

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
S. A. Storer and Sons Co.,
Respondent.

OSHRC Docket No. 01-1587

Appearances:

Linda Hastings, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio
For Complainant

Roger L. Sabo, Esq., Schottenstein, Zox & Dunn, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER ON REMAND

This case has been remanded by the Review Commission on May 27, 2004, pursuant to a decision and order of the United States Court of Appeals for the District of Columbia Circuit dated March 19, 2004.

The Review Commission has directed this judge to vacate the citation in so far as it alleges a violation of 29 C.F.R. § 1926.45 1(g)(1) with regard to the window opening area, to affirm the violation of that standard as to the materials staging area and to reassess an appropriate penalty for that portion of the citation affirmed.

On June 2, 2004, a telephone conference was held with the attorneys for both parties. Both parties indicated that they did not intend to make further submissions and that a decision could be issued on the current record.

In accordance with the Review Commission's Remand Order dated May 27, 2004, the violation of 29 C.F.R. § 1926.451(g)(1) is vacated in so far as it relates to the window opening area. A violation of 29 C.F.R. § 1926.451(g)(1) is affirmed as a repeat violation as to the materials staging area.

This violation occurred during an inspection by OSHA on June 14, 2001. One employee was exposed to a fall of approximately 20 feet at the materials staging area.

As discussed in my original decision, Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1969, 1776 (No. 88-237, 1994).

The discussion of the criteria in my previous decision is incorporated into this decision.

Gravity was found to be moderate. One employee was exposed to a fall of 19 to 20 feet from the materials staging area. The likelihood of serious injury or death from falling from this height is substantial.

In my original decision, the penalty was assessed considering all the required criteria. It was based in part on exposure of two employees, one at the window opening and one at the materials staging area. Both were found to be exposed to falls of 19 to 20 feet. On remand, I have considered the four criteria required by § 17(j) of the Act. After due consideration of those criteria, my conclusions remain unchanged. The only factor that has changed is the number of employees exposed to this fall has changed from two to one. Respondent's size has not changed. Its good faith and prior history of violations are the same. Gravity of this violation is not significantly reduced in evaluating exposure of one employee in one work area rather than two employees in two areas of the same scaffold system.

The number of employees exposed is only one of several factors to be considered in determining the gravity of a particular violation. *See J. A. Jones Construction Co.*, 15 BNA 2201, 2214 (No. 87-2059, 1993).

Consideration has been given to the duration of exposure of the employee at the materials staging area, precautions against injury and the likelihood of injury that would result from a fall of 19 to 20 feet from this portion of the scaffold. This violation is a repeat violation based on a

previous violation of the same standard, similar hazards and the same means of abatement.

Based on these factors, a penalty of \$3,000.00 is reasonable for the violation of 29 C.F.R. § 1926.451 (g)(1) at the materials staging area on respondent's jobsite on June 14, 2001.

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:

1. Citation No. 1, item 1, alleging a repeat violation of 29 C.F.R. § 1926.45 1(g)(1), to the extent that it relates to respondent's material staging area, is affirmed and a penalty of \$3,000.00 is assessed.
2. Citation No. 1, item 1, only to the extent that it alleges a repeat violation of 29 C.F.R. § 1926.45 1(g)(1) in the window opening area, is vacated.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: June 14, 2004

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ORDER

On June 14, 2004, respondent filed a motion to correct a portion of the Order contained in my Decision and Order on Remand dated June 2, 2004.

A conference call with counsel for both parties was held on June 16, 2004, during which respondent's counsel addressed his concerns about the language contained in Paragraph No. 2 of the Order. In order to clarify any possible misunderstanding of my Order, paragraph No. 2 is hereby amended to read as follows:

2. Citation No. 1, Item 1, insofar as it alleges a violation of 29 C.F.R. § 1926.451(g)(1) with regard to the window opening area, is vacated.

The remainder of the Decision and Order on Remand dated June 2, 2004, remains unchanged.

/s/ _____
STEPHEN J. SIMKO, JR.
Judge

Date: June 18, 2004