



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.
ACIES GROUP, LLC,
Respondent.

OSHRC DOCKET NO. 08-1446

Appearances: Judith Marblestone, Esquire
Jeffrey S. Rogoff, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Steven A. Sternlicht, Esquire
Port Jefferson, New York
For the Respondent.

Before: Covette Rooney
Administrative Law 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 Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a job site of Respondent, Acies Group, LLC (“Respondent” or “Acies”), during May and June 2008. The job site was located in Franklin Township, New Jersey, and the work involved installing synthetic stucco and faux brick on the exterior of the buildings at the site. As a result of the inspection, on July 31, 2008, OSHA issued to Acies a Citation and Notification of Penalty (“Citation”) that alleged five “repeat” violations of OSHA’s scaffolding requirements. Acies contested the Citation, and the hearing in this matter was held on May 14, 2009, in New York, New York. Both parties have submitted post-hearing briefs and reply briefs.

BACKGROUND¹

On May 28, 2008, shortly before 1:00 p.m., Rodger Frey, an OSHA compliance officer (“CO”), was driving by the job site.² He saw a man without a personal fall arrest system working on the second (and top) level of a scaffold that did not have any guardrails. The lack of fall protection was obvious, and the CO could see it clearly from the public road he was on.³ The CO pulled over to the side of the road, which was 100 to 200 feet from the scaffold, and he photographed the man on the scaffold. Then, as OSHA has a local emphasis program for construction fall hazards, the CO entered the site to conduct an inspection. (Tr. 14, 18-25, 33, 45, 81; C-2, pp. 1-2).

Upon entering the site, CO Frey saw that the man on the scaffold was prepping the building exterior. Another man was working on the ground, about 5 feet from the scaffold. The CO identified himself and asked the man on the scaffold to come down. The man did so by climbing down the end frame of the scaffold, and the CO noted there was no safe means to access or egress the scaffold.⁴ The CO also noted that the scaffold, which was tubular welded frame scaffolding, was not fully planked and was missing cross bracing. CO Frey held an opening conference with Chris Bochenko, the worker who had been on the scaffold, George Musjal, the other worker, and Bob Cottrell, the general contractor’s representative at the job site. The CO then inspected the scaffold with Messrs. Bochenko, Cottrell and Musjal, and he photographed his observations. C-2, pages 7, 10 and 12, show that the scaffold’s top level work surface was not fully planked, that cross bracing was missing from various areas, that there was no safe means of access, and that there was no fall protection at the top level. The CO also measured the scaffolding. C-2, pages 11-12, show the top level was 12 feet 9

¹All transcript cites in this decision are to the corrected transcript provided to all parties on July 14, 2009. The court reporter issued a new transcript after the Secretary filed a motion for leave to correct due to numerous errors in the original transcript. My order granting the motion shows the specific corrections made to the transcript.

²All dates in this background will refer to 2008, unless otherwise indicated.

³The CO was driving along Pierce Street in Franklin Township, New Jersey, when he saw the scaffolding. At the hearing, he noted the scaffolding’s location was circled on C-5, a diagram of the job site. The job site was a project called “The Shops at Pierce Street.” (Tr. 21-23; C-5).

⁴C-2, page 3, is the CO’s photo of the man climbing down the end frame. (Tr. 25).

inches from the ground, and C-2, pages 4-6, show the scaffold frames were 76 inches high, 60 inches wide and 96 inches in length. When the CO asked who was doing the work from the scaffold, Mr. Cottrell answered “Acies.” When the CO asked Mr. Bochenko who he worked for, Mr. Bochenko replied “Acies,” and Mr. Musjal, who was 4 to 5 feet away, nodded his head up and down. Messrs. Bochenko and Cottrell both said John Rajski was in charge of the work for Acies and was normally at the site every day. (Tr. 23-31, 82-83, 89-90, 132-33, 139-41).

In speaking to Mr. Cottrell, CO Frey learned Acies was working on Buildings One, Two and Three at the site, and a clock tower, as shown in C-5. He also learned that the work Acies was doing was installing synthetic stucco and faux brick on the exterior of the buildings. In speaking to Mr. Bochenko, the CO learned he had been working for Acies for about a year. The CO explained to him that someone needed to be at the site to inspect the scaffold before use to ensure it was safe. The CO also explained to him, and gave him pictures and documents, how the scaffolding should have been erected, *i.e.*, it needed to be fully planked and to have proper access, it had to be fully braced, and some type of fall protection had to be provided. The CO noted that when he returned to the site on May 29, all of the problems had been corrected. He also noted that when he had been at the site on May 28, he had not seen an access ladder or scaffold components nearby that could have been used to correct the problems; however, there were scaffolds in other areas of the site, and components from those scaffolds could have been utilized. (Tr. 31-34, 83-90, 102-03, 111-12).

After inspecting the site, CO Frey called Acies’ office, spoke to the receptionist, and asked for an appointment to discuss the job site with a company official. He met with Nicholas Sgobba, Acies’ president, on June 19. He held an opening conference with Mr. Sgobba, explaining who he was and why he was there, and he showed Mr. Sgobba some of the photos he had taken, *i.e.*, those depicting Mr. Bochenko working on and egressing the scaffolding and those depicting the other hazards.⁵ The CO asked who was doing the stucco and brick work at the site, and Mr. Sgobba said “Acies.” The CO also asked about the persons doing the work, and Mr. Sgobba told him they were his employees. The CO then asked who was in charge of the job site for Acies, and Mr. Sgobba said that Andy Zaczek was in charge and was normally there daily. Mr. Sgobba stated that Acies had 35

⁵The CO indicated he showed Mr. Sgobba C-2, pages 2, 3, 10 and 12. (Tr. 36-37).

employees, that they had a written safety and health program, and that they had safety training; the scaffold training was held in back of Acies' facility, where some scaffolding frames were set up. CO Frey told Mr. Sgobba Acies would potentially be receiving citations for the conditions he saw, that is, the lack of planking, cross bracing, safe access and fall protection. The CO also told Mr. Sgobba the citations might be "repeat" due to Acies' history of prior violations. The CO explained that Acies could pay the penalty, go to court, or have an informal conference; however, if wanted to contest the citations, he had to do so within 15 days of receiving them. When the CO asked to whom he should send the citations, Mr. Sgobba said to send them to his attention. (Tr. 34-40, 95-101).

At the meeting with Mr. Sgobba, the CO discussed New Jersey's state consultation program, which provides free training for employees. The CO gave pictures to Mr. Sgobba showing how to properly set up a tubular welded frame scaffold; he also gave him a scaffolding checklist employees could use at their work sites. During the meeting, Mr. Sgobba did not deny the violations the CO had pointed out, and he never stated that Acies did not employ the workers doing the work at the site. Mr. Sgobba also never stated that Acies had hired a subcontractor to do the work or that D&K Construction ("D&K") was performing the work at the site. The CO left his card with Mr. Sgobba and told him to feel free to contact him, but Mr. Sgobba never did so. (Tr. 40-42, 97).

After the Citation was issued, Acies' representative filed a notice of contest ("NOC") letter with OSHA.⁶ The letter was dated August 25, and it stated, as to the reason for the contest:

We will be unable to obtain all the facts surrounding the alleged citations prior to the end of the 15 day contest period.

The Secretary filed her complaint in this matter on October 29. Acies filed its answer on January 5, 2009. In its answer, Acies did not raise any affirmative defenses or state that it was not the employer at the site. On April 20, 2009, the Secretary took Rule 30(b)(6) depositions of three representatives of Acies, that is, Mr. Rajski, Mr. Zaczek, and Peter Witt. At his deposition, Mr. Rajski testified that Acies had subcontracted the stucco and brick work to D&K. He also testified that Mr. Bochenko and Dariusz ("Derek") Karlowski were the partners of D&K. (C-11, pp. 53, l. 4, through 57, 138-39). On May 1, 2009, the parties submitted C-1, their joint pre-hearing statement. C-1 states, in the Secretary's Statement of Such Facts ("SSSF"), that "[i]n its discovery responses,

⁶Keith B. Dague, of U.S. Compliance Systems, submitted the NOC letter. *See* C-15.

Acies contended that Chris Bochenko and Dariusz Karlowski were partners of an entity called D&K Construction which Acies contends it subcontracted with to perform physical labor for the exterior synthetic stucco, thin brick, and other construction work on the project at the worksite.” *See* C-1, pp. 8-9, ¶ 13. Acies essentially reiterates this statement in C-1. *See* C-1, p. 15, § B.⁷

Jurisdiction

The parties have stipulated that jurisdiction of this matter is conferred upon the Commission by section 10(c) of the Act. They have also stipulated that, at all relevant times, Acies was engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and that Acies was an employer within the meaning of section 3(5) of the Act. *See* C-1, p. 17, § V. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary’s Burden of Proof

The Citation alleges five “repeat” violations of OSHA’s scaffolding requirements. To prove a violation of a specific OSHA standard, the Secretary must show that (1) the cited standard applies, (2) the employer failed to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). Respondent does not dispute that the violative conditions existed at the work site at the time of CO Frey’s inspection. Rather, it contends the workers at the site were not its employees but those of D&K, its subcontractor. *See* C-1, pp. 7-16 (SSSF and Respondent’s reservations to SSSF). The three witness who testified in this regard at the hearing were CO Frey and Respondent’s witnesses Nicholas Sgobba and Peter Witt. The CO’s testimony is summarized *supra* in the background portion of this decision. The testimony of Respondent’s witnesses is set out below.

Testimony of Nicholas Sgobba

Mr. Sgobba has been the president of Acies for five years. He testified that he is in charge of marketing, sales and overseeing the daily aspects of the company, that Mr. Rajski is in charge of operations and safety, and that Mr. Witt is in charge of financial matters. He also testified that the

⁷While the record does not reflect exactly when Acies first asserted it subcontracted with D&K to perform the work at the site, the Secretary’s counsel indicated at the hearing that Acies’ discovery responses were received in March 2009. (Tr. 178).

meeting he had with CO Frey was very informal.⁸ It lasted about 30 minutes and addressed making the company more safety conscious and avoiding future violations.⁹ Mr. Sgobba did not recall the CO mentioning the subject site or showing him any photos. Upon viewing C-2, page 2, Mr. Sgobba said he did not know who the person in that photo was, and he did not know if that person was an employee of Acies or a subcontractor; according to Mr. Sgobba, he had never met Mr. Bochenko, he was not familiar with Acies' employees or subcontractors, and it was Mr. Rajski and Mr. Witt who knew those persons. Mr. Sgobba knew of D&K and that it and other companies worked as subcontractors on Acies' projects. He also knew of the contract for the subject site, as he had signed it on behalf of Acies. He stated, however, that the CO did not mention the job site or an opening or closing conference, that the CO took no notes, and that the only fines discussed were from a prior citation. He further stated that if he had realized the meeting was formal he would have stopped it and asked the CO to return at a time when he could be fully prepared. (Tr. 148-64; C-6).

Upon viewing C-15, Acies' NOC letter, Mr. Sgobba agreed it did not mention D&K or a subcontractor. Upon viewing C-9, an Acies marketing document, Mr. Sgobba agreed that it stated, on page 2, that Acies specialized in synthetic stucco systems and that "No sub-contracted labor applicators are used." Mr. Sgobba explained that C-9 applied only to a specific category of work, not all projects, and he said that Acies hired "a lot of subcontractors" for certain work. He also said that the subcontractors performed work "very similar" to what Acies' employees did. Mr. Sgobba was uncertain if Acies had advised the general contractor in this matter that a subcontractor would do the stucco and brick work at the site. Mr. Sgobba testified he does not directly represent Acies in OSHA matters and that Mr. Rajski handles such matters. He then conceded, however, that he had signed a settlement agreement with OSHA in March 2007 that related to a prior OSHA inspection.¹⁰ He also conceded he had met with OSHA about twice, before the meeting with CO Frey, in order to negotiate

⁸Mr. Sgobba agreed with the Secretary's counsel characterizing CO Frey's arrival as showing up "out of the blue." (Tr. 162).

⁹Mr. Sgobba said the CO gave him some OSHA safety guidelines and scaffold erection information; he and the CO discussed that and Acie's safety program. (Tr. 151-54, 162-63).

¹⁰C-4 contains the agreement Mr. Sgobba signed in 2007. (C-4, p. 22). Mr. Rajski signed the other four agreements in C-4, all of which were in 2005. (C-4, pp. 34, 50, 62, 73).

the fines after citations had been issued to Acies; in those cases, Mr. Sgobba had gone to OSHA's office. Mr. Sgobba indicated he had met with Messrs. Rajski and Witt after the subject Citation was issued; he did not meet with Mr. Zaczek in this regard. (Tr. 156-57, 164-77).

Testimony of Peter Witt

Mr. Witt testified that he and Mr. Rajski handled the contracts for subcontracted work and that Mr. Rajski handled the schedules for that work. Mr. Witt also testified that he was familiar with the subject project, with D&K, and with the other companies that subcontract with Acies.¹¹ Mr. Witt described the information he had as to the financial relationship between D&K and Acies. R-6, in Mr. Witt's handwriting, shows the cost breakdown for the various fixed contracts Acies had with D&K in late 2007 and in 2008.¹² The first page of R-6 shows the cost breakdown per square foot for the subject project, *i.e.*, the cost for the three buildings and the clock tower.¹³ R-1 shows a further breakdown for the project, setting out details of work done on the project and checks Acies paid to D&K in April 2008. The total price of the project was paid in interim payments throughout the job, less 10 percent, which was paid upon the work being approved. Mr. Witt said that D&K performed the work on the contracts shown in R-6 and that Acies paid D&K for that work. Mr. Witt did not know who the employees of D&K were, but he learned "after the fact" that Messrs. Bochenko and Karlowski were D&K's partners. Mr. Witt identified R-5 as a complete listing of Acies' employees for the first and second quarters of 2008.¹⁴ He noted that D&K was not shown on R-5 and that Messrs. Bochenko and Musjal were likewise not on the listing. He also noted that while Messrs. Bochenko and Musjal were working for Acies through D&K, the subcontractor, they were not employees of Acies and received no employee benefits from Acies. Mr. Witt said the partners of D&K had no relationship with Acies other than being a subcontractor. (Tr. 180-93, 209-10).

¹¹Mr. Witt said the project started towards the end of March 2008 and ended in August or September 2008. (Tr. 211).

¹²Mr. Witt stated that R-6 was prepared before the jobs it showed started, as he had to have a fixed contract price before applying any payments made against a contract. (Tr. 187).

¹³Mr. Witt noted that D&K actually did the work only on Buildings 1 and 3 and the clock tower; another subcontractor did the work on Building 2. (Tr. 186).

¹⁴Mr. Witt said the outside agency that does Acies' payroll prepared R-5. (Tr.191-92).

Mr. Witt further testified that the contract with D&K for the subject project was primarily for labor and that Acies supplied all the stucco and brick materials and anything necessary to install those materials; Acies also supplied all the scaffolding and scaffolding components, such as planks, cross bracing, ladders and guardrails. Mr. Witt agreed that C-14 indicated other checks that Acies wrote for D&K's work on the project and that while some were made out to D&K others were made out to either Mr. Bochenko or Mr. Karlowski; according to Mr. Witt, those checks were applied to D&K's contract and were made out to those individuals as that was what was requested.¹⁵ Mr. Witt also agreed that C-14 showed two other jobs D&K did for Acies that were not in R-6; he indicated that both jobs involved stucco work, that both were done pursuant to fixed contracts, and that any checks written to Mr. Bochenko or Mr. Karlowski were applied to those contracts. Mr. Witt said that the work Messrs. Bochenko and Karlowski did for Acies was the same work Acies employees did. He also said it takes about two years of on-the-job experience to learn how to do the stucco and brick work Acies does; it requires no schooling or degree and, once learned, is fairly repetitive. Mr. Witt conceded that Acies' contract with D&K for the subject site was verbal and that no 1099 forms were issued for Mr. Bochenko or Mr. Karlowski. He also conceded that Acies did not advise OSHA of D&K or that a subcontractor did the work at the site before the complaint was issued. (Tr. 194-211).

Discussion

In considering the foregoing, two facts are compelling. First, Acies never told OSHA about D&K or that a subcontractor performed the work at the site until it filed its discovery responses in March 2009. Stated another way, Acies first claimed it was not the employer at the site over nine months after CO Frey's inspection on May 28, 2008. Second, Mr. Sgobba testified that CO Frey appeared at his office "out of the blue" to discuss Acies becoming more safety conscious to avoid future citations; Mr. Sgobba also testified that the CO did not mention the subject site and that the only fines discussed were those from a prior citation. (Tr. 157-58, 161-63). Mr. Sgobba's testimony was incredible on its face, particularly in view of the testimony of CO Frey. I observed the demeanor of these two individuals as they testified, including their facial expressions and body language, and I found the CO to be a credible and convincing witness. The CO's testimony will thus be credited

¹⁵Mr. Witt stated that the checks Acies paid pursuant to the contract with D&K were paid every week or every other week. (Tr. 208).

over that of Mr. Sgobba to the extent there are differences in their testimony.¹⁶ The CO's testimony about his inspection, and the fact that Acies waited until discovery to assert it was not the employer at the site, are two very persuasive reasons for concluding that Acies was indeed the employer at the site. However, in this regard, both parties address the Commission's "economic realities test," first set out in *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703 (No. 14801, 1978) ("*Griffin & Brand*"), and the Supreme Court's test in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) ("*Darden*"). A discussion of these tests is set out below.

The Economic Realities Test

As noted above, the Commission first used this test in *Griffin & Brand*, in 1978. The Commission also used the test in later decisions. *See, e.g., Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992). The economic realities test has seven factors, which follow.

1. Whom do the Workers Consider their Employer?

The CO testified that when he asked Mr. Bochenko who he worked for, Mr. Bochenko replied "Acies," and Mr. Musjal, who was 4 to 5 feet away, nodded his head up and down. (Tr. 30, 82-83, 138-39). Further, Acies held itself out as the employer of Bochenko and the other workers at the site. Mr. Cottrell, the general contractor's representative at the site, told the CO that Acies was doing the scaffold work at the site and that Mr. Rajski was the Acies person in charge. (Tr. 30-31). Finally, when the CO went to Acies' office to meet with Mr. Sgobba, Acies' president, Mr. Sgobba told him Acies was doing the work at the site and that the employees at the site were his. (Tr. 37). At no time during the OSHA inspection did anyone mention D&K or tell the CO that Acies had hired a subcontractor to do the work at the site. (Tr. 41-44, 139-41). I find that Messrs. Bochenko and

¹⁶In crediting the CO's testimony, I have noted Acies' criticisms of the CO's inspection. For example, Acies criticizes the CO for not disclosing in his report that Mr. Bochenko spoke Polish and had limited English abilities. R. Brief, pp. 8-9. The CO testified that Mr. Bochenko spoke "broken English" but that "his English wasn't bad." (Tr. 87-88, 135). Acies also criticizes the CO for not interviewing Mr. Rajski and Mr. Zaczek. R. Brief, p. 21. However, the CO testified that when Mr. Sgobba, Acies' president, told him his employees were doing the work at the site, that "trumped it" for him. (Tr. 95). I agree with the CO, and I find that Mr. Sgobba's admission made it unnecessary for the CO to look for any further proof in that regard, in spite of Mr. Bochenko's lack of fluency in English or what Mr. Rajski and Mr. Zaczek might have stated to the CO. I have considered all of Acies' criticisms of the CO's inspection, and they are rejected.

Musjal considered themselves employees of Acies. I further find that Mr. Sgobba admitted to the CO on June 19, 2008, that the employees at the site were his employees.

2. Who Pays the Workers' Wages?

The record shows that Acies paid Mr. Bochenko his wages by check, at times directly to him and at other times indirectly through D&K. (Tr. 196-203). The record does not show whether Acies paid Mr. Musjal directly. However, as the Secretary notes, even assuming that Mr. Bochenko paid Mr. Musjal out of his earnings, that factor is not determinative. *See, e.g., MLB Indus., Inc.*, 12 BNA OSHC 1525, 1529 (No. 83-231, 1985) (“while MLB technically paid the workers, it appears that it assumed this responsibility primarily as a matter of convenience and ... we do not consider MLB’s payment of the employees to be significant in determining who was their employer”); *Griffin & Brand*, 6 BNA OSHC at 1703 (“[r]espondent’s control was not altered by arranging for [the migrant crew chief] to process the workers’ pay”). S. Brief, p. 33.

As the Secretary also notes, Acies’ payment scheme is consistent with an employment relationship. Although Acies claims it paid Messrs. Bochenko and Karlowski a “lump sum” for the job with payments based on percentage completion, Mr. Witt agreed Acies paid Mr. Bochenko, Mr. Karlowski and D&K weekly or biweekly, which represent typical employee pay periods. (Tr. 208; C-1, p. 16, ¶ 7; R-3, p. 17). The Secretary further notes that notwithstanding Acies’ assertion that Mr. Bochenko and Mr. Karlowski were subcontracted, the company did not issue IRS Forms 1099 to them for the work they did for Acies in 2008. (Tr. 207; C-1, p. 13, ¶ 67). Mr. Witt admitted this was so at the hearing. (Tr. 207). S. Brief, pp. 28-29.

I find that the evidence as to this factor supports the Secretary’s position. I also agree with the Secretary that Messrs. Bochenko and Karlowski were paid “off the books.” S. Brief, p. 29.

3. Who has the Responsibility to Control the Workers?

The record shows that pursuant to its contract, Acies was obligated to control the work done at the job site and to take all necessary safety measures. Specifically, its contract with the project’s owner required Acies to “[p]rovide labor, material, equipment and supervision to furnish and install ... [exterior stucco, thin brick, moisture barrier, grouting of joints, and hoisting, scaffolding and caulking]” at three buildings and a clock tower at the site. (Tr. 33-34; C-1, p. 8, ¶ 11; C-5; C-6, p. 61). The contract also required Acies to “supervise and direct the Work ... The Contractor shall be

solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work...” (C-6, p. 24, § 3.3.1). Acies was also “responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract.” (C-6, p. 40, § 10.1.1; C-11, p. 25). Although the contract required it to do so, Acies never told the owner of the project that subcontractors would be used at the job site. (C-1, p. 9, ¶¶ 15-16; C-6, p. 32, § 5.2.1; C-11, p. 35 (d. 112-13)). Acies explicitly stated in its advertising to general contractors that it did not use any subcontracted labor. As Mr. Rajski testified in his deposition, general contractors “want to know you’re using your men, your manpower at that project.” (C-9, pp. 2-3; C-11, pp. 35-36 (d. 112-14)). S. Brief, pp. 20-21.

The record also shows that Acies exercised actual control over the work done and the safety measures taken at the project. Mr. Rajski testified at his deposition that he met with Mr. Bochenko before the work began and told him “he would have to answer to our superintendent.” (C-11, p. 17 (d. 54-55)). Messrs. Rajski and Zaczek both instructed Mr. Bochenko on the scope of the work; they told him to follow the project’s blueprint and what kind of scaffolds and materials Acies would be supplying. (C-11, p. 17 (d. 55); C-12, pp. 34-35 (d. 85-87)). Mr. Zaczek testified at his deposition that he took Mr. Bochenko to the site to show him the buildings and what work was required; he also told him about the proper work sequence. (C-12, pp. 34-35 (d. 85-87)). S. Brief, p. 21.

The record establishes that, throughout the project, Acies exercised regular and direct control over Mr. Bochenko and the work that he and the other workers did at the job site. Acies managers, such as Messrs. Zaczek and Rajski, visited the site at least two to three times a week. The visits were to check on the work, to provide sequencing and scheduling instructions, to do scaffold, safety and other inspections, and to ensure that Mr. Bochenko and the other workers were performing the work properly and pursuant to Acies’ safety program and OSHA requirements. (C-1, pp. 7-8, 11-12, ¶¶ 2, 4, 7, 42-45, 47-48, 50, 53-55; C-12, pp. 3-4 (d. 13-16), 55). After receiving instructions from the general contractor, Mr. Zaczek would tell Mr. Bochenko what to do, such as where to work and the sequence of the work, and he expected Mr. Bochenko to follow his instructions. When Mr. Zaczek

told Mr. Bochenko to make corrections, Mr. Bochenko had to do so in a timely manner.¹⁷ (C-1, p. 12, ¶¶ 47, 49-50; C-12, pp. 7-8 (d. 29-30), 12, 50). S. Brief, pp. 21-22.

The record further establishes that Acies also exercised regular and direct control to oversee safety at the site. Acies was responsible for ensuring scaffolds were set up and used properly and that the workers performed their tasks pursuant to Acies' and OSHA's safety requirements. Acies' safety program was in effect for Mr. Bochenko and the other workers at the job site. (C-1, p. 12, ¶¶ 52-55; C-11, p. 28 (d. 79-80)). Mr. Rajski testified that Messrs. Bochenko and Karlowski would have been given all the information about Acies' safety program when they began their first project with Acies. He also testified that "to be working for us, they had to be indoctrinated into the safety and everything to do the work properly" and that they were "expected to do everything per our safety instructions." (C-11, pp. 28 (d. 81), 41). Acies' superintendents were responsible for ensuring, when they visited the site, that safety precautions were taken and that work on the scaffolding was done safely. (C-11, p. 22; R-2, p. 11). S. Brief, pp. 22-23.

As the Secretary notes, Mr. Zaczek was the competent person responsible for inspecting the site, including the scaffolding, and he inspected the site for safety compliance during every visit he made. Whenever Mr. Zaczek told him to correct a scaffolding or other safety hazard, Mr. Bochenko would immediately do so. (C-1, pp. 12-13, ¶¶ 53, 58, 60-61; C-7; C-11, pp. 22-23 (d. 65-66); C-12, pp. 7-8 (d. 26-27, 29-30), p. 16 (d. 53)). Mr. Zaczek completed checklists for his inspections at the site, for scaffold safety and job progress and conditions. As the Secretary further notes, Mr. Zaczek spoke to Mr. Bochenko every workday, even when he himself did not go to the site, to learn about the job's progress and safety. The record shows that Mr. Zaczek's supervision of Mr. Bochenko and the work at the subject site was the same as his oversight of Acies' employees and work on other job sites. (C-1, p. 12, ¶ 48; C-7-8; C-11, p. 22; C-12, pp. 3, 6 (d. 11-13, 25)). S. Brief, p. 23.

I agree with the Secretary that all of the foregoing clearly shows Acies' control over the subject site and the workers at the site, including Mr. Bochenko. I also agree that this factor weighs heavily in favor of finding that Mr. Bochenko was an employee of Respondent. The "control" factor is the most significant factor in the economic realities and *Darden* tests. *See Darden Test, infra.*

¹⁷The Secretary notes that Acies role at the site was "extensive and consistent with its supervision of employees at its other jobsites." (C-1, p. 8, ¶ 8; C-11, p. 4). S. Brief, p. 22, n.18.

4. Does the Alleged Employer have the Power to Control the Workers?

This factor is discussed above, in the third factor.

5. Does the Alleged Employer have the Power to Fire, Hire, or Modify the Employment Condition of the Workers?

Acies hired Messrs. Bochenko and Karlowski to do the work at the site. If they or someone else from D&K was not doing the work properly, Mr. Zaczek would speak to Mr. Bochenko or Mr. Karlowski. If Mr. Zaczek saw a problem with the scaffolding or the quality of the work, he directed Mr. Bochenko to correct it and Mr. Bochenko did so. (C-12, p. 7 (d. 26-27); R-4, pp. 11-12). Acies also required Mr. Bochenko and others from D&K to immediately correct conditions that exposed workers to safety hazards. Mr. Rajski testified that if they did not, “[w]e would terminate them if they [didn’t] abide by ... safety policy.” (C-1, p. 13, ¶ 60; C-11, pp. 22-24). I agree with the Secretary that Acies, like employers generally, had the power of control with respect to the hiring and firing of Mr. Bochenko. S. Brief, pp. 34-35. This factor weighs in favor of an employment relationship.

6. Does the Workers’ Ability to Increase their Income Depend on Efficiency rather than Initiative, Judgment, and Foresight?

As set out in the second, third and fifth factors, *supra*, Acies exercised tight control of the work sequencing, scheduling, materials, equipment and safety precautions for the subject project. Mr. Bochenko had to work within the framework dictated by Acies, and he could not effect changes on the project on his own or increase his income by using his own discretion or exercising his own independent judgment. Rather, Acies made all the significant business decisions, and Mr. Bochenko followed Acies’ instructions and did the physical labor at the job site. I agree with the Secretary that this factor weighs heavily in favor of finding an employment relationship. S. Brief, p. 35.

7. How are the Workers’ Wages Established?

The evidence regarding this factor is set out in the second factor, *supra*. As stated there, in spite of Acies’ claims that it paid Messrs. Bochenko and Karlowski a “lump sum” for the job with payments based on percentage completion, the record shows that Acies paid Mr. Bochenko, Mr. Karlowski and D&K weekly or biweekly; such payments represent typical employee pay periods. (Tr. 208; C-1, p. 16, ¶ 7; R-3, p. 17). Further, Acies did not issue IRS Forms 1099 to Mr. Bochenko and Mr. Karlowski for their work for Acies in 2008. (Tr. 207-08; C-1, p. 13, ¶ 67; C-1, p. 16, ¶ 7; R-3, p. 2). This factor supports the Secretary’s position.

The Darden Test

The Commission first addressed the Supreme Court's *Darden* test in *Loomis Cabinet Co.*, 15 BNA OSHC at 1637-38, where it noted that the economic realities and *Darden* tests have many of the same factors; it also noted the central inquiry of both was whether the alleged employer controlled the workplace. The Commission has relied on *Darden* in subsequent decisions. *See, e.g., Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1866-67 (No. 02-0865, 2007); *Froedtert Mem'l Lutheran Hosp.*, 20 BNA OSHC 1500, 1505-06 (No. 97-1839, 2004). The *Darden* test has 12 factors, as follows.

1. Whether the Hiring Party has the Right to Control the Manner and Means by which the Product is Accomplished

This factor, addressed above in the third factor of the economic realities test, weighs heavily in favor of finding an employment relationship.

2. The Skill Required

Mr. Witt testified that it takes about two years of on-the-job experience to learn how to do the stucco and brick work Acies does. He also testified it requires no schooling or degree and that, once it is learned, it is fairly repetitive. (Tr. 206). I agree with the Secretary that few, if any, specialized skills were required for the work performed at the site. S. Brief, pp. 23-24. I further agree, as set out *supra*, that Acies nonetheless gave instructions about the day-to-day work at the site and supervised the workers and the work they did. This factor weighs in favor of an employer-employee relationship.

3. The Source of the Instrumentalities and Tools

The record shows that Acies provided nearly all the equipment and materials for the project. Acies chose, purchased, provided and transported all the scaffolds and scaffold components and the stucco, brick and other materials needed for the work that Messrs. Bochenko, Karlowski and Musjal did at the job site. If more materials, scaffolds or scaffold components were needed, Mr. Bochenko requested them from Mr. Zaczek. The only materials Acies did not provide were hard hats and Mr. Bochenko's own hand tools. (Tr. 194-96; C-1, p. 9, ¶¶ 20-21; C-1, p. 16, ¶ 9; C-8; C-12, pp. 8-10, 13-14, 15 (d. 46), 18, 35 (d. 86); R-2, pp. 2-3; R-4, pp. 2, 5 (d. 60, 72)). Mr. Rajski testified that, as Acies had the contract with the owners to do the work, Acies had to make sure the project had the necessary materials. (C-11, p. 28 (d. 80)). In addition, Mr. Zaczek testified that Acies required its driver to check scaffold parts before delivering them to the site to make sure they were safe to use,

i.e., not damaged or broken. (C-12, pp. 18-19). S. Brief, pp. 24-25. I find that this factor weighs heavily in favor of an employer-employee relationship.

4. The Location of the Work

Mr. Zaczek testified that, before the job began, he took Mr. Bochenko to the work site and showed him the buildings and the blueprints; he also discussed the sequence of the work and the scaffolding to be used, and, when the job began, he introduced Mr. Bochenko to Mr. Cottrell. (C-12, pp. 34-35). I agree with the Secretary that this arrangement is consistent with a contractor's relationship with its employees and how it directs them where to work. S. Brief, p. 25. This factor supports the Secretary's position that Mr. Bochenko was an employee of Acies.

5. The Duration of the Relationship between the Parties

The record shows Mr. Bochenko had worked for Acies for about two years before the subject project began. (C-12, p. 32). It also shows that Messrs. Bochenko and Karlowski had worked on about five or six other projects for Acies during the year prior to March 2008, when the subject project started. Messrs. Bochenko and Karlowski worked on at least six jobs for Acies in 2008, including the subject project, which lasted five to six months. They worked on projects for Acies for 75 to 80 percent of the approximately 12-month period before March 2008. (Tr. 190, 196-99, 205, 211; C-1, p. 13, ¶ 65; C-14, pp. 1-2; R-6). As the Secretary notes, it is especially relevant that Mr. Bochenko worked full time during the five to six months that the subject project lasted. (Tr. 211; C-1, p. 9, ¶ 22; C-12, pp. 6 (d. 24), 10-11). S. Brief, p. 25-26.

In addition to the above, the record demonstrates that Acies had provided Messrs. Bochenko and Karlowski safety training at its office on a regular basis, along with its superintendents and foremen. (C-11, pp. 21-23). Acies had also provided Messrs. Bochenko and Karlowski with its safety program, and Mr. Rajski testified that Acies "expected [them] to do everything per our safety instructions." (C-11, pp. 28 (d. 81), 39-40). Mr. Bochenko attended safety training at Acies' office once every four to six weeks. (R-2, p. 22). S. Brief, p. 26.

The record establishes that Acies' business is seasonable and that it hires additional employees during the busy season, from April to October, and then lays them off during cold weather. The record further establishes that Messrs. Bochenko, Karlowski and Musjal worked for Acies during its busy season on the subject project. As the Secretary points out, when an entity merely provides labor to

an employer, but no supervision, materials, or safety precautions, it is a “conduit for labor,” and not an employer under the Act. I agree with the Secretary that Messrs. Bochenko and Karlowski served as a “conduit for [their own and other workers’] labor” for Acies when Acies had excess work. (C-13, p. 6). *See MLB Indus., Inc.*, 12 BNA OSHC 1525, 1529 (No. 83-231, 1985). The Secretary notes that Acies acknowledges that Mr. Bochenko and the other workers at the site performed only the labor portion of the project. (C-11, p. 16 (d. 51); R-4, pp. 6-7). Acies provided nearly everything else, *i.e.*, equipment, materials, and supervision. S. Brief, p. 26.

I further agree with the Secretary that the fact that Mr. Bochenko was not on Acies’ payroll does not alter the nature of their relationship. Acies employed Mr. Bochenko and other “subcontractors” during its busy season and when it had “a lot of contracts going.” (C-13, p. 6). Put another way, Acies used “subcontracted” labor interchangeably with the employees on its payroll to ensure the completion of its projects. The long duration of Mr. Bochenko’s work relationship with Acies points to an employment relationship. S. Brief, pp. 26-27.

6. Whether the Hiring Party has the Right to Assign
Additional Projects to the Hired Party

The record shows that Acies could “add on” projects for Mr. Bochenko and other workers to do at the subject site. Mr. Witt testified “they just add on, they’ve added caulking after the contract was set, that is probably what happened,” as to a document showing Acies made payments directly to Messrs. Bochenko and Karlowski. (C-13, p. 9; C-14, p. 3; R-3, p. 36). The record also shows that Mr. Karlowski worked on additional projects for Acies during the period Mr. Bochenko worked for Acies at the subject site. (C-12, p. 35 (d. 89); C-14, pp. 1-2). Mr. Rajski testified D&K worked fairly consistently for Acies and that “[w]e would try to keep them busy.” (C-11, p. 20). S. Brief, p. 27.

The record further shows Acies could remove projects from Messrs. Bochenko and Karlowski and hire others to perform them at the site when the workload demand was heavy. Acies had hired Messrs. Bochenko and Karlowski to do the exterior stucco and brick work on three buildings and a clock tower at the site. (C-11, p. 33 (d. 98)). However, the project owner needed two buildings done at once, and Acies had to hire more workers. Mr. Rajski testified this was necessary “to make sure we got the project done in time” and “to make sure we had enough of a – subcontracted enough workforce there to get the contract complete.” Mr. Bochenko “[did not] have enough manpower to do additional buildings at the same time” and “[could not] keep up with the schedule,” so Acies hired

another “subcontractor” to work on one of the buildings. (C-11, pp. 32-33 (d. 95-99)). I agree with the Secretary that, regardless of the label, this arrangement was functionally an employment relationship. I also agree that Acies controlled its assignments and work flow by using what it called “subcontracted” labor when it did not have enough employees on its payroll. S. Brief, pp. 27-28.

7. The Extent of the Hired Party’s Discretion over When and How Long to Work

The record shows Mr. Rajski handled the work schedules for D&K and that Acies monitored Mr. Bochenko’s work, and that of the other workers, on a daily basis. Mr. Zaczek testified he spoke with Mr. Bochenko daily to learn, *inter alia*, when the workers started and finished at the site that day. Mr. Zaczek then documented the hours worked in his written checklists. (C-1, p. 12, ¶ 51; C-7; C-8; C-12, p. 6 (d. 22-25)). The record plainly establishes that Mr. Zaczek oversaw Mr. Bochenko’s work hours, in that he knew that Mr. Bochenko worked eight hours a day, five days a week, and that Mr. Bochenko was at the job site every day throughout the project. (C-1, p. 9, ¶ 22; C-12, pp. 6 (d. 24), 10-11). I find that Mr. Bochenko had no real discretion over when and how long to work; he worked full time on the project, just like an employee on Acies’ payroll would have. (C-11, p. 11 (d. 31)). I agree with the Secretary that this factor indicates he was an employee of Acies. S. Brief, p. 28.

8. The Method of Payment

This factor is addressed in the second and seventh factors of the economic realities test, *supra*. This factor weighs in favor of finding an employment relationship.

9. The Hired Party’s Role in Hiring and Paying Assistants

The record shows that Respondent Acies hired and paid Messrs. Bochenko and Karlowski to perform the exterior stucco and brick work on the project. I agree with the Secretary that, because Mr. Bochenko was the exposed employee, Respondent’s role in hiring and paying Mr. Musjal is not determinative, especially since most of the factors under consideration support a conclusion that there was an employment relationship between Acies and Mr. Bochenko. In any case, as the Secretary points out, Mr. Musjal believed he was working for Acies, as he nodded his agreement when Mr. Bochenko told the CO that he worked for Acies. (Tr. 30, 82-83, 138-39). S. Brief, p. 29.

10. Whether the Work is part of the Regular Business of the Hiring Party

Acies’ primary business is installing synthetic stucco, and other materials like faux brick, to building exteriors. The record shows that Messrs. Bochenko and Karlowski did the same type of work

for Acies as the employees who were on its payroll. Acies “subcontracted” with Messrs. Bochenko and Karlowski to perform the same work that constitutes its core business. Acies’ work is seasonal, such that, when it has more work than the employees on its payroll can handle, it “subcontracts” the work to persons like Messrs. Bochenko, Karlowski and Musjal. (Tr. 207; C-1, p. 9, ¶ 19; C-9, p. 2; C-11, pp. 6 (d. 21), 17 (d. 57), 34 (d. 108-09); C-13, p. 6). I agree with the Secretary that, because Acies, Mr. Bochenko and Mr. Karlowski are in the same business, this factor weighs heavily in favor of an employment relationship. S. Brief, pp. 29-30.

11. Whether the Hiring Party is in Business

This factor is addressed in factor number 10, *supra*, and weighs in favor of finding that Mr. Bochenko was an employee of Acies.

12. The Provision of Employee Benefits and the Tax Treatment of the Hired Party

Mr. Witt testified that Messrs. Bochenko and Musjal did not receive employees benefits from Acies. (Tr. 193). He also testified, however, that Acies did not issue IRS Forms 1099 to Messrs. Bochenko and Karlowski for their work for Acies in 2008. (Tr. 207). As the Secretary notes, Acies in this case has tried to create the fiction that Messrs. Bochenko and Karlowski were a subcontractor or partnership, rather than employees, in part to justify not paying payroll taxes or benefits. As the Secretary further notes, Mr. Rajski’s description of Messrs. Bochenko and Karlowski as a “tag team” who stopped by Acies’ office looking for work is more apt. (R-4, p. 15). I agree with the Secretary that, in these circumstances, the fact that Messrs. Bochenko, Karlowski and Musjal did not receive employee benefits should not be accorded much weight, particularly in light of the other evidence indicating an employer-employee relationship. S. Brief, pp. 30-31.

Conclusions regarding the Economic Realities and Darden Tests

Based on the foregoing, and the fact that nearly all of the factors – including the principal factor, *i.e.*, the control of the workplace – weigh in favor of finding an employment relationship, I conclude that Mr. Bochenko was an employee of Acies at the subject site. In reaching this conclusion, I agree with the Secretary that the circumstances in this case are similar to those in two decisions in which the Commission held that, under the tests set out above, the respondent was the employer at work site. *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703-05 (No. 14801, 1978); *Froedtert Mem’l Lutheran Hosp.*, 20 BNA OSHC 1500, 1505-08 (No. 97-1839, 2004). S. Brief, pp.

16-19. I have also considered, in reaching my conclusion, Respondent's analysis of the above factors as set out in its post-hearing brief.¹⁸ However, I did not find Respondent's analysis persuasive. The Secretary's analysis, on the other hand, was convincing and presented the facts and circumstances of this case in an accurate and compelling manner. The Secretary's analysis, together with CO Frey's testimony and Acies' tardy contention that it was not the employer at the site, is more than sufficient to support a conclusion that Acies was in fact the employer at the subject site under the Act.

*Citation 1, Item 1*¹⁹

Item 1 alleges a violation of 29 C.F.R. 1926.451(f)(3), which provides as follows:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

CO Frey testified that the top level of the scaffolding, where Mr. Bochenko was working, did not have any guardrails and Mr. Bochenko did not have any personal fall protection; the top level was also not fully planked, and the scaffolding was missing cross bracing and did not have a ladder for proper access and egress. The CO further testified that this item was cited because scaffolds are to be inspected by a competent person before use and that if such an inspection had taken place the deficiencies would have been noted and corrected. The CO said the top level of the scaffold was 12 feet 9 inches high and that Mr. Bochenko could have fallen from the scaffold, due to its condition, and been seriously hurt or killed. The CO determined that Mr. Bochenko was not a competent person as he was working on a scaffold with obvious defects. (Tr. 19-20, 23-25, 28-29, 44-45, 72-74).

¹⁸I have also considered the parties' reply briefs. As to Respondent's initial brief, the Secretary asserts that Acies cited to some of its own discovery responses, such as interrogatory responses and admissions, as well as to some parts of depositions, that were never admitted in evidence. *See* S. Reply Brief, p. 16, and the Appendix to that brief setting out the cites. I have reviewed the Appendix, and I find the Secretary is correct. I agree with the Secretary that citing to evidence outside of the record was improper. Further, I note that a party may not utilize its own admissions at trial. *See, e.g., In re Air Crash*, 982 F. Supp. 1060, 1067 (D.S.C. 1996).

¹⁹As issued, Item 1 alleged a violation of 29 C.F.R. 1926.20(b)(2) and, in the alternative, 29 C.F.R. 1926.451(f)(3). The parties stipulated to refine Item 1 to allege a violation of the latter standard, and the Secretary withdrew the alleged violation of 29 C.F.R. 1926.20(b)(2). (Tr. 6).

I find the cited standard applies, due to the scaffolding with visible defects that was in use at the site.²⁰ I also find the terms of the standard were violated, in light of the scaffolding defects the CO observed, and that Mr. Bochenko was exposed to falls that could have resulted in serious injury or death. I agree with the CO that Mr. Bochenko was not a competent person within the meaning of the standard, since he was working on a scaffold with obvious defects.²¹ The photos the CO took support his testimony about the scaffold's condition. *See, e.g.*, C-2, pp. 2, 3, 7, 10, 12.

I conclude Acies could have discovered the scaffold's defects with the exercise of reasonable diligence. Pursuant to its contract, Acies was "responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract." (C-6, p. 40, § 10.1.1; C-11, p. 25). In addition, C-9, Acies' marketing document, states on page 3 that "Acies controls their manpower with a project foreman, who is on site at all times, and a project superintendent who is a liaison between the field personnel, office staff and building owner." Even assuming that Mr. Bochenko was the "project foreman," he clearly was not competent to erect and utilize a scaffold as required, despite the training and safety documents Acies claims he received. Further, despite visits to the site two to three times a week by managers like Messrs. Rajski and Zaczek, such visits were plainly insufficient to detect problems like the ones at the subject site.²² In the exercise of reasonable diligence, Acies should have ensured that "foremen" such as Mr. Bochenko were adequately trained in scaffold erection and use; otherwise, it should have ensured that superintendents like Mr. Zaczek performed a proper scaffold inspection prior to every use of scaffolding at its job sites. The record establishes Acies' knowledge of the cited condition.

²⁰The scaffold's defects were clearly visible; the CO saw the lack of guardrails from 100 to 200 feet away, and he noted the other conditions upon entering the job site. (Tr. 19-20, 25).

²¹A "competent person" is "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. 1926.450(b).

²²The record shows that one of the reasons managers went to the site was to inspect the scaffolding and make sure it was set up and used properly. (C-1, pp. 7-8, 11-12, ¶¶ 2, 4, 7, 42-45, 47-48, 50, 53-55; C-12, pp. 3-4 (d. 13-16), 55).

Based on the foregoing, the Secretary has demonstrated a violation of the cited standard. This item is affirmed as a serious violation.²³ A discussion of the repeated nature of all five violations, and the penalties assessed, is set out *infra*.

Citation 1, Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.451(b)(1)(i), which states that:

(1) Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports as follows:

(i) Each platform unit ... shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch ... wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

CO Frey testified that the four planks on the top level of the scaffold, where Mr. Bochenko was working, left a gap and did not fully plank the work surface, as shown in C-2, page 10. He said that two more planks were required to fill the gap, which was at least 15 inches wide, such that the fall hazard would not have existed. He also said that the condition was serious because a fall of over 12 feet could have caused serious injury or death. (Tr. 47-49).

The cited standard applies, and the CO's testimony establishes that its terms were not met and that Mr. Bochenko was exposed to the hazard of falling through the gap shown in C-2, page 2. Further, the discussion *supra* establishes Respondent's knowledge of the cited condition. The condition clearly could have caused serious injury or death. The Secretary has shown the alleged violation, and this item is affirmed as serious.

Citation 1, Item 3

This item alleges a violation of 29 C.F.R. 1926.451(e)(1), which provides:

(e) *Access*. This paragraph applies to scaffold access for all employees....

(1) When scaffold platforms are more than 2 feet ... 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. Crossbraces shall not be used as a means of access.

²³In affirming this and the other violations, I note that Respondent has never disputed the cited conditions, including in its post-hearing submissions.

The CO testified that he saw Mr. Bochenko egress the scaffold by climbing down the end frame, which was not a ladder or a permissible means of access or egress. He also testified that the cited standard applied because the scaffold platform was over 12 feet high and in excess of the 2 feet set out in the standard. The CO said the condition was serious for the same reasons indicated in Item 2, that is, it could have caused a fall and serious injury or death. (Tr. 55-57).

The cited standard applies, and the CO's testimony shows its terms were not met and that Mr. Bochenko was exposed to the hazard of falling while climbing down the end frame, as shown in C-2, page 3. The discussion in Item 1 shows Respondent's knowledge of the cited condition. The condition was plainly serious. The Secretary has proved the alleged violation. This item is affirmed as serious.

Citation 1, Item 4

This item alleges a violation of 29 C.F.R. 1926.451(g)(1)(vii), which states:

(1) Each employee on a scaffold more than 10 feet ... above a lower level shall be protected from falling to that lower level....

(vii) For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section [including tubular welded frame scaffolds], each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

The CO testified the cited standard applied because the top level of the scaffold, where Mr. Bochenko was working, was over 10 feet above the ground. He said the standard was violated as there was no fall protection for Mr. Bochenko, *i.e.*, either guardrails or a personal fall arrest system. He also said the condition was a serious hazard, for the same reasons given in Item 2. (Tr. 60-62).

The cited standard applies, and the testimony of the CO shows its terms were not met and that Mr. Bochenko was exposed to falls while working on the top level of the scaffold. The discussion in Item 1 establishes Respondent's knowledge of the violation. The condition was clearly serious. The Secretary has met her burden of proving the alleged violation. This item is affirmed as serious.

Citation 1, Item 5

Item 5 alleges a violation of 29 C.F.R. 1926.452(c)(2), which provides as follows:

(c) *Fabricated frame scaffolds* (tubular welded frame scaffolds)....

(2) Frames and panels shall be braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together laterally. The cross braces shall be of such length as will automatically square and align vertical members so that the erected scaffold is always plumb, level, and square. All brace connections shall be secured.

CO Frey testified that the cited standard was violated because both the upper and lower middle sections of the scaffold had no cross bracing at all; the lower outside sections also had no cross bracing on the sides next to the wall. The CO indicated the condition was hazardous as it could have caused Mr. Bochenko to fall from the scaffold and be seriously injured or killed. (Tr. 67-69).

The cited standard applies, and the CO's testimony, which is supported by C-2, page 7, shows the standard's terms were not met. The CO's testimony also shows the condition could have caused serious injury or death. The discussion in Item 1 establishes Respondent's knowledge of the condition. The condition was plainly serious. The Secretary has met her burden of demonstrating the alleged violation. This item is affirmed as serious.

The Violations were Repeated

All five items of the Citation have been classified as repeat violations. A violation is properly classified as repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061,1063-64 (No. 16183, 1979). At the hearing, the Secretary presented evidence that Acies had been previously cited for violations that were the same as or substantially similar to those cited in this case, that the previous violations were final orders when the Citation in this case was issued, and that the previous violations were either serious or repeat violations. (Tr. 51-53, 58, 63-66, 70-71, 74-77; C-4). Respondent does not dispute the repeated nature of the violations. The Secretary has clearly met her burden of proving that the violations in this case were repeated. Items 1 through 5 of Citation 1 are therefore affirmed as repeated violations.

Penalty Assessment

The Secretary has proposed a penalty of \$6,000.00 each for Items 1, 3 and 5 and a penalty of \$15,000.00 each for Items 2 and 4. In determining whether a proposed penalty is appropriate, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (citations omitted). Gravity is generally the principal factor, and a violation's gravity depends on such matters as the number of employees exposed, the duration of the exposure, precautions taken against injury, and the likelihood that an injury would result. *Id.*

CO Frey testified that all of the violations had high gravity, due to the greater likelihood of a fall occurring and any injury being serious. He also testified that while a 40 percent reduction was applied to the penalties for the employer's size, no reductions for good faith or history were applied due to the repeated classification of the violations. As to the specific penalties, the CO said the base penalty for Items 2 and 4 was \$25,000.00, as Acies had had previous repeat violations for the same or similar conditions; after applying the 40 percent reduction, the resulting proposed penalty was \$15,000.00 each for Items 2 and 4. He also said that the base penalty for Items 1, 3 and 5 was \$10,000.00, as Acies had had previous serious violations for the same or similar conditions; after applying the 40 percent reduction, the resulting proposed penalty was \$6,000.00 each for Items 1, 3 and 5. (Tr. 49-78). In view of the CO's testimony, I find that the proposed penalties are appropriate. They are accordingly assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Items 1, 3 and 5 of Citation 1, alleging repeat violations of 29 C.F.R. 1926.451(f)(3), 29 C.F.R. 1926.451(e)(1) and 29 C.F.R. 1926.452(c)(2), respectively, are affirmed. A penalty of \$6,000.00 each is assessed for these items.

2. Items 2 and 4 of Citation 1, alleging repeat violations of 29 C.F.R. 1926.451(b)(1)(i) and 29 C.F.R. 1926.451(g)(1)(vii), respectively, are affirmed. A penalty of \$15,000.00 each is assessed for these items.

/s/ _____
Covette Rooney
Judge, OSHRC

Date: August 28, 2009