

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

BRAND SCAFFOLD RENTAL and  
ERECTION, INC.,

Respondent.

DOCKET No. 00-1668

APPEARANCES:

Kevin E. Sullivan, Esquire  
Office of the Solicitor  
U.S. Department of Labor  
Boston, Massachusetts  
For the Complainant.

Stephen P. Harten, Esquire  
Ratcliffe, Burke & Harten, LLP  
Providence, Rhode Island  
For the Respondent.

BEFORE: G. MARVIN BOBER  
Administrative Law Judge

***DECISION AND ORDER***

This case is before the Occupational Safety and Health Review Commission (“the Commission”), pursuant to the Occupational Safety and Health Act of 1970, §§ 651-678 (1970) (“the Act”), to review a one-item citation for a serious violation of the Act, issued by the Occupational Safety and Health Administration (“OSHA”). Based on a March 6, 2000 inspection of a work site located at One Avery Square in Boston, Massachusetts, the Secretary of Labor, (“the Secretary”)

cited Brand for serious violations of 29 C.F.R. § 1926.451(e)(1) and 1926.501(b)(1).<sup>1</sup> The case was assigned to the EZ Trial docket on October 19, 2000.

On January 3, 2001, the undersigned granted the Secretary's motion to amend Citation 1, Item 1 "to allege in the alternative a serious violation of 29 C.F.R. 1926.451(e)(9)." The hearing was held in Boston, Massachusetts on January 8, 2001, and post-hearing briefs have been filed.<sup>2</sup>

***Motion To Dismiss***

During the course of the trial, Brand moved to dismiss. The undersigned denied the motion, without prejudice to revisit the issues following the presentation of the evidence. (Tr. 73-77). Given my decision on the evidence, the motion to dismiss is moot.

***Specific Issues To Be Briefed***

During the trial, I requested that the parties brief two specific issues. (Tr. 119). One issue, to wit, whether Brand was in the process of erecting or dismantling the scaffold, is determined herein. The other issue is, by this decision, rendered moot.

***Motion For Leave To File Reply Brief***

Without judicial permission, Brand submitted a reply brief, which was accordingly rejected on May 1, 2001. Brand re-submitted the reply brief together with a motion for leave to file a reply brief on May 10, 2001. The motion commented that Rule 74(c) had no applicability to the E-Z Trial procedures which were followed in the instant case. No reply was filed by the Secretary. While Brand is correct that Rule 74(c) is not applicable to cases handled under the E-Z Trial procedures, the purpose of the E-Z Trial regulatory scheme is to "simplify and accelerate the adjudicative process." [60 F.R. 21058-59 (1995)], and the Judge assigned to the case is given "the discretion to permit the parties to file written briefs \* \* \* ." [60 F. R. 21060 (1995)], 60 F.R. 41810 (1995) and Rule 209(e) of the Commission's Rules of Procedure, 29 C.F.R. 2200.209(e). As the undersigned did not issue an order allowing both parties to file post-trial reply briefs, Brand's reply brief is rejected.

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<sup>1</sup> On December 27, 2000, the Complainant withdrew Citation 1, Item 2, which alleged a violation of 29 C.F.R 1926.501(b)(1).

<sup>2</sup>Exhibit Rx-1 is an enlargement of Cx-4 (not included) (Tr. 59). Exhibit Rx-2 is an enlargement of Cx-1(not included) (Tr. 97-99).

## *The Relevant Testimony*

### **CHARLES WILLIAMS**

Compliance Officer Charles Williams testified that he has been a compliance officer for four years, has conducted over one hundred inspections, and, prior to his employment with OSHA, worked for 33 years as an ironworker in the construction trade. He testified that his OSHA training included “scaffolding issues,” which involved a ten hour course, and approximately forty hours of training “with respect to issues relating exclusively to scaffold erection and dismantling.” He also testified that he acquired on-the-job training through scaffold inspections and “responding to technical questions regarding the scaffold standard.” Finally, he testified that his prior work as an ironworker exposed him to scaffolding issues. (Tr. 9-10, 15-19).

According to his testimony, as soon as CO Williams arrived at the work site, he observed an employee climbing the scaffold on the “Washington” side. By the time CO Williams had reached the building, however, the employee had disappeared. (Tr. 11). Co Williams testified that, following the opening conference, he observed employees climbing a scaffold frame in some “kind of an alleyway.” He estimated the scaffold the employees were descending to be “ten to twelve feet” high. (Tr. 12-13, 15). He instructed his assistant CO - Jim Holiday - to take photographs of these individuals and to obtain their names. (Tr. 12, 15)

CO Williams observed two types of scaffolds - a coupler and one welded to the frame. (Tr. 12). He described the configuration of the scaffold around the building as follows:

There seemed to be tube coupler scaffold at the base of the building. That would have provided a walkway because this was being built over sidewalk and it was also being built over this alleyway entrance. So, I observed the tube with the coupler at the base and the tube with coupler adapted into a tubular frame. That would have probably had its finished product at about five floors because it was a low area at that particular point. (Tr. 13).

### **JAMES E. HOLIDAY, III**

CO Holiday, an OSHA Compliance Officer since October, 1999, testified that, as he was exiting the opening conference, he observed two or three workers climbing a scaffold located to the right of the alley way. He did not observe these workers using “any ladders or any climbing devices affixed to the scaffold or anywhere around the scaffold.” (Tr. 33-35, 37). CO Holiday observed that each horizontal brace of the scaffold was two to three feet apart, “probably closer to three feet.” (Tr.

38). He pointed the workers out to CO Williams, who directed him to take photographs, and obtain the identities of the exposed workers. (Tr. 33-35). He ascertained the identity the workers as Brand employees and obtained their first names, (Don, Rex and Richard, the foreman). (Tr. 37, 41).

CO Holiday offered his opinion that “a ladder could have been put in the area of the opening itself, coming out of the alleyway, up to the top of that scaffolding.” Also, a ladder could have been placed on the inside of the overhang area up to the scaffolding.” (Tr. 39-40, Ex. CX-1). He also suggested that an extension ladder could have been used. (Tr. 40, Ex. CX-2). Alternatively, he suggested that a stairway could have been constructed to vary and zig zag up the scaffolding. (Tr. 40).

CO Holiday admitted that he did not speak to any Brand employee “concerning the nature of the work being done at that location,” and that he thought the employees “were erecting that scaffold section.” (Tr.50-51).

In discussing the language of section 1926.451(e) he testified that section (e)(1) would not apply to the work being performed by Brand on March 6, 2000 and that he did not discuss with any Brand employee “any hazard that may accompany use of a ladder on that particular scaffold erection of March 6, 2000.” (Tr. 53-55). Finally, he did not take any measurements concerning the space within the framework of the scaffold (Tr. 57).

On the issues of feasibility and greater hazards, CO Holiday testified that it was a mistake not to cite Brand under e (9) instead of e (1). (Tr. 56). It was also his opinion that an Interpretive Memorandum produced by the Secretary provides “a non-mandatory set of guidelines” that the “competent person” would take into account when evaluating access in fall protection options to erectors and dismantles supported scaffolds,” although he does not believe there is in existence any such set of guidelines (Tr. 67). The letter refers to an “Appendix B”, but it is CO Holiday’s understanding that until Appendix B is issued “all such enforcement actions must be reviewed by the Directorate of Construction before the citations are issued,” and that he did not know if the citation was ever reviewed by the Directorate of Construction (Tr. 68).

### **JAMES FITZPATRICK**

James Fitzpatrick, Brand’s Construction Manager, testified that he has been involved in the scaffold industry since 1983, and has worked for Brand since 1997. (Tr. 78-80). His job responsibilities include supervising Brand employees in the erection and dismantling of scaffolds,

auditing job sites to prevent hazards from developing, and disseminating safety information to employees, either verbally or through written materials distributed with pay checks. (Tr. 80-82).

He testified that Brand has a safety program which requires that each foreman prepare a job safety analysis before the start of every day, covering “any specific task or duty that may change during the day.” Brand also maintains a job audit program which identifies “hazards to our crews in the field.” Fitzpatrick was present at the Boylston Street work site on March 6, 2000 (Tr. 80-82).

The foreman at that work site on that day was Richard Adams, an employee with over 15 years of scaffold experience, who had completed Brand’s safety programs and who, in Fitzpatrick’s opinion, is a “competent foreman in the scaffold industry.” (Tr. 83).

With respect to the location of the ladders, he testified as follows.

A: Due to the safety we had to keep all of our equipment and everything behind this fence with the debris netting on it. So, we had two ladders coming from inside the building behind that fence down at each end of the building at an angle and tied off to the scaffold platform that we already erected. (Tr. 93, Ex. RX-2)

With respect to the feasibility of the Secretary’s suggested placement of a ladder, he testified as follows.

The number one assessment ... in our judgment was the safety of leaving a ladder accessible to the public while we were erecting out there. Number two, the option of installing attachable ladders is standard scaffold. A detachable ladder, which is roughly sixteen inches wide, and it has an eight-inch deep horseshoe bracket that it is clamped off to on a horizontal or the vertical member. If you put that inside the tower to keep it from tipping over you would not be able to climb up the ladder because there is not enough room in the one foot ten bay. Take of the eight inches, about a foot, if you were lucky to squeeze a body between the ladder and the rungs that are guard railing it off.

Q: Let me stop you right there and let us break this down. You said you are concerned about pedestrian traffic. Is that right?

A: Yes.

Q: Was that concern heightened at all by the placement of the clinic at that corner?

A: Absolutely.

Q: The placement of the ladder inside the tower, that is the box that we just described. Is that right?

A: Yes.

Q: Where we find this gentleman descending the scaffold.  
Is that right?

A: Yes.

Q: Your reason for not putting a sixteen inch ladder in an eight inch bracket inside that box is what?

A: It would not allow him to safely climb up the ladder. He would be hitting himself and have obstructions in order to perform the task of securing the tresses in the ladder beam across the gap.

Q: Why not put a ladder on the outside of that tower?

A: Because at that point until the tresses are all connected at that point it is a free standing tower with only a two foot wide base. If you put a ladder on that and try to climb up it is about eight feet high or ten feet high at the top you are standing about six to eight feet. If you connect the ladder on the outside of a two-foot wide tower and you try to climb up that you will pull it over. It will be a tipping and you will pull it over on top of yourself. Until you get those tresses connected at the top. (Tr. 95-96)

He also testified that there was no ladder leading to the tower located on the far side of the alley, but that the far side of the alley was intended only to be a support tower for the beams and was never intended to be a work surface. In fact, once the link there was completed, they accessed all the work from the other side of the scaffold in order to avoid “the congestion all of the people hanging around that corner” (Tr. 98). Fitzpatrick also testified that it was safe for an experienced and trained scaffold erector and dismantler to climb down the horizontal cross members of the scaffold. (Tr. 99, 105, Ex. CX-4).

### **WALTER L. DAVIS**

Walter L. Davis, presently Brand’s southwest region safety manager, was Brand’s northern region manager of safety and regulatory compliance at the time of the investigation. (Tr. 109-110). As northern region manager, his responsibilities involved ensuring that all of the crew members had undergone training, including scaffold training, orientation, supervisor safety, First Aid, CPR, and OSHA outreach training. Davis’ duties also included overseeing Brand’s safety process, site audits and ensuring the correction of any violations, in addition to the training. He also oversaw the safety organization for Brand’s eight locations, and made sure that they had someone on staff responsible for the safety effort for each division. He also dealt with all litigation matters and workers compensation claims. (Tr. 110-111).

Davis explained the manner in which he trained personnel in safety, as follows.

All the supervisors went through our Supervisor Safety Training, to include how to perform a Job Safety Plan, to perform a Job Safety Audit, Incident Reporting. That was basically it. But also the Job Safety Plan, which is pretty much the key of our safety process.

The field supervisor, who knows how to perform and look for hazards, does perform a Job Safety Plan before each shift. He has his individual crew members sign the form and goes over it with them to make sure that they understand which hazards they probably will encounter. We use this because we are a union contractor. We get people down at the union hall on a daily basis. We use this as our training tool, for that specific job that specific day, for those specific hazards. (Tr. 112).

He further testified that Adams and Fitzpatrick both successfully completed the Brand orientation program and the Brand supervisor safety training program. (Tr. 113)

### ***Discussion and Conclusion***

In order to establish a violation of a specific standard, the Secretary must show: (a) the standard is applicable to the cited condition; (b) the employer's noncompliance with the terms of the standard; (c) the employees had access to the violative condition; and (d) the employer had actual or constructive knowledge of the conditions (*i.e.*, the employer either knew or could have known of the conditions with the exercise of reasonable diligence. *Armstrong Steel Erectors, Inc.*, 19 BNA OSHC 1630, 1632, (No. 97-0250, 1999); *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1974 (No. 97-0152, 1999); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1, item 1 alleges a serious violation of 29 C.F.R. 1926.451(e)(1) and proposes a penalty of \$2,000.00 The cited standard provides as follows:

(e) *Access.* This paragraph applies to scaffold access for all employees. *Access requirements for employees erecting or dismantling supported scaffolds are specifically addressed in*

*paragraph (e)(9) of this section.*

(1) 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.

In the alternative, the Complainant alleges a violation of 29 C.F.R. 1926.451(e)(9). This standard provides as follows:

(9) Effective September 2, 1997, access for employees erecting or dismantling supported scaffold shall be in accordance with the following:

(I) The employer shall provide safe means of access for each employee erecting or dismantling a scaffold where the provision of safe access is feasible and does not create a greater hazard. The employer shall have a competent person determine whether it is feasible or would pose a greater hazard to provide, and have employees use a safe means of access. This determination shall be based on site conditions and the type of scaffold being erected or dismantled.

The citation alleges a violation of the standards in that:

Employees were exposed to injury while climbing [South tower] sections of scaffolding without the use of ladders.

Turning to the first alleged standard violation, Citation 1, Item 1, 29 C.F.R. 1926.451(e)(1), it is clear that this regulation does not apply to “[a]ccess requirements for employees erecting or dismantling supported scaffolds \*\*\*.” See 61 Fed.Reg. 46026, 46028 (1996). CO Holiday admitted that he believed that the workers were erecting a scaffold, although he did not speak with any Brand employee, “concerning the nature of the work being done at that location” (Tr. 50-51). Moreover, on cross-examination, CO Holiday admitted that the photographs revealed that the employees “were erecting that scaffold section.” (Tr. 51, Ex. R-1). The evidence thus demonstrates that the employees

were erecting or dismantling the scaffolds. Accordingly, the standard does not apply and this citation item is vacated.

The alleged alternative standard violation, 29 C.F.R. 1926.451(e)(9), however, does apply, as Brand employees were erecting or dismantling the scaffold. The Secretary has also shown that Brand employees were exposed to a hazard. With respect to the Secretary's burden to establish a violation, CO Holiday testified that the placement of a ladder in the opening, inside the overhang area, or through the use of a stairway constructed to zig zag up the building, would provide possible safe means of access, and that no such access was provided to the employees. (Tr. 39-40, Ex. C.-1, Edh. C.-2). The Secretary has thus made a showing that the standard was violated. Finally, by virtue of the fact that a failure to have appropriate means of access is not a transitory defect and should have been discovered had Brand conducted regular inspections, the Secretary has established knowledge of the purported violation.

This showing, however, was sufficiently rebutted by Brand's evidence that it would pose a greater hazard to provide and have employees use as safe means of access ladders described by CO Holiday. The law is clear that the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995); *Peavy Grain Co.*, 15 BNA OSHC 1354, 1359 (No. 89-3046, 1991); *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1823 (No. 88-2572, 1992).

First, the evidence demonstrates that the determination that it would create a greater hazard to provide the suggested means of access was made by a competent person, to wit, Mr. Fitzpatrick. The term, "competent person" is defined 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.” 29 C.F.R. § 1926.32(f). Mr. Fitzpatrick has worked in the scaffold industry approximately twenty years. As Brand’s Construction Manager he has “authorization to take prompt corrective measures\*\*\*.” At Brand, he supervises the erection and dismantling of scaffolds. He also audits work sites to prevent hazards from developing and disseminates safety information to employees. He testified that he was present at the Boylston Street work site on March 6, 2000 and did not observe “existing or predictable hazards” or “working conditions which were unsanitary, hazardous or dangerous to employees.”(Tr. 78-82). Based upon his testimony regarding his work experience and authority “to take prompt corrective measures,” it is the opinion of the undersigned that Mr. Fitzpatrick is a “competent person” within the meaning of the regulation.

Second, the record establishes that Mr. Fitzpatrick, inspected the work site on the day of the OSHA inspection and determined that use of ladders would pose a greater hazard, in that the placement of the proposed ladders would create a hazard to pedestrian traffic, and could cause the scaffold to tip if used prior to the installation of the tresses, and that the placement of a ladder on the interior of the scaffold would not allow for a safe amount of room for the workers. (Tr. 95-98). It is the opinion of the undersigned that Brand has thus carried its burden of proving that it qualified for the exception set out in 29 C.F.R. 1926.451(e)(9). The proposed violation is vacated.

***ORDER***

It is ORDERED that the motion for leave to file a reply brief is DENIED and the reply brief is REJECTED.

It is FURTHER ORDERED that the disposition of the citation items is as follows:

<b><u>Citation 1</u></b>	<b><u>Violation</u></b>	<b><u>Disposition</u></b>
Item 1	29 C.F.R. 1926.451(e)(1)	Vacated
Alternative	29 C.F.R.1926.451(e)(9)	Vacated

/s/

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G. Marvin Bober  
Administrative Law Judge

Dated: 9 AUG 2001  
Washington, D.C.