

Secretary of Labor,
Complainant,

v.

A & W Construction Services, Inc.,
Respondent.

OSHRC Docket No. 00-1413

APPEARANCES

Leslie John Rodriguez, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Michael G. Murphy, Esq.
John Dannecker, Esq.
Holland & Knight, LLP
Orlando, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

A & W Construction Services, Inc. (A&W), a contractor from Ormond Beach, Florida, performs drywall/metal framing, acoustical sealing, and stucco/plastering work. While performing stucco finishing work from a four tier scaffolding system on a building in Daytona Beach, Florida, A&W was inspected by the Occupational Safety and Health Administration (OSHA) on March 22, 2000. As a result of OSHA's inspection, A&W received serious, willful and repeat citations on July 12, 2000. A&W timely contested the citations.

The hearing was held January 17 - 19, 2001, in Daytona Beach, Florida. The parties stipulated jurisdiction and coverage (Tr. 4). In partial settlement, the Secretary reduced the proposed penalties to \$750 for serious Citation No. 1, item 1, alleged violation of 29 C.F.R. § 1926.451(c)(1), and to \$3,000 for repeat Citation No. 3, item 1, alleged violation of 29 C.F.R. § 1926.451(h)(1). Based on the Secretary's amendments, A&W withdrew its contest to Citation No. 1, item 1, and Citation No. 3, item 1, and agreed to comply in the future (Tr. 5-8). The parties' partial settlement is approved and incorporated by this Decision and Order.

The alleged violations remaining at issue include serious Citation No. 1, item 2, alleged violation of 29 C.F.R. § 1926.454(a), for failing to train employees in the hazards associated with working from fabricated frame scaffolding, and willful Citation No. 2, item 1, alleged violation of 29 C.F.R. § 1926.451(g)(1), for failing to protect employees from fall hazards by a complete guardrail system or personal fall arrest system when working on fabricated frame scaffolding.

The serious violation proposes a penalty of \$1,500. The willful violation proposes a penalty of \$56,000.

A&W denies the alleged violations and classifications. A&W asserts unpreventable employee misconduct as an affirmative defense.

For the reasons discussed, the violations are affirmed and proposed penalties of \$500 and \$20,000 are assessed.

The Inspection

In business since 1993, A&W employs approximately 57 employees in drywall/metal framing, acoustical sealing, and stucco/plastering work in Volusia County, Florida. A&W's office is in Ormond Beach, Florida. A&W has three owners, including safety manager Rick Abercrombie (Tr. 70, 274, 359).

To perform its work, A&W uses scaffolding in approximately 75 percent of its jobs. Twenty-five percent of the scaffolding is over one tier high. A&W rents the scaffolding from Crom Equipment Rentals, Inc. (Tr. 82-83, 101, 150). If complex, the scaffolding is erected by specialists such as H & R Erection and Dismantling (Exhs. R-3, R-5; Tr. 82, 101, 108-109, 363-364).

In March, 2000, A&W contracted to perform the stucco finishing work on the front of the KRO radio station building in Daytona Beach, Florida. The KRO building is two stories high and approximately 45 feet long (Tr. 77, 315, 255, 372).

The scaffolding system for the KRO job ordered by Jim Buffington, A&W foreman, was delivered by Crom Equipment Rentals to the site on March 15, 2000. Buffington assisted Eric Hauger, H & R Erection and Dismantling, in erecting the scaffolding. It was completed by 4:30 p.m. (Tr. 32-33, 108-110, 150, 315, 406-407).

The erected scaffolding was four tiers high. Scaffolding of two bucks long were placed on one side of the building's entrance way and three bucks long on the other side.¹ Over the entrance way, 10-foot platforms were erected between the scaffolding bucks on the second, third and fourth tiers. Each tier was fully planked so that employees could walk/work at all levels. Because insufficient guardrail components were delivered to the site, the scaffolding was erected without guardrails, midrails and toeboards along the 10-foot center sections above the entrance

¹Each buck of scaffolding was 6 feet high, 5 feet wide and 7 feet long (Tr. 110-111).

way at the third and second tiers. The fourth tier was fully guarded (Exhs. C-8, C-10 through C-16; Tr. 111, 114, 133-134, 138-139, 257-258, 388, 516).

After erecting the scaffolding and discussing the need for additional guardrail components, Buffington “said he would take care of it himself” on “another date” (Tr. 117, 121).

Despite the lack of guardrails, A&W’s crew of approximately five employees worked from the scaffolding on Thursday (March 16) and Friday (March 17). Foreman Buffington was not at the job. He was attending a golf tournament. During Buffington’s absence, Guy Hulec was in charge of the crew (Exhs. C-25 through C-28; Tr. 388-389, 416, 431, 433, 453).

On Monday (March 20) and Tuesday (March 21), while the crew continued to work on the scaffolding, Buffington spent two hours each day at the KRO job. He had been assigned to also start another project. On Wednesday (March 22), Buffington was briefly at the KRO job prior to OSHA’s inspection. Guardrails on the second and third tiers of the scaffolding were still not installed (Exh. C-25; Tr. 65, 141, 356, 389-390, 397-398, 470-471).

On March 22, at approximately 10:00 a.m., OSHA compliance safety and health officer (CO) Joseph Roesler, while driving to another inspection site, passed the KRO building. He observed the unguarded 10-foot sections above the entrance way and employees working on the scaffolding. CO Roesler stopped his car, received permission to conduct an OSHA inspection, and videotaped the site. Three employees were observed working on the second tier, one employee on the third tier, and one employee on the ground operating a pulley. The employees were not wearing personal fall protection (Exhs. C-9, C-16; Tr. 129-130, 134-135, 150-152, 258-259).

Foreman Buffington returned to the site during OSHA’s inspection (Tr. 391-392, 468-469). He told OSHA that the lack of guardrails “was a big oversight on my part” (Tr. 148). Buffington testified that his focus was on getting the job completed and that he “simply forgot” (Tr. 390-391, 394). CO Roesler’s inspection resulted in the citations issued July 12, 2000.

Prior to CO Roesler’s inspection, A&W had received two previous OSHA inspections. One inspection found no violations. The other inspection in 1999 involved a scaffolding job at the Buca restaurant in Daytona Beach. As a result of the inspection, a serious citation issued June 24, 1999, included a violation of § 1926.451(g)(1) for the employees’ lack of fall protection while working on scaffolding. Jim Buffington was the crew foreman on the Buca job. He

testified that the violation involved the failure to provide guardrails on the third level of the scaffolding. The June, 1999, citation was informally settled with a reduction in penalty. At the safety meeting following the 1999 citation, Buffington was reprimanded, spoke of the incident in front of other employees and did not receive a safety bonus (Exh. C-4, exhibits 1 and 2; Tr. 55, 75-76, 172-173, 310-311, 381-382, 476-477).

Discussion

The Secretary has the burden of proving a violation.

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).

A&W does not dispute the application of the training and scaffolding standards to its job site in Daytona Beach, Florida. A&W's knowledge of the scaffolding requirements for training is admitted (A&W Brief, p. 9). A&W also does not dispute that the scaffolding at the KRO building lacked guardrails on the 10-foot sections of scaffolding above the building's entrance way at the second and third tiers. Employees on the unguarded portion of scaffolding were exposed to fall hazards in excess of 10 feet and were without personal fall protection.

A&W alleges that its work rules require guardrails and that the lack of guardrails was due to unpreventable employee misconduct. A&W also asserts that its training program, consisting of a written safety program and monthly safety meetings, is adequate.

ALLEGED VIOLATIONS

Citation No. 1, Item 2 - Alleged serious violation of § 1926.454(a)

The citation alleges that employees doing stucco work on scaffolding were not trained on the hazards associated with working from fabricated frame scaffolds. 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. The training shall include the following areas, as applicable:

- (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area;
- (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and dis-assembling the fall protection systems and falling object protection systems being used.

A&W agrees that scaffold training is a necessary part of its business. According to co-owner/safety manager Rick Abercrombie:

Scaffolding is Number 2 on my list because it is the most important issue in our Company. I can easily say every employee in our company at some time will be working on a scaffold. It's just the type of business that we are, whether they're in any of the three divisions, they're going to be working on scaffolding. It is the most important issue, and I mention it. At every single safety meeting that I've ever put on, I have mentioned scaffolding in my safety meeting (Tr. 287).

To meet its scaffold training requirements, A&W primarily relies on a written safety program and monthly safety meetings. In the two prior inspections, OSHA compliance officers considered A&W's written safety and health programs adequate. CO Roesler also found the written safety programs, including fall protection, to be adequate (Exhs. R-9, R-13; Tr. 228, 262). The OSHA citation, however, alleges that A&W's training of employees on scaffold safety was deficient.

A&W's safety meetings are held the first Tuesday of each month at its office in Ormond Beach. The meetings start after normal work hours at 4:00 p.m., last approximately one hour, and are conducted by safety manager Abercrombie. The monthly safety meetings started in approximately 1996. Abercrombie testified that scaffolding is discussed at each meeting. The record shows that employees received scaffold training on topics such as the use of screw jacks and mud sills, bracing and leveling the scaffold, tying the scaffold to the building, accessing the scaffold, and the proper installation of the scaffold. Foreman Buffington acknowledged

receiving the scaffolding training (Tr. 282, 287, 296, 315, 369-370, 379-380, 379, 482, 485-487, 489, 491).

The Secretary does not dispute that Abercrombie is a qualified scaffold trainer. Abercrombie had attended the OSHA 500 “Basic Instruction Course” in 1992. The 40-hour course included significant training on scaffolding (Exh. R-8; Tr. 272-273).

The Secretary also does not dispute that four of the five employees working at the KRO job received adequate scaffold training (Tr. 237). CO Roesler testified, “I asked the other employees about training and they all told me that they had been trained” (Tr. 236). Only employee, Phillip Spurlock, stated that he was not trained (Tr. 236).

The record establishes a violation for failing to train Phillip Spurlock. It is undisputed that Phillip Spurlock was working at the KRO building on Monday and Tuesday. On Wednesday, he was observed on the scaffolding during OSHA’s inspection. Spurlock had previously worked for A&W during the summer of 1999 for eight weeks under a prison work release program. After prison, he was hired by A&W in January, 2000, and worked until March, 2000, when he quit. He told CO Roesler that although he knew A&W had safety meetings, he had never attended one and he was never informed of scaffolding hazards. He described the KRO scaffolding as better than other scaffolding he had worked on (Exhs. C-21, C-27; Tr. 181, 235, 302-304, 357-358).

The statement of Spurlock is accepted under Rule 801(d)(2)(D), Federal Rules of Evidence, as an admission of an employee concerning a matter within the scope of his employment. *DCS Sanitation Management, Inc. v. OSHRC*, 17 BNA OSHC 1601, 1602 (8th Cir. 1996). Although Spurlock did not testify, notes from his interview are part of the record. Spurlock’s verbal statement, as testified by CO Roesler, is supported. Safety manager Abercrombie admitted that Phillip Spurlock never attended a safety meeting and that he did not know the extent of any prior experience or training which he may have had. A&W’s monthly safety meeting records show that Spurlock had not attended the meetings (Exhs. C-22, R-13; Tr. 207, 358, 370).

Although attendance at A&W’s safety meetings was encouraged, employees were not compensated, the meetings were after normal work hours, and attendance was not enforced. Abercrombie testified that there was no “iron-fist rule that they were to attend this meeting”

(Tr. 371). The safety meeting sign-in sheets show that attendance fluctuated (Exh. R-13; Tr. 265-266, 285-287, 345).

Section 1926.454(a) requires that “each” employee be trained. Spurlock was not trained. A&W argues that training was also provided on the job (Tr. 304). *Better Bilt Products, Inc.*, 15 BNA OSHC 1167, 1171 (No. 89-2028, 1991). A&W claims that CO Roesler did not ask foreman Buffington about verbal instructions given to Spurlock regarding scaffolding hazards (Tr. 235-236, 238). A&W, however, does not show nor does the record reflect that Spurlock actually received on-the-job training regarding scaffolding hazards. Buffington was at the KRO job for approximately four hours while Spurlock was working.

Further, although employees were trained to recognize scaffolding hazards, the lack of guardrails on the KRO scaffolding was plainly obvious. A&W employees worked on the scaffolding for five days. There is no showing that the employees complained or refused to work (Tr. 181). Although the occurrence of a violative condition such as lack of guardrails does not establish a violation of the training standard, it does show that employees are not understanding their training or are not concerned about the consequences of working in unsafe conditions. *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1426 (No. 90-1106, 1993).

The violation of § 1926.454(a) is affirmed as serious. A violation is serious under § 17(k) of the Occupational Safety and Health Act (Act), 29 U.S.C. § 666(k), if the violative condition creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

A&W should have known that an employee was not receiving training through its monthly safety meetings. Although A&W’s employee injury rate is low, the purpose of training is to prevent the first injury (Exh. R-6). In the event of an accident, a fall of 12 to 20 feet could have resulted in serious injury. The crew had worked from the unguarded scaffolding for four days prior to OSHA’s inspection.

Citation No. 2, Item 1 - Alleged willful violation of § 1926.451(g)(1)

The citation alleges that employees were exposed to falls while working at heights in excess of 10 feet on fabricated frame scaffolds without a guardrail system or personal fall arrest system. Section § 1926.451(g)(1) provides:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraph (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

A&W rented scaffolding for the KRO job from Crom Equipment Rental. The scaffolding was ordered by foreman Buffington on March 14 and 15, 2000. The scaffolding was erected at the KRO job site on March 15, 2000, by Eric Hauger of H & R Erection and Dismantling and A&W foreman Buffington. The scaffolding was four tiers high. Guardrails were required along the top of the fourth tier, which was approximately 26 feet, 9 inches, high; the third tier, which was approximately 20 feet, 2 inches, high; and the second tier, which was approximately 12 feet high. Guardrails were not required along the top of the first tier because it was less than 10 feet high (Exhs. C-10 through C-16).

Adequate guardrails were installed along the top of the fourth tier (Tr. 255-256). However, no guardrails were installed along the 10-foot center sections at the second and third tiers. Hauger informed Buffington that the guardrails were missing. Buffington responded that he would complete the guardrail system later (Tr. 117, 120-121). Instead of returning to the job the next day, Buffington went to a golf tournament for the weekend (Tr. 388-389). The crew, however, with Guy Hulec in charge, worked on the scaffolding on Thursday and Friday.

On Monday morning, before leaving his house, Buffington was called to another job site to start a new project (West Port Storage) (Tr. 389-390). However, Buffington was still the foreman on the KRO job. He visited the KRO job on Monday afternoon at approximately 2:00 p.m. and again on Tuesday for two hours. Buffington was also briefly at the KRO job on Wednesday prior to the OSHA inspection. The crew continued to work on the scaffolding. No guardrails or other protections were ever provided at the two 10-foot unguarded sections. Buffington had “simply forgot” (Tr. 390-391).

A&W does not dispute that employees worked on a tubular frame scaffolding at the second and third levels respectively, 12 and 20 feet above the ground level. Five employees worked without personal fall protection equipment and walked/worked along the unguarded 10-foot section. Job foreman Buffington was aware of these conditions because he assisted in erecting the scaffolding and was at the job site on March 20 - 22. Buffington has been a job foreman with A&W for six years (Tr. 378).

Despite knowing the guardrail system was incomplete, Buffington allowed the crew to continue to work at the second and third levels without adequate fall protection. Buffington's knowledge of the lack of guardrails is imputed to A&W.

“Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation.” *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). An employee such as Buffington who has been delegated authority over another employee is considered to be a supervisor for purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos. 86-360, 86-469, 1992).

Jim Buffington was delegated supervisory authority by A&W over employees doing the stucco work from the scaffolding. He erected the scaffolding and knew it lacked adequate guardrails. Buffington's knowledge is imputed to A&W. Also, Guy Hulec, the employee in charge of the crew in Buffington's absence, was a supervisor whose knowledge is also imputed to A&W. *A. P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (laborer designated as working foreman).

The record establishes a *prima facie* violation of § 1926.451(g)(1).

Unpreventable Employee Misconduct Defense

A&W asserts that Jim Buffington violated its work rules and therefore any violation for lack of guardrailing was due to unpreventable employee misconduct. To prove the affirmative defense of employee misconduct, A&W must show that it has (1) established work rules designed to prevent the violation; (2) adequately communicated the rules to its employees; (3)

taken steps to discover violations; and (4) effectively enforced the rules when violations have been discovered. *Nooter Construction Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

When a supervisory employee such as Buffington is involved in the alleged misconduct, the employee misconduct defense is more difficult to establish since it is generally the supervisor's duty to protect the safety of employees under his supervision. *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991). The "fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax." *United Geophysical Corp.*, 9 BNA OSHC 2117, 2123 (No. 78-6265, 1981). An employer can avoid responsibility based on supervisory misconduct by establishing that it "took reasonable measures to prevent the occurrence of the violation." *Dover Elevator Co.*, 16 BNA OSHC, *supra*, at 1286.

A&W's Work Rule

A&W has a work rule requiring full guardrails on scaffolding above the 10 foot level (Tr. 310, 379-380, 397). The work rule specifically provides that "handrails and toeboards will be installed on all sides and ends of platforms more than 10 feet above ground or floor" (Exh. R-9, "General Safety Guide," p. 11). Erik Hauger of H & R Erection and Dismantling testified that A&W had always put full guardrails on its scaffolds (Tr. 120).

The Secretary argues that A&W's safety program was deficient in scaffold support, *i.e.*, guys, ties, braces and cross-bracing used for guardrails. Also, the Secretary claims that the safety program was motivated to reduce Workers' Compensation carrier expenses (Tr. 306-307). These concerns, even if accurate, do not diminish the fact that there was a work rule requiring guardrails on the scaffolding at the KRO building.

A&W has an adequate guardrail work rule.

A&W's Communication of the Work Rule

A&W asserts that its work rule was communicated to employees at monthly safety meetings and on-the-job instruction. A&W's monthly safety meetings discussed scaffolding and guardrails at each meeting. Foreman Buffington knew the rule regarding full guardrails (Tr. 379-380, 385, 397, 492).

As discussed, however, employees' attendance at the meetings was not mandatory (Tr. 285-286, 345, 371). Buffington did not attend all the monthly safety meetings because of vacation and a project in south Florida (Tr. 314). Despite working over two months, employee Spurlock never attended a safety meeting. On-the-job instruction specifically regarding guardrails on scaffolding and fall protection was not shown to have been provided. However, Buffington acknowledged being told of the guardrail requirements.

A&W's Monitoring for Violations

At safety meetings, safety manager Abercrombie asked where scaffolding was being used so that he could plan safety inspections. Abercrombie has personally inspected the scaffolding on "several jobs." Buffington remembered several jobs inspected by Abercrombie (Tr. 294-295, 325-327, 366, 382-383, 492-494). Abercrombie did not visit the KRO job site prior to OSHA's inspection. He did not have actual knowledge of the inadequate guardrail system (Tr. 260, 328).

Monitoring means also that employees are properly supervised. *L. R. Wilson and Sons, Inc.*, 17 BNA OSHC 2059, 2064 (No. 94-1546, 1997). The inadequate guardrail at the KRO job was in plain view in front of the building along a main highway. There were at least six employees (Buffington and five employees in the crew) who knew or should have known that the guardrail work rule was not being followed. Buffington was the foreman for the job, and in his absence Guy Hulec was in charge. During the five days employees worked on the scaffolding, the record does not show that any supervisor or employee questioned the inadequate guardrails. The employees continued to work on the scaffolding in plain view.

A&W's monitoring, which appears to rely on one employee (Abercrombie) to discover violations of work rules, was inadequate.

A&W's Enforcement of Work Rules

An effective disciplinary program should consist of increasingly harsh measures taken against employees who violate the work rules. It should clearly inform the employee of the consequences of unsafe activity. *Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 2080 (No. 16162, 1979). To show that its disciplinary system is more than a paper program, an employer must present evidence of having actually administered the discipline outlined in its policy. *Pace*

Construction Corp., 14 BNA OSHC 2216, 2218 (No 86-758, 1991). The evidence should show that disciplinary action progressed to higher levels of punishment designed to provide deterrence. *Archer-Western Constructors, Ltd.*, 15 BNA OSHC, *supra*, at 1016-1017 (No. 87-1067, 1991).

A&W's system of enforcement includes the Golden Hammer Award, safety bonuses, coaching and positive reinforcement, and, the highest sanction, termination, when appropriate. The Golden Hammer award is a plaque on which the names of employees who have violated a company rule are placed. The purpose of the award is to heighten awareness. Also, the employee is required to give a public confession to other employees. Money from A&W's insurance compensation carrier is used for employee safety bonuses (Exhs. R-14, R-15; Tr. 307-309, 311-312).

Safety manager Abercrombie testified that he has fired employees who violated A&W's work rules regarding its drug and alcohol free work policy. He terminated two employees for drinking at lunch and two other employees for smoking marijuana after a customer complained (Tr. 289). However, two of the employees terminated were later returned to work after making a public confession (Tr. 496-497). It was not shown that employees were terminated for safety rule violations.

After receiving the citation in 2000, A&W, as punishment, made Buffington stand before his peers and relate how his failure to follow work rules on fully installing guardrails on scaffolding resulted in the OSHA citation. His name was placed on the Golden Hammer plaque. Also, Buffington did not receive a safety bonus check (\$2,000) at the end of the year. Buffington was not terminated. This was nine months after the June, 1999, citation where Buffington failed to comply with the same work rule (Exhs. R-14, R-16; Tr. 310-314, 381-382, 395-396).

There is also no evidence that other employees who worked at the KRO job were disciplined. In Buffington's absence, Guy Hulec was in charge of the KRO job. "Where all the employees participating in a particular work activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1865 (No. 93-1122, 1996).

The lack of guardrails existed for five days and supervisor Buffington knew that the guardrails had not been erected. He returned to the job three days and made no corrections to an obviously unsafe condition. He "simply forgot" (Tr. 390-391, 394).

Buffington's discipline appears more the result of A&W receiving the OSHA citation than from violating the company's rule on guardrails. He did not receive the Golden Hammer or make his public confession until after A&W received the citation. There is no showing that Buffington received additional scaffolding training or monitoring to ensure compliance. A&W's enforcement program is inadequate.

Based on inadequate monitoring and enforcement, A&W's unpreventable employee misconduct defense is rejected.

Willful Classification

The violation of § 1926.451(g)(1) is classified as willful. It is well settled that 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. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

A&W was cited in 1999 for a similar violative condition under the same standard; § 1926.451(g)(1). Buffington, A&W foreman for six years, was the supervisor on both jobs (Exh. C-4, exhibit 2; Tr. 64, 75-76, 203, 381). The citations were nine months apart. Buffington knew the requirements for guardrails. He assisted in erecting the scaffolding and was specifically advised of the inadequate guardrails. Although he knew the guardrail requirement, he made a deliberate and conscious decision to disregard the requirement. Buffington failed to correct the lack of guardrails despite repeated opportunities. He returned to the KRO job at least three times after erecting the scaffolding. Mr. Hulec, an employee placed in charge of the crew, also failed to correct the condition.

A&W's management officials were aware of the OSHA fall protection requirements. Safety manager Abercrombie admits that employees should be aware of the requirement (Tr. 246, 328). However, despite at least five employees working on the scaffolding for five days, corrections were not made. The employees would have continued to work from the scaffolding

without fall protection if OSHA had not inspected (Tr. 426). Buffington “simply forgot” (Tr. 391, 394). His focus was on completing the job rather than employee safety (Tr. 390).

The lack of adequate guardrails was clearly visible. It was an unsafe workplace in plain view. The lack of guardrails over the entrance way could be seen from along a busy highway within 10 miles of A&W’s company office (Tr. 259).

A&W’s argument that the compliance officer’s testimony regarding the willful classification should not be given weight is misplaced (A&W’s Brief, p. 32). The compliance officer’s confusion or misunderstanding regarding the distinction between intentional disregard and plain indifference merely shows a lack of legal sophistication (Exh. C-23, p. 4; Deposition filed with court January 11, 2001; Tr. 242). The compliance officer’s role is to investigate and obtain the facts. The court decides if the facts sustain a willful classification such as in this case.

Also, A&W’s allegation of compliance officer bias was not shown. A&W argues bias based on CO Roesler’s statements that he wanted to “nail” A&W and that he wanted to make an example of A&W (Tr. 102). Also, he told Crom Equipment Rentals in the worst case A&W could receive a willful citation (Tr. 218).

Despite these inappropriate statements, if made, A&W has not asserted vindictive prosecution as a defense. Also, if the comments were made, the record fails to establish bias. Witnesses other than the compliance officer supported the violations.

A&W’s argument that the record shows A&W has made a good faith effort to comply, even though not entirely effective, is also misplaced. A&W asserts that good faith is shown by A&W’s safety meetings, inspections of job sites, and its post-response to the citation. *Anderson*, 17 BNA OSHC at 1894. The inadequacies of A&W’s safety program have previously been discussed and do not establish good faith to defeat a willful classification.

After resolving the previous 1999 citation, it was not shown that A&W took additional steps to ensure future compliance. It failed to post scaffolding requirements on each site as it had agreed in the informal settlement (Exh. C-4, exhibit 1). Also, Buffington was not provided additional training or monitoring to ensure compliance.

Penalty Consideration

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.

A&W does not dispute the reasonableness of the penalties proposed by the Secretary in its brief. A&W is a medium sized employer with approximately 57 employees (Tr. 190). It is entitled to credit for size, which was not provided by the Secretary (Tr. 206).

A&W is not entitled to credit for history. A&W had received a prior serious citation for scaffolding violations, including the lack of guardrails (Tr. 191). However, A&W is entitled to credit for good faith for penalty purposes in that it does have an adequate written safety program, a sincere intent to operate safely, and a lack of employee accidents for three years (Exh. R-6). Although elements of its program may be deficient, its overall safety program is generally good.

A penalty of \$500 is reasonable for violation of § 1926.454(a). Five to nine employees worked on the project from March 16 to March 22. Because the scaffolding had an open side on the third deck over 20 feet high, gravity was high severity (Tr. 189-190). Only one employee, who worked for a short period, never attended the monthly training meetings. However, other employees were shown to have received the training and knew the guardrail requirements.

A penalty of \$20,000 is reasonable for the willful violation of § 1926.451(g)(1). Employees were working on the second and third tiers and were observed "dangerously close to the edge" (Tr. 205). One employee was seen leaning from the scaffolding trying to grab a bucket (Exh. C-16). The third tier was over 20 feet high (Tr. 205-206). Five employees were exposed to fall hazards in excess of 10 feet due to the lack of guardrails or personal fall protection. This was A&W's second violation for the lack of guardrails on scaffolding within one year. The same supervisor was involved in both situations. However, CO Roesler agreed that the A&W scaffolding was not the worst seen (Tr. 248). The scaffolding was fully guarded except on the two, 10-foot sections, sat on solid level concrete, had full mud seals and screw jacks, was fully planked, was squared and plumbed, was not likely to collapse despite not being tied back, and was lightly loaded (Tr. 248-249).

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:

1. Citation No. 1, Item 1, alleged serious violation of § 1926.451(c)(1), is affirmed in accordance with the parties' settlement and a penalty of \$750 is assessed.
2. Citation No. 1, Item 2, alleged serious violation of § 1926.454(a), is affirmed and a penalty of \$500 is assessed.
3. Citation No. 2, Item 1, alleged willful violation of § 1926.451(g)(1), is affirmed and a penalty of \$20,000 is assessed.
4. Citation No. 3, Item 1, alleged repeat violation of § 1926.451(h)(1), is affirmed in accordance with the parties' settlement and a penalty of \$3,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: July 20, 2001