent had full knowledge of the violations since a foreman was located in both areas and knew of these conditions. Moreover, the cited standard clearly required that casters or wheels on said mobile scaffolds must be locked to prevent

movement, and the existence of a hazard must be presumed when noncompliance is shown, as herein. Respondent's violation of the standard at 1926.451(e)(8) has been established.

There was always the possibility that if the scaffold suddenly moved or jerked while the employees were working thereon they could be thrown resulting in a four foot or sixteen foot fall. The likely result of such a happening could be serious physical injury and even death. Respondent's violation was serious.

Alleged Violation of 29 C.F.R. 1926.451(e)(10)

The Secretary alleges that the Respondent violated Section 1926.451(10) for its failure to have guardrails installed at all open side on a manually propelled mobile scaffold more than 10 feet above the ground or floor.

Section 1926.4519E)(10) provides:

(e) Manually propelled mobile scaffolds.

(10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), 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 side and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

Hereto, the unrefuted testimony of the compliance officer established that the mobile scaffold at the 3d level upon which he noted two employees working did not have the guardrails required by the standard, thusly exposing the employees to a fall of more than 10 feet to the ground. The compliance officer stated there was a potential fall hazard of 16 feet. The evidence further demonstrates that the Respondent had actual knowledge that the necessary guardrails were missing. His non-compliance with Section 1926.451(e)(10) was proven. A fall from such a height could likely result in serious injury or death. Respondent's violation was serious.

PENALTY DETERMINATION

The Commission is the final judge of penalties in all contested cases. *Secretary v. OSAHRC and Interstate Glass Co.*, 487 F2d 438 (8th Cir. 1973). Respondent had three employees working on the scaffolds. There is no evidence of a history of prior violations. Moreover, the evidence shows there was a employee assigned adjacent to the scaffolds to help maintain their stability. The gravity of the violations is moderate to severe. After due consideration of the relevant factors, it is determined that the following are appropriate penalties:

Item 1	\$150.00
Item 2	\$250.00

FINDINGS OF FACT AND CONCLUSIONS OF LAW

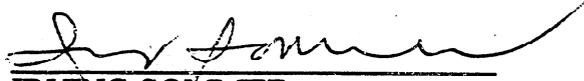
The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

In view of the foregoing and good cause appearing in support of the determinations, it is ORDERED; That the allegations and proposed penalties set forth in the serious citation issued to Wohl are modified and affirmed as follows:

Serious Citation no. 1, item 1 - Affirmed with an assessed penalty of \$150.00.

Serious Citation no. 1, item 2 - Affirmed with an assessed penalty of \$250.00.


IRVING SOMMER
Judge

DATED: **JUN - 2 1993**
Washington, D.C.