

Secretary of Labor,

Complainant,

v.

Ranch Masonry, Inc.

Respondent.

OSHRC Docket No. 01-0742

Appearances:

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Curtis Gaye, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Thomas L. Scott, Esq.
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Humble, Texas
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Ranch Masonry, Inc. (Ranch), contests a citation issued by the Secretary on February 13, 2001, alleging three serious violations of construction standards under the Occupational Safety and Health Act of 1970 (Act). The citation arose from an Occupational Safety and Health Administration (OSHA) investigation of an employee fatality at a construction site in Atlanta, Georgia. The employee fell from the fifth level of a scaffold that had been erected next to a four-level (a basement and three upper stories) building.

Item 1a of the citation alleges a serious violation of § 1926.451(b)(3)(ii) for exceeding a distance of 18 inches between a building a scaffold platform. Item 1b alleges a serious citation of § 1926.451(e)(8) for allowing employees to access a building from a scaffold platform across a 24-inch gap. Item 2 alleges a serious violation of § 1926.501(b)(1) for failing to provide fall protection (guardrails, safety nets, or personal fall arrest systems) to employees working from a balcony 6 feet or more above the ground.

Ranch argues that the Secretary failed to establish any of the alleged violations. A hearing was held in this matter on October 9, 2001, in Atlanta, Georgia. The parties have filed post-hearing briefs. For the reasons stated below, items 1a, 1b, and 2 will be affirmed.

Background

Ranch, which is incorporated in Texas, had been in business for 6 years at the time of the hearing. In 2000, general contractor Fingers Construction had subcontracted Ranch to apply the exterior cladding to a new apartment complex under construction located at 3400 Garson Drive in Atlanta, Georgia. The apartment complex consists of 324 units in 10 buildings. Ranch had erected a scaffold next to the south side of Building 400. Building 400 has a basement with 3 stories above it. By September 29, 2000, Ranch's scaffold was five levels high. Ranch had a crew of two men working on the fifth level of the scaffold, spraying a stucco finish onto the south wall of the building (Tr. 49-51, 169). The fifth level of the scaffold was 33 feet above the ground (Tr. 118).

At approximately 3:00 p.m. on September 29, Ranch employee Jaime Perez fell to his death from the fifth level of the scaffold. Perez fell between the scaffold and the south wall of Building 400 (Tr. 15). The following day, OSHA compliance officer William Harvey arrived to investigate the fatality site. Due to Harvey's workload, compliance officer Kurt Petermeyer completed the investigation (Tr. 108-109). Based upon the investigation conducted by Harvey and Petermeyer, the Secretary issued the citation that gave rise to the instant case.

Citation No. 1

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

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

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

Item 1a: Alleged Serious Violation of § 1926.451(b)(3)(ii)

Section 1926.451(b) addresses scaffold platform construction. The Secretary alleges that Ranch committed a serious violation of § 1926.451(b)(3)(ii), which provides:

The maximum distance from the face for plastering and lathing operations shall be 18 inches (46 cm).

Ranch's employees were spraying stucco, which is a plastering operation. It is undisputed that § 1926.451(b)(3)(ii) applies to the cited condition.

The distance between the scaffold and the south wall was a major point of contention at the hearing. The citation alleges that "an employee was performing plastering operations from the 5th level of a system scaffold. The employer erected the scaffold in a manner that left an approx. 24-inch opening at the face of the building."

Harvey testified that he measured the distance from the edge of the top platform of the scaffold to the edge of the balcony on the top level (the fourth story) of the building. The balcony was outset 4 inches from the wall face. Harvey stood in the doorway to the fourth floor balcony and extended a steel tape measure to the edge of the scaffold platform. Harvey did not measure the width of the balcony. According to Harvey's reading of the tape measure, the edge of the fifth level scaffold platform was 24 inches from the edge of the fourth floor balcony, and 28 inches from the face of the wall (Tr. 79, 83, 93-94, 98).¹

Harvey also measured the distance from the base of the wall to the base of the scaffold at ground level, and found it to be 29 inches (Tr. 72). The scaffold was secured to the building with wire tape at various points (Tr. 34).

Ranch argues that Harvey could not have taken an accurate measurement under the circumstances he described. Ranch alleges that the width of the balcony is approximately 10 feet,² which would have meant that Harvey would have had to lean forward and read the tape measure as it extended approximately 12 feet to the scaffold. Ranch contends that a reading taken under these circumstances is inherently unreliable, and that Ranch took more reliable measurements that establish that the scaffold was within the regulation 18 inches of the wall.

¹ The fifth level platform of the scaffold and the fourth floor balcony were not on an even plane with each other. The fifth level of the platform was approximately 1 foot higher than the edge of the fourth floor balcony (Tr. 92, 161).

² No witness testified that the width of the balcony was, in fact, 10 feet, and Ranch failed to produce any documentary or photographic evidence backing up this claim. The 10-foot measurement was put forth by counsel for Ranch during cross-examination, and is repeated by Ranch in its post-hearing brief as if it were an established fact. The record, however, fails to establish that the width of the balcony was 10 feet. Its actual width cannot be determined from the record.

In support of its claim that the gap between the scaffold's platform edge and the balcony edge was within the 18 inches allowed by the cited standard, Ranch presented the testimony of Donald Eckhardt. Eckhardt is apparently a foreman for Mike Phillips Masonry (Phillips), although when asked what his position with Phillips was, Eckhardt responded, "I don't think we've ever figured that out" (Tr. 41). Eckhardt stated that he "oversee[s] the work that Mr. Phillips has as far as jobs" (Tr. 10). Phillips and Ranch work closely together on various construction projects. Eckhardt stated that, at the site at issue, "I was working for Mike Phillips with Ranch Masonry" (Tr. 11).

Eckhardt was not at the site at the time Perez fell, but he returned to the site the next morning and took his own measurement of the gap between the wall and the scaffold (Tr. 17, 29). Eckhardt testified that the gap was 18 inches (Tr. 19, 23). Ranch produced a photograph (Exhibit R-1) purporting to show a second measurement taken by Eckhardt on October 5, 2000, several days before the scaffold was taken down. The photograph supposedly shows that the gap measured 18 inches (Exh. R-1; Tr. 31-32). Eckhardt did not measure the gap from the base of the wall to the base of the scaffold (Tr. 42).

Exhibit R-1 is problematic for a number of reasons. At the far right of the photograph, a tape measure is visible starting at approximately the 8-inch mark. The photograph does not show the end of the tape measure actually touching the wall or balcony edge. The 18-inch mark on the tape is being held against a vertical pole that is part of the scaffold frame. The photograph is misleading in that it shows a 10-inch wide platform plank to the right of the scaffold pole that was not present at the time of Perez's fall. On cross-examination, Eckhardt explained that the plank and the side arm (or side bracket) on which it rested "were put there the following Monday [after the accident] to make--well, we had had an accident. They just wanted to do everything over and above to make sure that that area was better than it was" (Tr. 58). The tape measure in the photograph shows the plank to the left of the scaffold frame pole (which was in place at the time of the accident) to be at approximately the 22-inch mark on the tape measure. It is difficult accurately to read the measurement because the tape measure is being held several feet above the edge of the plank, and the plank is photographed at an angle. It is clear, however, that the front edge of the plank exceeds the 18-inch mark on the tape measure by several inches.

Eckhardt testified that he believed the 18-inch gap allowed by § 1926.451(b)(3)(ii) is to be measured from the wall to the scaffold frame (Tr. 66):

Well, the scaffold is the scaffold itself. The plank is the plank. When you're erecting the scaffold, the frame is the first thing you put up. If I have 18 inches and I need 18 inches, I'm going to use 18 inches. And I had 18 inches there.

Eckhardt conceded that the platform on which Ranch's employees were working was more than 18 inches away from the wall (Tr. 63): "At the edge of the scaffold, the frame itself was 18 inches. The plank is inset . . . I'm not denying that [the plank] is farther away, no, I'm not."

The cited standard is a subsection of § 1926.451(b)(3), which provides (emphasis added):

Except as provided in paragraphs (b)(3)(i) and [the cited paragraph] (ii) of this section, *the front edge of all platforms* shall not be more than 14 inches (36 cm) from the face of the work, unless guardrail systems are erected along the front edge and/or personal fall arrest systems are used in accordance with paragraph (g) of this section to protect employees from falling.

It is the front edge of the scaffold platform, and not the scaffold frame, that is the relevant point of measurement for the purposes of § 1926.451(b)(3). Ranch's reliance on Eckhardt's measurement from the wall to the scaffold frame is misplaced.

Even if Harvey's measurements were considered questionable standing alone, the measurements do not stand alone. In addition to Harvey's measurement and Eckhardt's admission that the front edge of the platform plank was more than 18 inches from the wall, the Secretary adduced other evidence corroborating that the gap in question exceeded 18 inches. Petermeyer testified that two medical examiners on site to investigate the fatality estimated the gap between the platform and the building to be 30 inches (Tr. 152). Petermeyer interviewed Ranch's foreman, Juan Sanchez, who estimated that the gap was 24 inches (Tr. 115-116). The record establishes that the gap exceeded 18 inches.

Employee exposure is undisputed. The day of the accident, two Ranch employees were assigned to work on the fifth level of the scaffold. Employer knowledge is also established. Ranch was aware of the gap between the scaffold and the building. The scaffold had been erected for several weeks prior to Perez's fall, and was in plain view. Foreman Sanchez had even

attempted to shorten the gap by placing two 10-inch planks on the side arm, but found “it would have been too tight to the building” (Tr. 144). Ranch’s owner, Arturo Garcilazo, testified that he inspected the site every 2 weeks, and that he paid particular attention to the scaffolds (Tr. 175-176).

The Secretary has established a violation of § 1926.451(b)(3)(ii). The hazard created by the gap is exposing employees to a fall of 33 feet, which is likely to result in death (as in the present case) or serious physical injury. The violation is serious.

Item 1b: Alleged Serious Violation of § 1926.451(e)(8)

Section 1926.451(e)(8) provides:

Direct access to or from another surface shall be used only when the scaffold is not more than 14 inches (36 cm) horizontally and not more than 24 inches (61 cm) vertically from the other surface.

The citation alleges that “[e]mployees were accessing and egressing a system scaffold by crossing a gap of approx. 24 inches to or from the 4th floor balcony.”

Ranch argues, as is did in the previous section under 1a, that Harvey failed to accurately measure the gap. As discussed in the previous section, it is determined that the gap between the front edge of the scaffold’s fifth level platform and the fourth floor balcony edge was approximately 24 inches.

Sanchez told Petermeyer that he allowed employees to cross over the gap between the scaffold and the building, even though employees could access the scaffolds by using the interior ladder. Employees Juan Benuelos and Adolfo Rodriguez both told Petermeyer that they routinely crossed the gap when working at the top levels of the scaffold and building (Tr. 123-124, 180-181).

The Secretary has established a serious violation of § 1926.451(e)(8).

Item 2: Alleged Serious Violation of § 1926.501(b)(1)

Section 1926.501(b)(1) provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

The citation alleges, “Employees were exposed to fall hazards while performing plastering operations from the 4th floor balcony. Hazard of a fall approx. 32 feet to lower level.” It is undisputed that Ranch did not provide a guardrail system, safety net system, or personal fall arrest systems for its employees working on the balcony at heights above 6 feet.

Ranch claims that the scaffold platform located next to the balcony is in itself a form of fall protection. Ranch again claims that the distance between the balcony and the scaffold platform was only 14 inches. As noted in the previous two sections, it is determined that that distance between the balcony and the scaffold was approximately 24 inches. Furthermore, the balcony floor and the scaffold platform were not level. The scaffold platform was 1 foot higher than the balcony floor. It is difficult to see how a platform that is higher than the unprotected level on which employees are working could provide fall protection.

Ranch states in its post-hearing brief, “It would have been impossible to apply the stucco finish to the balconies and columns if the guardrails were in place” (Ranch’s brief, p. 5). It is noted that Ranch did not assert an affirmative defense of infeasibility. Ranch makes no claim of impossibility regarding the use of safety nets or personal fall arrest systems.

Ranch’s argument is rejected. The plain language of the standard makes clear that the employer must choose one of the listed forms of fall protection. Ranch failed to use any form of fall protection. At least two employees were working from the 4th floor balcony the day of the fatality (Tr. 14). These employees were exposed to falls of 33 feet. Ranch, through Sanchez, was aware that no fall protection was being used. The Secretary has established a serious violation of § 1926.501(b)(1).

Penalty Determination

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

At the time of Perez’s death, Ranch employed approximately 35 employees (Tr. 183). OSHA had previously inspected Ranch six times (Tr. 121). Ranch is accorded some consideration for good faith because it had implemented ongoing scaffold training and competent

person training, in both English and Spanish (Tr. 169-174). The gravity of the three violations is very high. As Perez's death demonstrates, exceeding the allowable distance between the scaffold and the building, and failing to provide fall protection create a potentially lethal condition.

Upon consideration of the relevant factors, it is determined that the appropriate total penalty for items 1a and 1b is \$5,000.00. The appropriate penalty for item 2 is \$4,000.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1. Items 1a, alleging a violation of § 1926.451(b)(3)(ii), and 1b, alleging a violation of § 1926.451(e)(8), are affirmed, and a total penalty of \$5,000.00 is assessed; and
2. Item 2, alleging a violation of § 1926.501(b)(1), is affirmed, and a penalty of \$4,000.00 is assessed.

_____/s/_____
NANCY J. SPIES
Judge

Date: April 29, 2002