

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

Denny Maize Construction,

Respondent,

OSHRC DOCKET NO. 09-0275

Appearances:

Clara Saafir, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

No appearance at trial for Respondent

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

Procedural History

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 Denny Maize Construction¹ ("Respondent") worksite in Tyler, Texas on December 13, 2008. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging nine serious violations of the Act with penalties totaling \$5,850.00.

Respondent timely contested the citation items and an administrative trial, pursuant to the Commission's Simplified Proceedings rules, was conducted on November 10, 2009, in Dallas, Texas. The Secretary appeared at the hearing ready to proceed. Respondent failed to appear.

¹ Some of the pleadings filed in the record refer to the Respondent as "Denny MYI Construction." A review of the original citations indicates that the correct name of the cited employer is "Denny Maize Construction." Despite this discrepancy, the record establishes that copies of all notices, orders, and pleadings were directed to Respondent at its correct address of record.

(Tr. 4). After a one hour delay to allow for Respondent's possible late arrival, the Secretary proceeded with the presentation of her evidence. (Tr. 4).

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. Respondent is an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slinghuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Findings

Based on Respondent's failure to appear at trial, the court concludes that the following facts, offered by Complainant, are undisputed. On December 13, 2008, OSHA Compliance Safety and Health Officer ("CSHO") Jack Rector conducted an inspection of Respondent's worksite at 1721 S. Beckham, Tyler, Texas. (Tr. 5; Ex. 1, 2). Respondent's four-person crew was performing cornice work as part of the construction of a new bank. (Tr. 6-7). During his inspection, CSHO Rector observed two of Respondent's employees working without hard hats eighteen feet below two other of Respondent's employees who were working with nail guns. (Tr. 6, 8). CSHO Rector also observed that the two employees using the nail guns, as well as two other employees using saws, were not wearing any eye protection. (Tr. 11; Ex. 2a through 2d). The two circular saws being used by Respondent's employees had their blade guards altered with wedges of wood so that the guards would remain open during use. (Tr. 14-15; Ex. 2e). CSHO Rector also observed that the extension cords used to power these circular saws had torn outer sheathings which exposed internal wiring in several places. (Tr. 16; Ex. 2e). One of the extension cords had been improperly spliced and duct-taped. (Tr. 17). CSHO Rector also observed one of Respondent's employees standing on a carpenter's bracket scaffold which was 11 inches wide, rather than the required minimum of 18 inches. (Tr. 18-19). That same employee was working 18 feet above the ground on scaffolding without fall protection. (Tr. 20).

Additionally, employees working on the scaffold had no safe means of access, like a ladder, to enter or exit the scaffold. (Tr. 22-23). Finally, another employee was observed walking on the roof of the building, approximately 12 feet above the ground, while not using any type of fall protection. (Tr. 21).

Jose Villa was Respondent's foreman at the site and was working in plain view of these conditions. (Tr. 7, 15, 19, 20, 23; Ex. 2). Foreman Villa was actually the employee walking on the roof without fall protection and one of the employees using a nail gun without eye protection. (Tr. 13, 22). Respondent's owner, Denny Maize, also visited the jobsite daily. (Tr. 9). All four of Respondent's employees working at this location, including Foreman Villa, were exposed to one or more of these violative conditions. (Tr. 15-16, 18-19, 22-23; Ex. 2).

CSHO Rector characterized the hard hat violation as serious because equipment and/or materials falling 18 feet onto employees below could have resulted in serious physical harm or death. (Tr. 8). He characterized the failure to wear eye protection violations as serious because materials entering the eye during the nail gun or sawing process could have resulted in serious eye injuries. (Tr. 12-13). The lack of fall protection on the narrow scaffolding and roof could have also resulted in serious injury or death. (Tr. 24). Finally, the deficient condition of the saw guards and extension cords could have resulted in serious injury or death. (Tr. 24).

In calculating the proposed penalty for each alleged violations, CSHO Rector credited Respondent 10% for its lack of violation history and another 60% for Respondent's small size. (Tr. 10, 14, 17, 18).

Discussion

To establish a prima facie violation of the Act, the Secretary must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Citation 1 Item 1a

29 C.F.R. 1926.100(a) provides:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.100(a). Equipment or materials striking an employee in the head from eighteen feet above could undoubtedly result in serious injury or death. Therefore, Citation 1 Item 1a will be AFFIRMED as a serious violation.

Citation 1 Item 1b

29 C.F.R. 1926.102(a)(1) provides:

Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.102(a)(1). Equipment or materials striking an employee in the eye while using nail guns and circular saws could result in serious injury or death. Therefore, Citation 1 Item 1b will be AFFIRMED as a serious violation.

Citation 1 Item 2

29 C.F.R. 1926.300(a) provides:

Condition of tools. All hand and power tools and similar equipment, whether furnished by the employer or the employee, shall be maintained in a safe condition.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.300(a). Circular saws being used while the blade guards were intentionally wedged open, rendering the guards useless, could result in serious injury or death. Therefore, Citation 1 Item 2 will be AFFIRMED as a serious violation.

Citation 1 Item 3a

29 C.F.R. 1926.403(b)(1) provides:

Examination, installation, and use of equipment-(1) Examination. The employer shall ensure that electrical equipment is free from recognized hazards that are likely to cause death or serious physical harm to employees. Safety of equipment shall be determined on the basis of the following considerations:

* * *

(ii) Mechanical strength and durability, including, for parts designed to enclose and protect other equipment, the adequacy of the protection thus provided; (iii) Electrical insulation...

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.403(b)(1). Using extension cords with tears in the outer sheathing, exposing internal wiring could result in serious injury or death. Therefore, Citation 1 Item 3a will be AFFIRMED as a serious violation.

Citation 1 Item 3b

29 C.F.R. 1926.405(g)(2)(iii) provides:

Splices. Flexible cords shall be used only in continuous lengths without splice or tap. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.405(g)(2)(iii). Using an extension cord which was spliced into another extension cord, and then duct-taped together, could result in serious injury or death. Therefore, Citation 1 Item 3b will be AFFIRMED as a serious violation.

Citation 1 Item 4a

29 C.F.R. 1926.451(b)(2) provides:

Except as provided in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, each scaffold platform and walkway shall be at least 18 inches (46 cm) wide.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.451(b)(2). Employees working on a scaffold seven inches narrower than the required minimum could result in serious injury or death. Therefore, Citation 1 Item 4a will be AFFIRMED as a serious violation.

Citation 1 Item 4b

29 C.F.R. 1926.451(g)(1) provides:

Fall protection. Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower

level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.451(g)(1). Falling eighteen feet from a scaffold could undoubtedly result in serious injury or death. Therefore, Citation 1 Item 4b will be AFFIRMED as a serious violation.

Citation 1 Item 5

29 C.F.R. 1926.501(b)(13) provides:

Residential construction. Each employee engaged in residential construction activities 6 feet (1.8m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.

The Secretary failed to establish that Respondent's employees were engaged in residential construction. On the contrary, the Secretary presented evidence establishing that Respondent's employees were engaged in commercial construction at this site. They were participating in the construction of a new bank. (Tr. 7). Therefore, the Secretary failed to establish that the regulation applies to the cited condition. Since the Secretary failed to prove one of the elements necessary for a prima facie violation, Citation 1 Item 5 will be VACATED.

Citation 1 Item 6

29 C.F.R. 1926.1051(a) provides:

A stairway or ladder shall be provided at all personnel points of access where there is a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist is provided.

The Secretary's undisputed evidence established all of the elements necessary for a prima facie violation of 29 C.F.R. 1926.1051(a). Falling while accessing an eighteen foot scaffold, due to a lack of access equipment, such as a ladder, could result in serious injury or death. Therefore, Citation 1 Item 6 will be AFFIRMED as a serious violation.

Penalties

Section 17(j) of the Act requires the Commission to give “due consideration” to four criteria when assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD ¶129,964 (No. 87-2059, 1993). Based on the Secretary's undisputed evidence, I find that the proposed penalties for each violation are appropriate.

Alternative Order for Respondent's Failure to Appear

Alternatively, Respondent's failure to appear at the hearing justifies vacating Respondent's Notice of Contest, as to all of the citation items except Citation 1 Item 5, and affirming the remaining items as issued. Commission Rule 64; *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶130,051 (No. 92-0899, 1993).

ORDER

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

1. Citation 1 Items 1(a) and (b) are AFFIRMED and a grouped penalty of \$600.00 is ASSESSED;
2. Citation 1 Item 2 is AFFIRMED and a penalty of \$750.00 is ASSESSED;
3. Citation 1 Items 3(a) and (b) are AFFIRMED and a grouped penalty of \$750.00 is ASSESSED;
4. Citation 1 Items 4(a) and (b) are AFFIRMED and a grouped penalty of \$1,500.00 is ASSESSED;
5. Citation 1 Item 5 is VACATED;
6. Citation 1 Item 6 is AFFIRMED and a penalty of \$750.00 is ASSESSED.

/s/
HONORABLE SIDNEY J. GOLDSTEIN
Judge, OSHRC

Date: February 4, 2010
Denver, Colorado