

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street N.W., Ninth Floor  
Washington, DC 20036-3457

Secretary of Labor,

Complainant,

v.

Atlantic Heydt Corporation,

Respondent.

OSHRC Docket No. 02-1936

Appearances:

Jane Snell Brunner, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York  
For Complainant

Thomas J. Bianco, Esq., Kaufman, Schneider & Bianco, LLP, Jericho, New York  
For Respondent

Before: Administrative Law Judge Covette Rooney

**DECISION ON REMAND**

On May 7, 2004, the Review Commission remanded the captioned case for further proceedings. The Commission directed reconsideration of item 1 of citation no. 2, which the court had affirmed as a serious violation of § 1926.451(g)(2), based on Atlantic Heydt Corporation's (AHC's) failure to have a competent person determine the feasibility of providing fall protection.

Having reconsidered item 1 of citation no. 2, the court finds, for the reasons set out below, that AHC was not in violation of § 1926.451(g)(2).

**Item 1 of Citation No. 2: Alleged Violation of § 1926.451(g)(2)**

Section 1926.451(g)(2) provides:

Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees

erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

The court determined in her original decision that AHC failed to comply with the first sentence of this standard because its designated competent person was not, in fact, competent. In its remand order, the Commission states that neither the citation nor the complaint alleged that AHC failed to have a competent person make the feasibility determination. The court notes that item 1 of citation no. 2 originally alleged a violation of § 1926.501(b)(15), which has no requirement that a competent person determine feasibility. It is in the complaint that the Secretary cites in the alternative the violation of § 1926.451(g)(2). While the Secretary did not mention the competent person issue in the body of her complaint, she did raise the issue at the hearing and addressed it in her post-hearing brief.<sup>1</sup> AHC adduced evidence of its competent person training and submitted certificates confirming that some of its employees (not including Aleman) received such training (Exh. R-17; Tr. 638-639).

Be that as it may, the Commission has directed the court “to determine whether the Secretary established that respondent violated § 1926.451(g)(2) by not providing feasible fall protection.” The court will proceed to do so, now assuming that Aleman was competent to determine feasibility.

Under § 1926.451(g)(1), fall protection is required for all work activities on a scaffold, other than erecting and dismantling the scaffold, without regard to a competent person’s determination. Section 1926.451(g)(2), however, leaves the determination of feasibility during scaffold erection and dismantling to the competent person. Section 1926.451(g)(2) is a performance-based standard. As long as the

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<sup>1</sup> On pages 6 and 7 of her brief, the Secretary states, “The ways in which Mr. Aleman was not competent are staggering and are of particular concern because respondent’s competent person was the one who made the decision as to whether fall protection was feasible.” She accompanies this statement with footnote 13, which goes on for a page and a half detailing examples of Aleman’s incompetence. On pages 19 and 20 of her brief, the Secretary states with regard to § 1926.451(g)(2) that, “[T]he burden was on the respondent to establish (here, through its competent person) that fall protection was infeasible and/or caused a greater hazard.” She accompanies this statement with footnote 35, which states:

It is important to note that, in order to succeed respondent would have had to have a competent person making the determination. Here, the determination on feasibility was made every day by **respondent’s foreman, Mr. Aleman, who was in no way competent to do so.** See discussion supra, especially at footnote 13.

(Underlines in original, boldface emphasis added.)

competent person makes a reasonable determination regarding feasibility, the employer complies with the requirements of the standard. It would be contrary to the intent of the standard to permit the Secretary to second guess the determination by the competent person, unless it is shown to be unreasonable.

Aleman testified that he made a determination each day on the site whether or not it was feasible to use fall protection (Tr. 767). Aleman had his crew participate in a “mockup” at AHC’s yard in May 2002 to test compliance officer Reinhardt’s assertion that AHC could have tied off while working on the hoist tower. As the designated competent person, it was Aleman’s determination that use of the retractable lanyards and safety harnesses recommended by Reinhardt created tripping hazards, caused employees to get tangled up when their lines crossed, and posed a possible pendulum effect for employees who fell (Tr. 782-783, 789-790). The Secretary did not show that this assessment was unreasonable.

Infeasibility<sup>2</sup> and greater hazard<sup>3</sup> are affirmative defenses for which the employer has the burden of proof. These defenses are presumed to be available to the employer regardless of whether or not they are mentioned in a standard. Their inclusion, however, within the language of § 1926.451(g)(2) and the wording of the standard itself indicate that the burden of proof is shifted. By establishing that Aleman made a daily determination regarding the feasibility of fall protection, AHC has made a *prima facie* case that it complied with the standard. The Secretary can only show noncompliance by demonstrating that Aleman’s determination was unreasonable, *i.e.*, that fall protection was feasible. Thus the burden is on the Secretary to prove unreasonableness.

As noted, *supra*, the Secretary originally cited AHC for a violation of § 1926.501(b)(15). The Secretary stated in her post-hearing brief that she amended item 1 “protectively, since [AHC] had been arguing, as it argued at hearing, that the hoist tower complex was a scaffold. However, as the evidence

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<sup>2</sup> To establish the affirmative defense of infeasibility, an employer must show that (1) the means of compliance prescribed by the standard are technologically or economically infeasible, or necessary work operations are technologically infeasible after implementation; and (2) there are no feasible alternative means of protection. *V.I.P. Structuring*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

<sup>3</sup> To establish a greater hazard defense, the employer must demonstrate by a preponderance of the evidence that (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protection are unavailable; and (3) a variance was unavailable or inappropriate. *Seibel Modern Manufacturing & Welding Co.*, 15 BNA OSHC 1218, 1225 (No. 88-821, 1991).

adduced at hearing showed, the hoist tower was not a scaffold” (Secretary’s post-hearing brief, p. 14). Mistakenly assuming that the court would agree with her conclusion that the hoist tower was not a scaffold, the Secretary did not marshal an effective argument aimed at establishing AHC’s violation of § 1926.451(g)(2). The testimony she elicited at the hearing was in support of the theory that AHC had violated § 1926.501(b)(15). Sections 1926.501(b)(15) and 1926.451(g)(2) are distinctive standards addressing different conditions; the evidence required to establish one is not interchangeable with the other. Although the Secretary cited § 1926.451(g)(2) in the alternative, she made no real effort to prove the elements of that standard.

The Secretary called two expert witnesses, both of whom stressed the importance of pre-planning for fall protection long before the construction phase. At the time of the hearing, Martin Lalonde had been a fall protection instructor and consultant for a company called Fall Protection Group for 7 years. Before that, he worked for Gravitech Systems, which sells fall protection equipment. Fall Protection Group instructs workers, managers, and on-site safety personnel in fall protection. It develops written safety programs and procedures for employers (Tr. 297-298). Lalonde is qualified as a trainer at the OSHA Training Institute in Chicago in fall protection, which he teaches three to five times a year (Tr. 306). Lalonde was qualified as an expert in fall protection systems (Tr. 317).

Lalonde testified that employees working on the hoist tower complex could have used personal fall arrest systems as fall protection and that AHC could have achieved 100% tie-off, which is what AHC’s written safety program requires (Exh. R-20, pp. 8, 11, Exh. R-21, p. 5; Tr. 404-405).

Lalonde testified that AHC should have pre-planned for fall protection before it began erecting the hoist tower (Tr. 462-465). He stated that, rather than erecting the hoist tower several stories at a time, it was necessary for AHC to erect the hoist tower one level at a time (Tr. 320-323). Lalonde testified (Tr. 323-324):

The type of fall protection that’s feasible is called a fall arrest system and it’s based, obviously, once again, on an anchor, connector, and a harness. So if you were to build a four-pole system one story at a time what that does now is it creates a few different options for anchoring. . . . You have the option of anchoring off to the building now and you have the option of anchoring to the structure itself because you’re not four stories up without being fully all braced in. I think that at a lower level like that we would probably be able to get a much stronger anchor point for the workers to connect to.

The Secretary also called as a witness Mohammad Ayub, a director of engineering for OSHA (Tr. 529). Ayub provides engineering assistance to OSHA's field offices, conducts accident investigations, and provides resources for structural engineering for OSHA field offices. Ayub has worked for OSHA's office of engineering since 1989 (Tr. 530). He holds a B.S. degree in civil engineering from India and a Master's degree in civil engineering from George Washington University (Tr. 532). Ayub was qualified as an expert in structural engineering to determine whether a structure could provide anchorage for fall protection (Tr. 533, 543).

Ayub testified that the hoist tower complex could have been erected one level at a time without losing stability. He too emphasized the need for pre-planning before erecting the hoist tower (Tr. 547-548).

AHC argues that the hoist tower could not have been built floor by floor. The employer relied on the expertise of an outside engineering firm, hired to design the hoist tower. John Driscoll, owner of Finian Engineering, designed the hoist tower (Tr. 794). Driscoll has an Associates degree in Architecture from the College of Staten Island and a Bachelor of Engineering degree in civil engineering from City College in New York (Tr. 795).

When asked if he could have designed the hoist tower to be built one floor at a time, Driscoll responded (Tr. 808):

[Y]ou would never do that, you would never do that. And we say "one level at a time," you're, you're saying one deck level at a time. First of all, you would never do that for a couple of reasons. Well, we'll mention first of all, the structural reason, okay. It would be one of the most unstable structures that you can build—and I don't think it takes much, much to figure that out—is a top-heavy structure. Now, any structure that has weight at the top and is floating becomes unstable because it can easily rock and sway back and forth. And the more weight you add to the top of the structure, the more unstable it becomes. So, one of the issues is to keep the structure as light as possible while you're building it.

You also want to cut down on any, also wind area. Because what's happening is the more you add to it is adding more wind area. Where, you know, even though you could have some slight winds could, could create a slight sail effect and start it rattling on you. So, you want to minimize that until you get it tied, then it becomes, you know, very much more rigid.

Neither Lalonde nor Ayub visited the site of the hoist tower, and neither of them had worked with a four-pole scaffold structure (Tr. 308-309; 932-935).

The experts' emphasis on pre-planning is misplaced when determining whether AHC violated § 1926.451(g)(2). The two sentences of the standard must be read together. The onus is on the competent

person to make a reasonable feasibility determination. Competent persons are generally crew foreman or supervisors overseeing the actual construction process, with no say in the engineering design. Lalonde stated, “You have to pre-plan these, obviously you’re not going to walk up there with the wall already done and go ‘How do we put it in now?’ It’s far too late, this needs to be done on the front end before the job even started” (Tr. 463). The citation alleges three specific dates on which employees were observed working without fall protection in 2002: April 17, June 4, and July 11. Section 1926.451(g)(2) requires the competent person to determine feasibility at the time employees are erecting or dismantling the scaffold, not in the pre-construction phase when the design is being engineered. The focus of the Secretary’s concern should be the engineer who designed the tower, not the crew foreman who had a specific set of circumstances with which to work.

In the preamble to § 1926.451, the Secretary acknowledges that fall protection with respect to erecting and dismantling supported scaffolds presents a special case that requires a flexible solution:

The Agency has determined that, due to the large variety of supported scaffolds and an infinite number of unique site conditions that could affect the feasibility or safety of providing fall protection, neither a blanket exception nor a requirement for 100% fall protection is appropriate for erectors and dismantlers. OSHA agrees with commenters . . . that the people on site (competent persons) must have the flexibility to address fall hazards for erectors and dismantlers on a site-specific basis. Therefore, OSHA finds that the determination of what fall protection is feasible and can be used safely at a given worksite should be made by a competent person at the worksite. The competent person will need to have the ability and knowledge to decide whether fall protection can be provided for erectors and dismantlers under the specific site conditions, and, if so, what measures are appropriate.

61 Fed. Reg. 46,025, 46,067 (1996).

If, as the Commission directs, Aleman is to be considered a competent person, then it is his on-site daily determinations that must be evaluated for reasonableness. The Secretary cannot use faulty pre-planning by AHC’s engineers in establishing this particular violation. Lalonde and Ayub both testified that fall protection was feasible if the tower had been pre-planned differently. Both experts testified that fall protection was infeasible because of the lack of suitable anchorage points on the dates in question (Tr. 474, 604). The Secretary has not otherwise shown that Aleman’s determination that fall protection was infeasible with respect to the scaffold as it existed on the days in question was unreasonable.

The Secretary has failed to establish that the competent person's determination that fall protection was infeasible was unreasonable. AHC was not in violation of § 1926.451(g)(2).

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

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

**ORDER**

Based upon the foregoing decision, it is ORDERED that:

Item 1 of citation no. 2, alleging in the alternative a violation of § 1926.451(g)(2), is vacated, and no penalty is assessed.

/s/ \_\_\_\_\_  
COVETTE ROONEY  
Judge

Date: 7/14/2004