United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GUZZO MASONRY, INC.,<br><br>Respondent. | OSHRC Docket No. 16-1561 |

Appearances: John A. Nocito, Esq.
Office of the Regional Solicitor
United States Department of Labor
170 S. Independence Mall West
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For the Complainant

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For the Respondent

Before: Keith E. Bell
Administrative Law Judge

## DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 451 (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite located at 515 Bridle Drive, Wilmington, Delaware 19808 on or about June 2, 2016. As a result, on August 17, 2016, OSHA issued a Citation and Notification of Penalty (Citation) to Guzzo Masonry Incorporated (Respondent or Guzzo), alleging multiple violations of the Act. Citation 1 included Items 1a, 1b, 2, 3, 4a, 4b all classified as "serious".[1] CX-1. Citation 2 had 1 Item classified as "repeat". A hearing was held on May 23rd and 24th, 2017. For the reasons that follow, Citation 1, Items 1a, 4a, 4b and Citation 2, Item 1 are AFFIRMED. Citation 1, Item 2 is VACATED.

## Jurisdiction

The parties have stipulated to the Commission's jurisdiction over this proceeding and coverage under the Act. (JX-1, no. 1). The parties have also stipulated that Guzzo is a New Jersey corporation with its principal place of business in Vineland, New Jersey. (JX-1, no. 5). The parties stipulated, and the record reflects, that at all times relevant to this case, Guzzo was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). (JX-1, no. 3). The evidence supports a finding that the Act applies, and the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c).

## Stipulated Facts[2]

[1] Prior to the hearing, the parties reached a partial settlement that resolved Citation 1 Items 1b and 3. On October 6, 2017, the undersigned issued a Severance Order assigning the Citation Items settled (Citation 1, Items 1b & 3) a new docket number (17-1650). On the same day, the undersigned also issued an Order approving the partial settlement resolving Citation 1, Items 1b and 3.

[2] At the start of the hearing, the parties moved to admit Joint Exhibit no. 1 (JX-1) that included stipulated facts 1-17.

1. The Review Commission has jurisdiction in this proceeding pursuant to § 10(c) of the OSH Act, 29 U.S.C. § 651 *et seq*.

2. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the State of New Jersey.

3. Respondent is an employer engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3), (5).

4. The Construction Industry Safety and Health Standards, 29 C.F.R. Part 1926, are generally applicable in this case because the work being performed at the worksite falls within the definition of "construction" work.

5. Respondent, Guzzo Masonry, Inc., is a New Jersey corporation, with its principal place of business at 3501 D'Ippolito Drive, Vineland, NJ 08360.

6. As of June 2, 2016, Respondent had more than 25 employees.

7. As of June 2, 2016, Jerry Guzzo was the President of Guzzo Masonry, Inc.

8. Respondent had a worksite at 515 Bridle Drive, Wilmington, Delaware 19808 ("the worksite") on June 2, 2016.

9. Jerry Guzzo was not present at the worksite at any time on June 2, 2016.

10. As of June 2, 2016, Respondent maintained a valid Delaware business license.

11. On June 2, 2016, James Nichols performed work for Respondent at the worksite.

12. On June 2, 2016, Zenon Cruz performed work for Respondent at the worksite.

13. On June 2, 2016, Marcelo Ramirez performed work for Respondent at the worksite.

14. On June 2, 2016, Marcelo Ramirez was Respondent's Foreman at the worksite.

15. James Nichols and Zenon Cruz were employees of Respondent on June 2, 2016.

16. Respondent was previously cited for a violation of 29 C.F.R. § 1926.451(e)(1) in OSHA Inspection No. 950677 (Citation 1, Item 1), issued on January 14, 2014 at its worksite located at 2261 Jacksonville Road in Bethlehem, PA.

17. The Citation stemming from OSHA Inspection No. 950677 issued to Respondent on January 14, 2014 became a final order via informal settlement agreement between Respondent and OSHA.

## Background

Respondent, Guzzo Masonry, Inc., is a family owned and run business based in Vineland, New Jersey. Tr. 228. Jerry Guzzo is the President and held that position on the day of the inspection. JX-1, no. 7. The company specializes in stucco, stone and minor carpentry. Tr. 229. Guzzo was hired by Toll Brothers to remediate stucco where homeowners have issues such as water infiltration. Tr. 231. Guzzo had a worksite at 515 Bridle Drive in Wilmington Delaware on June 2, 2016. JX-1, no. 8. The job at the 515 Bridle Drive worksite started on April 22, 2016. Tr. 248. It was a stucco remediation job. *Id*. June 2, 2016, was respondent's last day on the worksite. Tr. 251, RX-1.

*OSHA Inspection*

OSHA Compliance Officer (CO), Maria Armstrong, conducted an inspection of respondent's worksite on June 2, 2016. Tr. 47. CO Armstrong received a phone complaint a few days before the June 2, 2016, inspection. *Id*. The complaint was about the use of scaffolds at a Toll Brothers development in an area comprised of one or two streets. Tr. 48. The complaint was not specifically about the worksite at 515 Bridle Drive. Tr. 145-46. CO Armstrong went to the location; however, she did not see anyone exposed to a hazardous condition, so no inspection was opened at that time. Tr. 48. CO Armstrong returned to the Toll Brothers development on June 2, 2016. *Id*. She arrived on site at approximately 10:00 a.m. At that time, CO Armstrong saw a two-level scaffold with men working on both levels. The top tier of the scaffold had no frames or guardrails and the planks were separated. Tr. 49. Based on CO Armstrong's observations, the planks on the scaffold were more than an inch apart. Tr. 50. Initially, CO Armstrong observed two men working; however, she eventually saw an additional man working on site. Tr. 150. The third man was working on the ground in the center of the

scaffold. Tr. 53. The men were applying stucco to the wall of a house. The man working on the top level was approximately 14 feet above ground. The man on the top level was already up there when CO Armstrong first observed him. Tr. 150. Before entering the property, CO Armstrong rang the doorbell and asked for the homeowner's permission to talk to the men working on the scaffold. Tr. 52. The men appeared to be finishing up their work. Tr. 177. CO Armstrong approached the men working on the scaffold, displayed her credentials and asked the identity of the site foreman. Mr. Marcelo Ramirez identified himself as the foreman. Tr. 53. CO Armstrong informed Mr. Ramirez that she had already taken some photos and would also take measurements and talk to each of the workers in private. Tr. 54. Following the inspection, CO Armstrong recommended that citations be issued to Guzzo based on her June 2, 2016 inspection of the worksite. Tr. 113.

**Discussion**

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Grp., Inc*., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). A preponderance of the evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Astra Pharma. Prods*., 9 BNA OSHC 2126, 2131, n. 17 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

### *Alleged Violations of 29 C.F.R. § 1926.451(b)(1)*

Citation 1, Item 1a alleges a violation of 29 C.F.R. § 1926.451(b)(1) which states:

> [e]ach platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows: (i) Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

Specifically, Citation 1, Item 1a alleges that on or about June 2, 2016, the employer failed to provide fully planked platforms at all working levels. The parties stipulated to the general applicability of the Construction Industry and Health Standards codified at 29 C.F.R. § 1926. JX-1, no. 4. Photos taken by CO Armstrong depict a scaffold with spaces between the planks. CX-5. The cited standard applies.

According to CO Armstrong, the decking planks on the top level of the scaffold were more than an inch apart. Tr. 50. She testified that the planks were approximately 8" wide and there were only two of them. Tr. 71. Photos taken by CO Armstrong show that there were more than two planks on the top level of the scaffold. CX-5, nos. 3-6[3]. However, only two of them were close together. *Id*. Further, the space between the first two planks, which were close together, and the other plank(s) was more than an inch in violation of the standard's requirement. Respondent does not argue that a wider space between the planks was necessary, but rather argues that the scaffold was fully planked while in use. Resp't Br. at 10. Respondent argues that the crew was in the process of breaking down the scaffold when the CO arrived. Resp't Br. at 11. Marcelo Ramirez, an employee for Guzzo working on site on the day of the inspection (JX-1, no. 13) testified that they started breaking down the scaffold and damaged the wall in the

[3] CX-5 is comprised of 8 photos however, nos. 3-6 were each marked in court by a witness resulting in duplicates being admitted.

process. Tr. 211-12. 29 C.F.R. § 1926.451(a)(6)(b)(ii) provides an exception to the requirement to have a fully planked scaffold decking when the platforms are used "solely as walkways or solely by employees performing scaffold erection or dismantling. In these situations, only the planking that the employer establishes is necessary to provide safe working conditions required." The argument that this exception applies to these facts would have been plausible except that a couple of photos depict Messrs. James Nichols and Marcelo Ramirez working atop the scaffold applying stucco. CX-5, no. 5. In fact, Respondent acknowledges that Mr. Nichols was "fixing the damage the removal of the planks caused" when the inspection began. Resp't Br. at 10. This act of repairing the damaged stucco does not fall within the exception provided for "assembly or disassembly" of scaffolding.

*Greater Hazard Defense* [4]

Respondent also asserts the "greater hazard" defense to the allegation that it violated 29 C.F.R. § 1926.451(b)(1). The Commission will vacate a citation under the greater hazard defense if the employer can prove: (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance application would be inappropriate. *E & R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3d Cir. 1997).[5] "All three elements must be shown to establish a greater hazard defense." *Id*. At 163, citing *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1080 (3d Cir. 1980).

Respondent argues that the "greater hazard" of compliance would be caused by a repeated cycle of assembly and disassembly which would continue to result in damage to the

[4] Respondent raised multiple defenses in its Answer; however, Respondent only argues the "greater hazard" defense in its post hearing briefs. Accordingly, all other defenses are deemed abandoned. *See L&L Painting Co*., 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (finding item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc*., 19 BNA OSHC 1540, 1543 n. 5 (No. 00-0322, 2001) (noting arguments not raised in post-hearing briefs generally deemed abandoned).

[5] The Third Circuit Court of Appeals has appellate jurisdiction over this case.

wall and employees exposed during the disassembly process. Resp't Br. at 12. This argument is flawed because it assumes that disassembly will **always** result in damage to the stucco wall. Mr. Guzzo testified that it is common for a wall to be damaged during the disassembly process because ladders, boards, scaffold may scuff the wall. Tr. 300. However, he did not testify that careful disassembly of the scaffold always results in such damage. Respondent failed to establish the first prong of the "greater hazard" defense. Respondent's assertion that there is no viable alternative means of protecting exposed employees under these conditions rests solely on the self-serving testimony of its Owner, Mr. Guzzo. Resp't Br. at 12. However, during an exchange with the undersigned, Mr. Guzzo conceded that the way to make it safe enough is "by putting the railings and the fully plank (sic) and everything." Tr. 293-94. Respondent failed to satisfy prong 2 of the "greater hazard" defense. Respondent did not address prong 3 in its brief. The evidence establishes that Respondent failed to comply with the requirements of the standard and its actions did not fall within a recognized exception, nor did compliance with the standard constitute a "greater hazard" to the exposed employee(s). The Secretary has established that Respondent failed to comply with the requirements of the cited standard.

*Employee Exposure*

The Third Circuit has held that an employee is exposed to a hazard if he/she has access to the zone of danger. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985). The parties stipulated that there were three employees working on site on the date of the inspection: Messrs. James Nichols, Zenon Cruz, and Marcelo Ramirez. JX-1, nos. 11-13. Photo number 5 in CX-5 depicts two employees: James Nichols on top, and Marcelo Ramirez in the middle of the scaffold. Tr. 69-70. Photo number 3 of CX-5 shows Zenon Cruz working on the ground underneath the second level of the scaffold. Tr. 81-82. CO Armstrong testified that all

three employees were cited as "exposed" to the hazard because any of them could have accessed the top level of the scaffold at any time. Tr. 121. Also, she testified that if Mr. Nichols had fallen through the planks, he could have landed on Messrs. Ramirez and Cruz respectively. Tr. 122-23. Employee exposure to the fall hazard is established.

*Employer Knowledge*

The Commission has held that an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr. Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994). On the date of the inspection (June 2, 2016), Marcelo Ramirez was the foreman at the worksite. JX-1, no. 14. Mr. Ramirez was working on the second level of the scaffold just below the less than fully planked top level which was in plain sight. CX-5, no. 5. The evidence establishes that Guzzo had knowledge of the hazardous condition cited by way of its foreman. For all the reasons stated, the Secretary has proven, by a preponderance of the evidence, that Respondent violated 29 C.F.R. § 1926.451(b)(1).

**Serious Classification**

To prove a violation was "serious" under section 17(d) of the Act, 29 U.S.C. § 666(d), the Secretary must show there was a substantial probability that death or serious physical harm could have resulted from the cited condition and that the employer knew or should have known of the condition; the likelihood of an accident occurring is not required. *Spancrete Ne., Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991). CO Armstrong measured the height of the scaffold to be 14 feet from the ground. Tr. 56, 152. There was at least one employee (James Nichols) working on the top level with no fall protection when she arrived. Tr. 51. CO Armstrong testified that, based on her experience, Mr. Nichols could have suffered broken bones, brain damage and more if he had fallen from the scaffold. Tr. 123-24. Respondent argues that the

alleged violation was not "serious" because there was some planking in place while the patch work was being performed. Resp't Br. at 13. Also, Respondent argues that the height of the scaffold was just a few feet above the threshold where fall protection was required. *Id*. Both arguments are rejected as unpersuasive, inconsistent with the protective purpose of the standard, and neither negates the "serious" nature of any resulting injury in the event of a fall. The Secretary has met his burden of proving that the violation alleged in Citation 1, Item 1a is properly classified as serious.

***Alleged Violation of 29 C.F.R. § 1926.451(c)(2)(i)***

Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.451(c)(2)(i) which states: "[f]ootings shall be level, sound, rigid, and capable of supporting the loaded scaffold without settling or displacement."

Specifically, Citation 1, Item 2 alleges that on or about June 2, 2016, the employer failed to provide a footing capable of supporting the loaded scaffold without displacement. The applicability of this standard is not in dispute. Also, the parties have stipulated to the general applicability of the Construction Industry Safety and Health Standards codified at 29 C.F.R. § 1926. The photographic evidence depicts scaffold footings which are the subject of the alleged violation at issue here. CX-5, nos. 7-8. The cited standard applies.

CO Armstrong observed and photographed at least two separate footings resting on pieces of wood called mudsills. CX-5, nos. 7-8. A mudsill is a piece of wood used to distribute the weight of a scaffold. Tr. 100. CO Armstrong recommended that Respondent be cited for a violation of this standard because the scaffold was not set up level and the footings had space between them and the mudsills. Tr. 133. The first photograph of a scaffold footing shows a space between it and the mudsill. CX-5, no 7. To show the amount of space between the footing

and the mudsill, CO Armstrong placed a pen between the two. *Id*. The second photograph of a scaffold footing appears to show only half of the footing plate half on and half off the mudsill. GX-5, no. 8. There was also some space between the mudsill and the footing plate as reflected by the pen that CO Armstrong placed between the two to illustrate that point. *Id*. However, CO Armstrong also testified that the ground where the scaffold was set up was not completely level. Tr. 100. Therefore, it is logical that such a space may have existed between the footing plate and the mudsill to level off the scaffold. Neither party argued or admitted evidence of what constitutes a "level" footing. Here, the Secretary's allegation was that the footing provided was not capable of supporting the loaded scaffold without settling or displacement. CO Armstrong testified that she was concerned that the mudsills would crack under the weight of the scaffold. Tr. 102-03. The basis of this concern seemed to be the appearance of the mudsills. According to CO Armstrong, both mudsills appear to be dry and discolored with jagged edges. Tr. 102. Also, Respondent correctly points out CO Armstrong's testimony that she did not observe any movement or displacement of the scaffold. Tr. 153. This testimony makes CO Armstrong's concerns about what could have happened speculative at best. Finally, the cited standard focuses on the function over the form of the footings. In the absence of evidence to the contrary, it appears that the mudsills, despite their appearance and condition, stabilized the scaffold without settling or displacement. The Secretary did not establish Respondent's failure to comply with the requirements of the cited standard.

The evidence does, however, establish that Respondent's employees working on site were exposed. Also, the cited condition was in plain view and visible to Foreman Marcelo Ramirez. Therefore, Respondent had knowledge of the cited condition.

***Alleged Violation of 29 C.F.R. § 1926.451(g)(1)(iv)***

Citation 1, Item 4a alleges a violation of 29 C.F.R. § 1926.451(g)(1)(iv) which states:

> [e]ach employee on a self-contained adjustable scaffold shall be protected by a guardrail system (with minimum 200 pound toprail capacity) when the platform is supported by the frame structure, and by both a personal fall arrest system and a guardrail system (with a minimum 200 pound toprail capacity) when the platform is supported by ropes.

Specifically, Citation 1, Item 4(a) alleges that, on or about June 2, 2016, the employer failed to protect the employees by a guardrail system. The parties have stipulated to the applicability of the Construction Industry Safety and Health Standards codified at 29 C.F.R. § 1926. JX-1, no. 4. Respondent does not dispute the applicability of the standard. CO Armstrong testified that the employee working on the top level had no fall protection. Tr. 51. She further testified that the top level of the scaffold had no frames or guardrails. Tr. 49. The cited standard applies.

The photographic evidence clearly shows that the scaffold had no guardrail on the top level. CX-5, nos. 5 & 6. Respondent's argument is the same for this standard as it was for the first alleged violation --- that the scaffold was being disassembled. Resp't Br. at 16. This argument is once again rejected as inconsistent with the photographic evidence reflecting James Nichols atop the scaffold repairing the stucco. CX-5, no. 5. Also, Respondent concedes that Mr. Nichols was repairing stucco damaged during removal of the planks. Resp't Br. at 16. Once Mr. Nichols resumed work on the stucco, disassembly ceased or, at a minimum, was interrupted. Interestingly, Respondent's argument that the scaffold was in a state of disassembly is also belied by the picture showing Mr. Ramirez also working on the wall from the second level of the scaffold. CX-5, no. 5. Respondent also argues that the guardrails were on site and that CO Armstrong simply failed to look for them. Resp't Br. at 17. This argument is without merit because the moment Mr. Nichols undertook the repair of the damaged stucco, the exception for

disassembly of scaffolding no longer applied.

Once again, Respondent also argues the "greater harm" defense. Resp't Br. at 17. The basis for the argument is the same as it was for the first alleged violation. Accordingly, the argument fails on the same grounds as previously articulated in that Respondent failed to satisfy prongs 1 and 2, and made no argument regarding prong 3 of the defense. The evidence establishes Respondent's failure to comply with requirements of the cited standard.

Employee access and employer knowledge are both established by the same evidence previously cited for the prior alleged violations. The Secretary has proven, by a preponderance of the evidence, that Respondent violated 29 C.F.R. § 1926.451(g)(1)(iv). Based on evidence previously relied upon for the first alleged violation (§ 1926.451(b)(1)), the Secretary has also established that such violation is properly characterized as "serious".

***Alleged Violation of 29 C.F.R. § 1926.454(a)***

Citation 1, Item 4b alleges a violation of 29 C.F.R. § 1926.454(a) which states:

> [t]he 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. The standard then sets forth specific areas to be covered as applicable.

In this instance, Citation 1, Item 4b alleges that, on or about June 2, 2016, the employer failed to train employees who perform work on scaffolds. The parties have stipulated to the applicability of the Construction Industry Safety and Health Standards codified at 29 C.F.R. § 1926. JX-1, no. 4. Respondent does not dispute the applicability of the standard. During the inspection, at least one employee indicated that he did not have the requisite training. Tr. 109-110. The standard applies.

The terms of this standard require training that cover (1) recognition of hazards

associated with the type of scaffold being used; and (2) training on procedures to control or minimize such hazards. However, the standard does not set forth specific requirements to achieve the stated goals. When the language of a training standard is general and potentially subjective, the Commission and courts have applied a reasonableness standard. That is, to establish non-compliance, the Secretary must prove that the cited employer failed to provide the instructions that a "*reasonably prudent employer*" would have given in the same circumstances. *El Paso Crane and Rigging Co., Inc.*, 16 BNA OSHC 1419, 1426 (No. 90-1106, 1993). (emphasis added). Here, questions are raised regarding whether Messrs. Ramirez and Nichols received any training at all. Regarding Mr. Zenon Cruz, he testified that he received scaffold training and his testimony is supported by the evidence. Tr. 100-11, RX-5. James Nichols testified that he did not have scaffold training nor was he provided a safety manual. [6] Tr. 140, 181. However, Mr. Nichols also testified that he had 23 years of experience in construction before joining Guzzo during which he received training on scaffolds. Tr. 190. The OSHA 10-hour training which Mr. Cruz and other Guzzo employees received was given in 2010 before Mr. Nichols was hired in February 2016. Tr. 324-25, CX-10. Marcelo Ramirez was also hired after the 2010 training (3/04/2012). Tr. 324, CX-10. Owner, Jerry Guzzo testified that he hired a company called "Philaposh" to give OSHA training to his employees. Tr. 233. According to Mr. Guzzo, Philaposh put on a 10-hour course that covered fall protection and scaffolding. Tr. 243. However, Mr. Guzzo did not provide certificates of completion of the Philaposh course for Messrs. Nichols and Ramirez. Tr. 326. Mr. Guzzo also testified that the company has a safety manual in English and Spanish[7] and it is given to each employee when hired. Tr. 235-36, RX-2.

[6] During the hearing, Respondent adduced testimony that Mr. Nichols was not a credible witness. Tr. 303, 305-06. However, the undersigned finds no basis to make such a finding given that Mr. Nichols testimony was consistent with the evidence of record.

[7] Mr. Guzzo testified that most of his employees are of Spanish decent. Tr. 235. He further testified that his son is second in command at the company and speaks Spanish. Tr. 243. Mr. Guzzo's son did not testify at the hearing.

In the absence of evidence that Messrs. Ramirez and Nichols received the appropriate training from Philaposh, the undersigned turns to the company safety manual and the safety talks he purported to have with employees each morning before they began work.[8] Tr. 235, RX-2.

The safety manual has two safety rules that are specific to scaffolds. They are: (#28) Build scaffolds according to manufacturer's recommendations and OSHA Construction Safety Standard Part 12 – Scaffolding[9]; and (#29) Scaffold planks shall be properly lapped, cleated or otherwise secured to prevent shifting. CX-2, pg. 8. These provisions fall far short of what a reasonably prudent employer would provide to an employee expected to recognize the hazards associated with scaffolds and the appropriate controls and procedures to minimize such hazards. Additionally, Mr. Ramirez testified that Spanish is his first language. Tr. 204. He further testified that he never received a safety manual in Spanish and he doesn't read English.[10] Tr. 224-25. Mr. Guzzo testified that he does not know Mr. Ramirez to be a liar. Tr. 241. Finally, when pressed about whether Mr. Ramirez was given a copy of the company's safety manual in Spanish, Mr. Guzzo testified that he didn't know for sure and "it could have been an oversight". Tr. 353.

Regarding the "safety talks" Mr. Guzzo claimed to have with each employee every morning before they began work, no evidence of such talks was admitted. Moreover, it is unclear how Mr. Guzzo would have communicated with his employees since he testified that he does not speak Spanish though most of his employees do. Tr. 238. Mr. Guzzo's claim that his Spanish-speaking employees all understand him is unsubstantiated by the evidence of record.

[8]Mr. Guzzo eventually conceded that Mr. Ramirez didn't receive the Philaposh training, but that he was trained by other employees. Tr. 358. No evidence of such training was ever adduced or admitted into evidence.

[9] OSHA Construction Safety Standard Part 12 was not appended to the handbook for an employee's reference.

[10] Mr. Ramirez's difficulty understanding English was evident during the hearing. Despite Mr. Ramirez's difficulty understanding English, Respondent made no accommodations for an interpreter nor was the court ever alerted to the need for one.

Tr. 238.

The evidence is clear that Mr. Ramirez wasn't trained in compliance with the cited standard's requirements. Regarding Mr. Nichols, despite testimony of his prior experience and training on scaffolding, a reasonably prudent employer would have re-trained him on the hazards associated with the type of scaffold being used by Guzzo and the procedures to control or minimize those hazards. The Secretary has established that Respondent failed to comply with the requirements of the cited standard.

Employee exposure is established with respect to Mr. Ramirez only since the extent of Mr. Nichol's training on this type of scaffold is unclear. Actual employer knowledge is established by evidence that Mr. Guzzo knew that Mr. Ramirez had not been trained nor had he received a safety manual in his native language --- Spanish. Regarding Mr. Nichols, the Secretary failed to establish that Respondent had knowledge (actual or constructive) of his lack of training in compliance with the cited standard given Mr. Nichols' own testimony about his experience and training. The Secretary has proven, by a preponderance of the evidence, that Respondent violated 29 C.F.R. § 1926.454(a) with respect to Mr. Ramirez.

CO Armstrong testified that the danger to employees, like Mr. Ramirez, who are not properly trained is a lack of knowledge on how to protect themselves from a potential fall. Although there was no evidence on the height of the second level of the scaffold from which Mr. Ramirez was working, the photographs show that his platform was elevated several feet above ground. CX-5, no. 5. CO Armstrong testified that a fall could result in broken bones. Tr. 138. The Secretary has established that this violation is properly classified as "serious".

***Alleged Violation of 29 C.F.R. § 1926.451(e)(1)***

Citation 2, Item 1 alleges a violation of 29 C.F.R. § 1926.451(e)(1) which states:

> [w]hen scaffold platforms are more than 2 feet (o.6 m) above or below a point of access, portable ladders, hook-towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

Specifically, Citation 2, Item 1 alleges that, on or about June 2, 2016, the employer failed to provide a ladder, hook-on ladder, stair tower to access the scaffold. The parties have stipulated to the applicability of the Construction Industry Safety and Health Standards codified at 29 C.F.R. § 1926. JX-1, no. 4. Respondent does not dispute the applicability of the standard. The cited standard applies.

The evidence establishing that Mr. Nichols was observed by CO Armstrong working atop the scaffold platform approximately 14 feet above ground has previously been cited. CO Armstrong testified that she doesn't know how Mr. Nichols got up there. Tr. 150. However, she later observed, and photographed, him descending the platform using the scaffold cross braces as ladder rungs. Tr. 81-83, CX-5, no. 3. During the inspection, Foreman Ramirez told CO Armstrong that they didn't bring a ladder to the worksite on that day. Tr. 98, 108-09. His statement about having no ladder on site is supported by the testimony of James Nichols who also said there was no ladder on site. Tr. 186. Also, there was no ladder built into this scaffold. Tr. 83-84, 188. Again, Respondent argues that the scaffold was being disassembled. Resp't Br. Respondent further argues that removal of the ladder(s) was necessary during disassembly. *Id.* Once again, Respondent's argument is rejected as inconsistent with the evidence showing Messrs. Nichols and Ramirez both working on the wall. CX-5, no. 5.

Again, Respondent asserts the "greater harm" defense. However, Respondent offers no new evidence and has failed to establish this defense.

Employee access and employer knowledge are both established by the same evidence

previously cited for the prior alleged violations. The Secretary has proven, by a preponderance of the evidence, that Respondent failed to comply with the requirements of 29 C.F.R. § 1926.451(e)(1).

**Repeat Classification**

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.[11] *Potlach Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). In *Potlach*, the Commission held that in cases where the Secretary shows that the prior and present violations are for an employer's failure to comply with the same specific standard, it may be difficult for an employer to rebut the Secretary's prima facie showing of similarity. This is true simply because in many instances the two violations must be substantially similar in nature to be considered violations of the same standard. However, in cases where both violations are for failure to comply with the same general standard, it may be relatively undemanding for the employer to rebut the Secretary's prima facie showing of similarity. A *prima facie* showing of similarity would be rebutted by evidence of the disparate conditions and hazards associated with these violations of the same standard. *Potlach Corp.* at 1063.

Respondent does not dispute the "repeat" classification for this alleged violation. Also, the parties have stipulated that Respondent was previously cited for a violation of 29 C.F.R. § 1926.451(e)(1) in OSHA Inspection No. 950677 (Citation 1, Item 1), issued on January 14, 2014 at its worksite located at 2261 Jacksonville Road in Bethlehem, PA. JX-1, no. 16. In absence of evidence to the contrary, the Secretary has established the "repeat" classification of the standard cited.

[11] The Third Circuit Court of Appeals has embraced the definition of "repeat" as articulated in *Potlach*. *See Reich v. D.M. Sabia Co.*, 90 F.3d 854, 855–56 (3d Cir. 1996).

## Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (no. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. Although Respondent argues that all but one[12] of the proposed penalties are "unreasonable", it does not offer evidence disputing the factors upon which the Secretary based his penalty calculations. Resp't Br. at 13, 15, 19 & 21. CO Armstrong assessed the penalty factors for each of the violations affirmed as follows:

- Citation 1, Item 1a: gravity (high); employer's size (30% reduction); history (10% increase); and good faith (0% reduction). CX-4, pg. 1.
- Citation 1, Item 4a: gravity (high); employer's size (30% reduction); history 10% increase); and good faith (0% reduction). CX-4, pg. 21.
- Citation 1, Item 4b: gravity (low); employer's size (30% reduction); history (10% increase); and good faith (15% reduction). CX-4, pg. 25.
- Citation 2, Item 1: gravity (high); employer's size (30% reduction); history (10% increase); and good faith (0% reduction). CX-4, pgs. 29-29.

The evidence supports a finding that the penalties proposed are appropriate.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

[12] Respondent makes no argument regarding the penalty proposed for Citation 2, Item 1.

The foregoing 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 Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1a alleging a violation of 29 C.F.R. § 1926.451(b)(1) is AFFIRMED as issued and a penalty in the amount of $9,603.00 is imposed.
2. Citation 1, Item 2 alleging a violation of 29 C.F.R. §1926.451(c)(2)(i) is VACATED.
3. Citation 1, Item 4a alleging a violation of 29 C.F.R. § 1926.451(g)(1)(iv) is AFFIRMED as issued and a penalty in the amount of $9,603.00 is imposed.
4. Citation 1, Item 4b alleging a violation of 29 C.F.R. § 1926.454(a) is AFFIRMED as issued.[13]
5. Citation 2, Item 1 alleging a violation of 29 C.F.R. § 1926.451(e)(1) is AFFIRMED as issued and a penalty in the amount of $19,205.00.

*/s/Keith E. Bell*
Keith E. Bell
Judge, OSHRC

Dated: December 27, 2017
Washington, D.C.

[13] Citation 1, Items 4a and 4b were "grouped" by the Secretary and a single penalty was proposed.