

Joseph Watson, d/b/a Joseph Watson Masonry
OSHRC Docket No. **00-1726**

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Joseph Watson, d/b/a Joseph Watson Masonry (JWM), contests three citations and penalties issued by the Secretary on August 25, 2000. The citation alleges that JWM committed serious, willful, and repeated violations of construction standards while acting as the masonry subcontractor on a barracks complex construction project in Savannah, Georgia, in February 2000.

Item 1 of citation no. 1 alleges a serious violation of § 1926.20(b)(1) for failing to initiate and maintain a safety program at the worksite. Item 2a alleges a serious violation of § 1926.502(b)(1) for failing to maintain the top rails of its guardrail systems at least 39 inches above the working level exposing employees to fall hazards greater than 11 feet. Item 2b alleges a serious violation of § 1926.502(b)(2)(i) for failing to maintain midrails of its guardrail system between 19.5 and 21 inches above the working level. Item 2c alleges a serious violation of § 1926.502(b)(9) for failing to place flags with high visibility materials at no more than 6 foot intervals on wire rope used for top rails.

Item 1a of citation no. 2 alleges a willful violation of § 1926.451(e)(1) for failing to provide ladders or other means of safe access and egress for employees performing masonry work on scaffolding. Item 1b alleges a willful violation of § 1926.451(g)(4)(i) for failing to provide standard guardrails or other means of fall protection for employees performing masonry work on scaffolding.

Item 1 of citation no. 3 alleges a repeated violation of § 1926.451(c)(2) for failing to erect a scaffold using base plates and mud sills. Item 2 alleges a repeated violation of § 1926.451(f)(7) for failing to erect scaffolds under the supervision of a competent person. Item 3 alleges a repeated violation of § 1926.454(a) for failing to provide safety training in scaffolding.

JWM's general contractor on the project was Metric Constructors, Inc. The Secretary issued one citation to Metric arising from the same inspection alleging serious violations of the construction standards (Docket No. 00-1930, Decision to be filed January 24, 2002).

A consolidated hearing was held in Savannah, Georgia, on January 31, and February 1 and 2, 2001; and in Atlanta, Georgia, on February 15 and 16, 2001. The parties stipulated jurisdiction and coverage (Tr. 6).

JWM denies the Secretary's charges and asserts it lacked knowledge of any OSHA standards being violated by its employees. For the reasons discussed below, item 1 of citation no. 1, item 1a of citation no. 2, and item 2 of citation no. 3 are vacated. Items 2a, 2b and 2c of citation no. 1 are affirmed. Item 1b of citation no. 2 is affirmed as serious. Items 1 and 3 of citation no. 3 are affirmed.

Background

Pursuant to a contract with the United States Army Corps of Engineers (Corps), Metric began construction in September 1998 of a barracks complex at Hunter Army Air Field in Savannah, Georgia. Metric hired JWM to perform the masonry and brickwork. Metric's contract with the Corps required it to conduct daily inspections (Tr. 82, 100, 145, 404, 561). Metric had three employees on the site: project superintendent Tony Pittman, chief of quality control Robert Garcia, and carpenter and brick mason Lucky Caswell (Tr. 44, 243, 316, 831).

The project involved the construction of three three-story barracks buildings (buildings 310, 311, and 313) and a service community building (building 312). Each building is approximately 60 yards long and 20 yards wide.

Subcontractor JWM began installing the brick exterior on the buildings in August 1999. JWM owner Joseph Watson supervised the brick work for the first three months. In December, Watson left the site to start another project in Atlanta. After that, Watson visited the site each

month for approximately 2 days. JWM foreman Jesse Fowler supervised JWM's employees on the site. JWM had approximately 20 employees (masons and laborers) on the project. Some of the employees were newly hired through the Savannah newspapers solely for the barracks project (Tr. 52, 55, 63-64, 340).

The Corps inspected the project daily for progress and quality, as well as for safety hazards (Exhs. R-1 through R-20). Fred Gotthardt, Corps supervising project engineer, performed the inspections, assisted by Steve Bentley and Christopher Pruitt (Tr. 79, 402, 476). When Gotthardt performed the inspections, he was accompanied by Metric's Pittman or Garcia, or both. If the inspection involved masonry work, JWM foreman Fowler participated in the inspection.

Gotthardt found repeated safety problems with the scaffolding and fall protection for the employees (Exhs. C-4 through C-18). Gotthardt noted the problems in the Corps's daily reports and informed Metric's representatives of what he found.

On February 29, 2000, Occupational Safety and Health Administration (OSHA) compliance officer Xavier Aponte conducted a programmed, planned inspection of the project. Aponte arrived at the site at approximately 10:00 a.m. He conducted an opening conference with Garcia, performed a walkaround inspection, and interviewed employees. As a result of Aponte's inspection, the Secretary issued the citation that gave rise to this case (Tr. 558-560).

Citation No. 1

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1926.20(b)(1)

The Secretary alleges that JWM committed a serious violation of § 1926.20(b)(1), which provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

On direct examination, Aponte initially testified that he had asked JWM owner Joseph Watson and JWM foreman Jessie Fowler if JWM “had any kind of work rule or procedures of inspections, training, or any kind of safety program and there was none” (Tr. 673-674). When asked specifically about Fowler’s statement regarding a safety program, Aponte stated, “[Fowler] indicated he didn’t know. He was not aware of the existence of any kind of guidelines, regulations, work rules or policies in his company, and he had never seen any kind of recent document or recent safety program” (Tr. 674).

Fowler contradicted Aponte at the hearing. He stated that he had a copy of the safety program on site in his truck at the time of Aponte’s inspection. Fowler testified that he did not provide Aponte with a copy of the safety program because Aponte did not ask for it (Tr. 395).

Aponte also stated that Watson told him that JWM did not have a safety program (Tr. 674). Watson contradicted Aponte while corroborating Fowler’s statement that JWM did have a safety program and that it was on site at the time of Aponte’s inspection. Watson stated that he informed Aponte that the safety program was on site (Tr. 35).

Aponte failed to document the alleged statements made by Fowler and Watson admitting JWM had no safety program (Tr. 713). On cross-examination, Aponte conceded that Watson told him later in his interview with him that JWM did have a safety program. Aponte’s testimony on this point demonstrates the tenuousness of the Secretary’s case (Tr. 717-718):

Q.: Did you believe that Joseph Watson had been on site for September, October, November, December, January and February with the Corps doing two inspections a day without having a written safety and health program in the office?

Aponte: None was provided to me when I asked for one on the day of the inspection.

Q.: So, the reality is, Mr. Aponte, that you cited Joseph Watson and proposed a citation for \$4,000.00 because they didn’t give you a safety and health program; is that not true?

Aponte: No, sir.

Q.: They told you they had one, correct?

Aponte: They told me that they had one.

Q.: And they told you they had one; did they not?

Aponte: Later, they did have one.

At the hearing, JWM produced a safety program (Exh. R-26). The Secretary alleges no faults with the actual program.

The Secretary failed to establish that JWM did not have a written safety program on site on the day of Aponte's inspection. JWM's owner and its foreman both testified that the safety program was on site and that Aponte did not ask for a copy of it. Aponte gave contradictory testimony, first asserting that Watson told him that JWM did not have a safety program, then stating that later Watson told him that JWM did have one. While Aponte failed to document in his inspection notes the statements on which he based his recommendation for citing JWM for violating § 1926.20(b)(1), he did document Watson's statement that JWM had a safety program. The Secretary gave no explanation for the discrepancies in Aponte's notes. The Secretary's evidence is insufficient to support a finding of a violation of § 1926.20(b)(1).

Item 1 is vacated.

Items 2a, 2b, and 2c: Alleged Serious Violations of §§ 1926.502(b)(1), (b)(2)(i), and (b)(9)

The Secretary alleges that JWM violated §§ 1926.502(b)(1), (b)(2)(i), and (b)(9), which provide:

(b) *Guardrail systems.* Guardrail systems and their use shall comply with the following provisions:

(1) Top edge height of top rails, or equivalent guardrail system members, shall be 42 inches (1.1 m) plus or minus 3 inches (8 cm) above the walking/working level. When conditions warrant, the height of the top edge may exceed the 45-inch height, provided the guardrail system meets all other criteria of this paragraph.

...

(2) ...

(i) Midrails, when used, shall be installed at a height midway between the top edge of the guardrail system and the walking/working level.

...

(9) Top rails and midrails shall be at least one-quarter inch (0.6 cm) nominal diameter or thickness to prevent cuts and lacerations. If wire rope is used for top rails, it shall be flagged at not more than 6-foot (1.8 m) intervals with high-

visibility material.

Aponte found several defects in the guardrails erected on the scaffolds located at buildings 311 and 313. JWM argues that its employees were not supposed to be working on building 311 the day of the OSHA inspection, and thus it lacked knowledge that employees were being exposed to violative conditions there. This argument is rejected. JWM's employees were working in plain view all morning on the scaffolds. Aponte videotaped the employees on the scaffolds before he began his inspection. JWM was aware that employees were working on scaffolds at building 311.

On February 29, 2000, JWM employees were working on the second and third floors of the east side of building 313, and on the second and third floors of the east side of building 311. They were working more than 12 feet above the ground (Exh. C-22; Tr. 672, 776). The top rails and the midrails of the guardrail system consisted of steel cables. Aponte took a series of measurements of the guardrails on the breeze ways on the east sides of buildings 313 and 311. The top rails were between 34 and 38 inches high and the midrails were between 17 and 19 inches high (Tr. 664-669). The steel cables did not have any flagging or any other type of highly visible material (Exh. C-25; Tr. 671). Bentley testified that the Corps had ongoing problems with the steel cables not having enough tension in them. He stated that the cables "were usually sagging or laying on the ground." Bentley had discussed the problem with Fowler (Tr. 407).

The Secretary has established serious violations of §§ 1926.502(b)(1), (b)(2)(i), and (b)(9). Items 3a, 3b, and 3c are affirmed.

Citation No. 2

Item 1a: Alleged Willful Violation of § 1926.451(e)(1)

The Secretary alleges that JWM committed a serious violation of § 1926.451(e)(1), which provides:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as a means of access.

The citation alleges two instances of violative conditions:

a) At the construction site, Bldg. 311, east - Employees were exposed to fall hazards while performing masonry work on the 3rd level (and above) of a scaffold that was not provided with ladders or any other means of safe access/egress, on or about 02/29/00.

b) At the construction site, Bldg. 311, west - Employees were exposed to fall hazards while performing masonry work on the 2nd level of a scaffold that was not provided with ladders or any other means of safe access/egress, on or about 02/29/00.

As expressed in the language of § 1926.451(e)(1), OSHA permits the use of hook-on ladders, the tops of which are flush with the working surface of the scaffold. JWM contends that the Corps's regulations require that access ladders extend two feet above the working surface (Tr. 501), but Gotthardt and Bentley both denied that the Corps prohibits the use of hook-on ladders or that they informed Metric and JWM that it did (Tr. 86, 420).

Based on its belief that Corps regulations prohibited hook-on ladders, Metric built its own ladders (Tr. 327). Garcia testified that "the Corps didn't really like them and kept saying, 'We would like the store-bought ones.' So we said, 'All right, fine. We'll use both. Let's go ahead and buy some more ladders'" (Tr. 327-328). Metric purchased ladders to be used with the scaffolds (Exh. R-28).

The record establishes both that Metric provided ladders for access to the scaffolds, and that the Corps had ongoing problems with JWM's employees failing to use the ladders. Gotthardt stated (Tr. 86):

I had had numerous discussions with regard to ladders [prior to February 29, 2000]. As scaffolds would be moved from one location to another, the ladders seemed like they wouldn't move with the scaffolds, and about the time that we would get the scaffold or the contractor would get the scaffold set up properly with all the ladders and so forth, they would finish their work in that area, and they would start moving to another location.

Gotthardt had "numerous discussions" with Garcia and Pittman "over the period of time before" the OSHA inspection (Tr. 86).

The Secretary's basis for citing item 1 appears to have changed between the date the citation was issued and the date of the hearing. Each instance of item 1 in the citation charges JWM with a violation of § 1926.451(e)(1) for permitting employees to work on "a scaffold that was not provided with ladders." At the hearing, compliance officer Aponte conceded that the

scaffolds were provided with ladders.

Aponte testified that he observed two job-made ladders leaning against the scaffolds that are the subject of this item. It was Aponte's opinion that the job-made ladders were structurally defective (Exhs. R-27, R-31; Tr. 562-564, 590-591). The Secretary's examination of Aponte led to some confusion regarding where the alleged violation occurred, with Aponte contending that the adequacy of the ladders was at issue:

Q.: Was this ladder a part of any of the violations that you had found?

Aponte: There were some problems with the ladder. So one of the job-made ladders that had some structural defects on it [sic]. It did not have any supports or filler blocks between the cleats.

Judge Welsch: The question she asked was: Is that ladder that's depicted at that portion of the video part of any of the alleged violations that you cited in this case?

Aponte: Yes.

Judge Welsch: Do you know which one?

Aponte: That would be the citation for 451(e)(1). . .

Q.: Do you have any knowledge as to whether employees used this ladder?

Aponte: No, ma'am.

(Tr. 591).

Counsel for JWM objected to the Secretary's further examination of Aponte regarding the adequacy of the ladders, stating that JWM had not been cited for having inadequate ladders. Counsel for the Secretary agreed, stating, "[W]e're not citing the ladder standard. We're citing the safe access standard" (Tr. 593). Counsel for the Secretary expressly declined to amend the item to cite a more specific ladder standard (Tr. 596-597). Counsel for the Secretary did move to "amend the complaint to conform to the evidence," allowing consideration of the condition of the ladder when determining whether JWM violated § 1926.451(e)(1), instead of whether any ladder had been provided at all. The court left this question open (Tr. 595-596).

In her subsequent case and in her post-hearing brief, the Secretary has failed to show that the presence of a defective ladder providing access to a scaffold can support finding a violation

of § 1926.451(e)(1). That standard requires that when scaffold platforms are more than 2 feet above or below the point of access, “ladders . . . shall be used.” If the Secretary had evidence that the ladders used were defective, she could have cited JWM under § 1926.1053, which contains detailed, specific requirements regarding the dimensions and load-bearing capacities of the ladder rungs, cleats, and steps.

The Secretary cited JWM for violating § 1926.451(e)(1), claiming that JWM failed to provide ladders to scaffolds being used by its employees on or about February 29, 2000. The record establishes that, on that date, ladders were provided for the scaffolds (Exh. R-27, R-31). Item 1a is vacated.

Item 1b: Alleged Willful Violation of § 1926.451(g)(4)(i)

Section 1926.451(g)(4)(i) provides:

Guardrail systems shall be installed along all open sides and ends of platforms.
Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

On the day of Aponte’s inspection, a JWM employee was performing masonry work from an outrigger section of a tubular welded frame scaffold without fall protection on the ends and sides of the platform. The scaffold was located on the west side of building 311. The employee was working approximately 12 feet above the ground (Exhs. C-23, C-24; Tr. 644, 647, 652).

On the east side of building 311, a JWM employee was mixing mortar on the third level of a tubular welded frame scaffold. He was approximately 18 feet above the ground. There was no fall protection provided for the outside of the scaffold (Exhs. C-22, C-25; Tr. 649, 672).

Another JWM employee was performing brick masonry work from an outrigger platform located adjacent to the second level of the tubular welded frame scaffold on the west side of building 311. There was no fall protection on the sides or ends of the platform. The employee was working approximately 12 feet above the ground (Exh. C-26; Tr. 651-652).

JWM argues that it did not have the requisite knowledge that its employees were using the scaffolds located at building 311. Aponte videotaped the worksite before he held his opening conference with JWM. The scaffolds with the employee working on them were in plain view (C-19; Tr. 575-578). Aponte observed Fowler supervising the masonry operations to the west

side of building 311. Fowler was in the “direct line of sight” of the masonry operation on building 311 when Aponte began his walkaround inspection (Tr. 682). Actual or constructive knowledge of a supervisory employee is imputed to the employer, and the Secretary makes a *prima facie* showing of knowledge by proving that a supervisory employee knew of a violation. *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598).

The Secretary has established a violation of § 1926.451(g)(4)(i). Item 1b is affirmed.

The Secretary charges that the Secretary’s violation of § 1926.451(g)(4)(i) is willful.

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.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 C.H. OSHA ¶ 30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff’d* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated). A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer’s efforts were not entirely effective or complete. *L.R. Willson and Sons, Inc.*, 17 BNA OSHC 2059, 2063, 1997 C.H. OSHA ¶ 31,262, p. 43,890 (No. 94-1546, 1997), *rev’d on other grounds*, 134 F.3d 1235 (4th Cir. 1998); *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 C.H. OSHA ¶ 27,893, p. 36,589 (No. 85-355, 1987). The test of good faith for these purposes is an objective one; whether the employer’s efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997); *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC at 2068, 1991-93 C.H. OSHA at p. 39,168; *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 C.H. OSHA at pp. 36, 589.

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

Most of the Secretary’s argument for a finding of willfulness in her post-hearing brief is predicated on the finding of a violation of item 1a of citation no. 2, for failing to provide ladders for scaffolds. Because item 1a is vacated, most of the Secretary’s argument is rendered moot. She does mention in connection with item 1b that JWM had received several warnings from the

Corps about ongoing deficiencies in its scaffolding guardrails.

This argument is rejected as a basis for finding the violation of § 1926.451(g)(4)(i) willful. The Corps has more stringent safety standards than does OSHA, so that not all of its warnings to JWM resulted from OSHA violations. The record establishes that JWM made good faith efforts to correct deficiencies in the guardrail system when they were noted. Gotthardt, referring to JWM, testified that, “I do not recall any time that I’ve asked them to fix something that they did not fix it” (Tr. 149). The nature of the masonry work was such that the scaffolds were rapidly erected, disassembled, and moved throughout the project. JWM’s failure to detect the guardrail violations the day of Aponte’s inspection reflects a lack of due diligence in monitoring the working conditions, a serious violation. It does not demonstrate a heightened awareness of the illegality of the violative conditions. The Secretary has failed to show either JWM’s conscious disregard for the requirements of § 1926.451(g)(4)(i), or its plain indifference to the safety of its employees.

Item 1b is affirmed as serious.

Citation No. 3

Item 1: Alleged Repeat Violation of § 1926.451(c)(2)

The Secretary alleges that JWM committed a repeat violation of § 1926.451(c)(2), which provides:

Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.

Aponte observed a scaffold on the east side of building 13. One of the legs of the scaffold rested on a base plate. Fully half of the base plate hung over the edge of the mud sill (Exh. C-32; Tr. 686). The configuration of the base plate and mud sill is self-evidently unstable.

JWM argues that the configuration of the base plate and mud sill does not in itself establish that the scaffolding was not bearing on an adequate firm foundation. JWM notes that it technically provided the required components of the standard, a base plate and a mud sill, and that the Secretary failed to prove that they did not provide a firm foundation. The company notes Aponte’s testimony that he shook the scaffold and it did not move (Tr. 802). JWM fails to note that a single man standing on the ground and shaking a scaffold that weighs several thousand pounds is unlikely to be able to move it. It is the weight and vibrations caused by several

employees working on the scaffold that cause concern.

The standard assumes that the required components will be used correctly. It would render the standard meaningless to require the use of base plates and mud sills and yet allow them to be configured in such a patently unsafe manner. Item 1 is affirmed.

The Secretary alleges that the violation is a repeat violation. A violation is considered a repeat violation under § 17(a) if, at the time of the alleged repeat violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary makes a *prima facie* showing of substantial similarity by establishing that both violations are of the same standard. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The Secretary cited JWM for violating the same standard on May 21, 1998 (Exh. C-33). JWM did not contest the citation, and it became a final order of the Commission (Tr. 7, 688). The Secretary has established a repeat violation of § 1926.451(c)(2).

Item 2: Alleged Repeat Violation of § 1926.451(f)(7)

Section 1926.451(f)(7) provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

Section 1926.450(b) defines a competent person as “one who is 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.”

Foreman Jessie Fowler was JWM’s designated competent person (Tr. 823). Fowler supervised JWM’s employees while they erected scaffolds. Fowler inspected the scaffolds after they were erected (Tr. 387-388).

The Secretary charges that Fowler was not qualified as a competent person based on his lack of formal safety training and the noncompliance of the scaffolds with the safety standards. Fowler conceded that he had never taken a class in scaffold safety training (Tr. 348).

The Secretary has failed to establish a violation of § 1926.451(f)(7). A competent person under this standard is not required to have taken a formal safety training class. At the time of the inspection, Fowler had 45 years of experience in erecting scaffolds (Tr. 348). He demonstrated in his testimony that he is capable of identifying existing and predictable hazards on scaffolds. The Secretary did not show that he was lacking in competency. Item 2 is vacated.

Item 3: Alleged Repeat Violation of § 1926.454(a)

Section 1926.454(a) provides:

The employer shall 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.

Watson testified that some of JWM's employees were hired locally in Savannah. He was not certain that all of the newly hired employees were trained in scaffold safety (Tr. 31-34). Aponte interviewed five of JWM's laborers, four of whom told Aponte that they had not received safety training relating to working on scaffolds (Tr. 699-708).

Metric held weekly safety meetings where various topics were discussed, including scaffold safety. Those attending the meetings signed signature sheets at the back of the dated meeting summary. It is noted that in the weeks before Aponte's February 29, 2000, inspection, the names of the employees who told Aponte they had not received training do not appear (Exh. R-25).

The Secretary has established a violation of § 1926.454(a). Despite JWM's claims that its employees attended Metric's weekly safety meetings, JWM offered no evidence that specific scaffold safety issues were discussed and adduced no documentation contradicting Aponte's testimony that four JWM laborers stated they had not received the required training. Item 3 is affirmed.

The Secretary had cited JWM for a violation of § 1926.454(a) on February 3, 1999 (Exh. C-34; Tr. 703). The citation became a final order (Tr. 7). The Secretary has established a repeat violation of item 3.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

JWM employed 10 to 30 employees at any given time. The company had 10 to 12 employees on the site at issue (Tr. 59). OSHA had cited JWM within the 3 years prior to the inspection (Tr. 703). JWM is given no credit for good faith because Corps's representatives experienced ongoing problems with JWM's enforcement of safety regulations.

The gravity of the violations of the guardrail standards is high. Employees were exposed to falls of 12 to 18 feet and were working with either inadequate fall protection or no fall protection. It is determined that the appropriate total penalty for items 2a, 2b, and 2c of citation no. 1 (for inadequate guardrails) is \$2,000.00. The appropriate penalty for item 1b of citation no. 2 (for no guardrails) is \$3,000.00

The gravity of the violation for failing to correctly use the base plate and mud sill is moderate. A penalty of \$3,000.00 is assessed for item 1 of citation no. 3. Failure to train employees in scaffold safety is a violation of high gravity. Untrained employees were exposed to falls of 12 to 18 feet, and were not provided with adequate fall protection. The penalty for the violation cited in item 3 of citation no. 3 is \$5,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Citation No. 1

1. Item 1, alleging a serious violation of § 1926.20(b)(1), is vacated.
2. Item 2a, alleging a serious violation of § 1926.502(b)(1), item 2b, alleging a serious violation of § 1926.502(b)(2)(i), and item 2c, alleging a serious violation of § 1926.502(b)(9), are affirmed and a total penalty of \$2,000 is assessed.

Citation No. 2

1. Item 1a, alleging a willful violation of § 1926.451(e)(1), is vacated.
2. Item 1b, alleging a willful violation of § 1926.451(g)(4)(i), is affirmed as serious and a penalty of \$3,000 is assessed.

Citation No. 3

1. Item 1, alleging a repeat violation of § 1926.451(c)(2), is affirmed and a penalty of \$3,000 is assessed.
2. Item 2, alleging a repeat violation of § 1926.451(f)(7), is vacated.
3. Item 3, alleging a repeat violation of § 1926.454(a), is affirmed and a penalty of \$5,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: January 24, 2002