

SECRETARY OF LABOR,

Complainant,

v.

N.PICCO & SONS CONTRACTING
COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 02-2200

Appearances:

Margaret A. Temple, Esquire
U.S. Department of Labor
Office of the Solicitor
New York, New York
For the Complainant.

Rowland A. Riccardi
N. Picco & Sons Contracting
Company, Inc.
Mamaroneck, New York
For the Respondent, *pro se*.

Before: Irving Sommer
Chief 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. § 651 *et seq.* The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work site, located in Bronxville, New York, on October 9, 2002; the work at the site involved the construction of a three-story addition to an existing school building, and OSHA had received a complaint about the scaffolding being used at the site. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (“Citation”) on October 25, 2002, alleging various violations of OSHA’s construction standards; the four alleged serious violations were grouped and proposed a total penalty of \$5,000.00, and the one alleged “other” violation did not propose a penalty. Respondent timely contested the Citation, and this case was designated for E-Z Trial pursuant to Commission Rule 203(a).

After notice to both parties, a hearing in this matter was held on June 3, 2003. Although the Secretary's counsel appeared with her witness for the hearing, no one appeared on behalf of Respondent; as a consequence, the Secretary's motion for a default judgment was granted in a decision and order issued on June 11, 2003. On June 27, 2003, the Commission received a letter from Respondent indicating that it had not received notice of the June 3 hearing and requesting that another hearing be scheduled. The undersigned issued an order vacating and setting aside the June 11 decision and order and scheduling another hearing for July 30, 2003. A representative of Respondent appeared at the July 30 hearing, and the Secretary and her witness also appeared.

The OSHA Compliance Officer's Testimony

Angelo Signorile, the OSHA compliance officer ("CO") who conducted the inspection, testified that upon arriving at the site, he held an opening conference with Rowland Riccardi, the project manager for Respondent ("Picco"), and Robert Phelan, Picco's job site superintendent; also present were the carpentry and masonry shop stewards.¹ The CO then began his inspection, accompanied by Mr. Riccardi and the two shop stewards. On the south side of the building, the CO observed two employees who were standing on tubular welded frame scaffolding in order to put insulation on the building under construction; one employee was on the sixth level of the scaffolding, about 36 feet from the ground, and the other employee was on the seventh level, about 42 feet from the ground.² The CO noted that the employees wore harnesses and that their lanyards were tied off to the frame of the scaffolding, as shown in photo G-1; he further noted that the employees also tied off to the cross bracing as they moved to other parts of the scaffold to work. When the CO asked if he was familiar with anchorage points for fall arrest systems on scaffolds, Mr. Riccardi indicated that he was not, even though he had told the CO that he was the qualified person at the site and knew the OSHA regulations. The CO testified that the condition was hazardous; Mr. Riccardi could not tell him if the scaffold could withstand the weight of a falling person, and, if an employee had fallen, the scaffold could have collapsed. (Tr. 9-20).

¹Mr. Riccardi also told the CO that he was the general superintendent on the site. (Tr. 12).

²Mr. Riccardi informed the CO that the workers were Picco employees. (Tr. 18-19).

The CO testified about three other conditions on the scaffold that were a hazard. First, the scaffold was not fully planked to provide a safe work platform; the areas where the employees were working had only two planks, as shown in photo G-2, and, if a worker had misstepped or lost his balance, he could have fallen from the scaffold. Second, the planks the employees used as work platforms were more than 14 inches from the face of the building, as shown in photo G-3, exposing the workers to falls between the planks and the building.³ Third, the CO did not see a ladder to access the scaffold. Mr. Riccardi took him inside the building and up to the third floor, where they saw the employees coming down from the scaffold; to do so, the employees jumped from the scaffold into an opening in the wall and then jumped over a cable and onto the third floor. The CO said that the condition exposed the workers to falls and serious injury. The CO indicated that Mr. Riccardi agreed with all of his determinations with respect to the scaffold and that he abated the hazards by having the employees come down; Mr. Riccardi also agreed to install safety lines so that each employee could be independently attached to a safety line, and he and the CO discussed how to abate the access ladder violation. (Tr. 20-28).

The final condition that the CO observed was debris, shown in photos G-5-7, that was scattered underneath the scaffold on which the employees were working. The CO stated that the debris consisted of bricks and insulation that could have exacerbated injuries if employees had fallen from the scaffold; the debris could also have caused the employees to trip and fall. The CO further stated that Mr. Riccardi told him the materials belonged to Picco and that he (Mr. Riccardi) had the employees begin picking up the materials. (Tr. 29-30; 33-34).

Serious Citation 1

Item 1a of Citation 1 alleges a violation of 29 C.F.R. 1926.502(d)(15)(ii), which requires anchorages for attachment of personal fall arrest equipment to be under the supervision of a qualified person. Item 1b of Citation 1 alleges a violation of 29 C.F.R. 1926.451(b)(1), which requires platforms on working levels of scaffolds to be fully planked or decked. Item 1c of Citation 1 alleges a violation of 29 C.F.R. 1926.451(b)(3), which requires the front edge of all scaffold platforms to not be more than 14 inches from the face of the work. Item 1d of Citation 1 alleges a violation of 29

³The CO indicated that he measured the distance between various planks and the face of the building at the ground level and determined that the distance, on average, was 18 inches. (Tr. 23).

C.F.R. 1926.451(e)(1), which requires ladders or other suitable means of access to be used when scaffold platforms are more than 2 feet above or below a point of access.

The testimony of the CO, set out above, establishes a prima facie violation of each of the foregoing cited standards. At the hearing, however, Mr. Riccardi testified that the scaffolding the CO observed was under erection and that the two employees should not have been working there. He also testified that the masonry shop steward asked the job site foreman what the employees were doing there, and the foreman replied that the employees were supposed to be working on a scaffold on the north side of the building. Mr. Riccardi said that after the employees came down from the scaffold, he called Edward Cooke, the delegate for Carpenters Local 11. Mr. Cooke interviewed the employees and talked to them about employee misconduct; he also asked them who instructed them to work on the scaffold, and they told him that they had just wanted to finish that one area and that they had thought it was a critical area. It was Mr. Riccardi's understanding that the employees had been sent to additional OSHA training offered by Carpenters Local 11. (Tr. 35-39).

Mr. Riccardi said he had discussed the above with OSHA in a phone conference after the citation was issued. He also said he had a letter documenting the employee misconduct that he had sent Mr. Cooke. Mr. Riccardi did not have the letter with him at the hearing, but he was advised that he could submit a copy of the letter to the Secretary and to my office after the hearing. (Tr. 38-41). Mr. Riccardi did in fact provide the letter, and it has been received in evidence as R-1. The letter is dated August 16, 2002, it is addressed to Edward Cooke at the Empire State Regional Council of Carpenters, Local 11, and it is essentially consistent with Mr. Riccardi's testimony.

Notwithstanding Mr. Riccardi's testimony and R-1, I conclude that Picco has not rebutted the Secretary's prima facie case, for the following reasons. First, the CO testified that Mr. Riccardi said nothing to him during the inspection about the scaffold on the south side being under erection. He said that he and Mr. Riccardi had walked by the west side of the building, where scaffold erection was taking place, and that he had talked to Mr. Riccardi about how employees should tie off during scaffold erection; however, as the employees were working on the first frame, he did not address that scaffold. The CO also said he had asked Mr. Riccardi to indicate to him the area in question and that Mr. Riccardi had told him it was the scaffold on the south side. (Tr. 32-33; 41-42). I observed the demeanor of the CO as he testified, and I found him to be a sincere and credible witness.

Second, even assuming that all of the events that Mr. Riccardi described occurred, albeit after the inspection had taken place, there is no basis for vacating the citation items. To prove that a violation was the result of unpreventable employee misconduct, the employer must show that it has established work rules designed to prevent the violation, that it has adequately communicated the rules to its employees, that it has taken steps to discover violations, and that it has effectively enforced the rules when violations have been discovered. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). Picco has not met its burden of demonstrating that the violations in this case were due to unpreventable employee misconduct.

Based on the foregoing, Picco was in violation of the cited standards, and Items 1a through 1d of Citation 1 are accordingly affirmed as serious violations. As noted *supra*, these four items were grouped for penalty purposes, and a total penalty of \$5,000.00 has been proposed. The CO discussed how his office arrived at the proposed penalty, and, in view of his testimony and the record as a whole, I conclude that a penalty of \$5,000.00 is appropriate. (Tr. 28-29). The proposed penalty is therefore assessed.

“Other” Citation 2

Item 1 of Citation 2 alleges a violation of 29 C.F.R. 1926.25(a), which requires debris to be kept cleared from work areas and in and around buildings or other structures. The CO’s testimony set out above establishes a prima violation of the cited standard. Mr. Riccardi testified that the brick under the scaffolding belonged to Picco but that the other materials belonged to other contractors at the site. (Tr. 36). However, as indicated *supra*, the CO testified that Mr. Riccardi told him that the materials under the scaffolding were Picco’s, and he denied that Mr. Riccardi told him that only the bricks belonged to Picco; the CO also testified that Mr. Riccardi had his employees start picking up the materials. (Tr. 30; 33-34). Based on the record as a whole and my credibility determination *supra*, I find that Picco was in violation of the cited standard. Item 1 of Citation 2 is affirmed as an “other” violation. No penalty was proposed, and none is assessed.

Conclusions of Law

1. Respondent was in serious violation of 29 C.F.R. §§ 1926.502(d)(15)(ii), 1926.451(b)(1), 1926.451(b)(3) and 1926.451(e)(1), as set out in Items 1a through 1d, respectively, of Citation 1.

2. Respondent was in “other” violation of 29 C.F.R. § 1926.25(a), as set out in Item 1 of Citation 2.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 1a through 1d of Citation 1 are AFFIRMED as serious violations, and a total penalty of \$5,000.00 is assessed for these items.

2. Item 1 of Citation 2 is AFFIRMED as an “other” violation, and no penalty is assessed for this item.

/S/
Irving Sommer
Chief Judge

Date: October 2, 2003
Washington, D.C.