



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.

LANDCOAST INSULATION, INC.,

Respondent.

OSHRC Docket No. 09-0625

ORDER

This case is before the Commission on a Direction for Review entered by Commissioner Horace A. Thompson III on June 14, 2010. On July 6, 2010, Respondent filed a Notice To Withdraw Petition For Discretionary Review. Shortly thereafter, on July 8, 2010, the parties filed a Stipulation and Settlement Agreement (“Settlement”) pursuant to Commission Rule 100(c), 29 C.F.R. § 2200.100(c), which disposes of all remaining issues. We hereby approve the Settlement and thus no further review by the Commission is warranted.

We incorporate the Settlement into this Order and we set aside the Administrative Law Judge’s Decision and Order to the extent that it is inconsistent with the Settlement.
SO ORDERED.

/s/ Thomasina V. Rogers
Chairman

/s/ Horace A. Thompson III
Commissioner

/s/ Cynthia L. Attwood
Commissioner

Dated: July 30, 2010

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

Secretary of Labor,

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v.

LandCoast Insulation, Inc.,

Respondent.

OSHRC Docket No. **09-0625**

Appearances:

Uche N. Egemonye, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

David C. Goff, Esquire, Deutsch, Kerrigan & Stiles, LLC, Gulfport, Mississippi
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

LandCoast Insulation, Inc. (LCI) is an industrial specialty contractor with an office in New Iberia, Louisiana. On November 4, 2008, LCI was installing a system scaffold, approximately 165 feet high, inside a boiler at Mississippi Power, Plant Daniel, in Moss Point, Mississippi when the scaffold collapsed. One LCI employee died and several employees were injured. The Occupational Safety and Health Administration (OSHA) inspected the collapse and issued to LCI serious and willful citations on March 24, 2009. LCI timely contested the citations.

The serious citation alleges LCI violated 29 C.F.R. § 1926.451(f)(4) (item 1) for failing to immediately repair, replace, or remove from service the damaged scaffold components, and 29 C.F.R. § 1926.454(b) (item 2) for failing to adequately train by a competent person each employee to recognize hazards associated with damaged scaffold components. The serious citation proposes a penalty of \$4,500.00 for each alleged violation.

The willful citation alleges LCI violated § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651 *et seq.*, for erecting a scaffold without using critical components

listed on the scaffold drawings prepared by an engineering company, or in the alternative, as amended by the Secretary on November 2, 2009, for using scaffold drawings that were not approved by a registered professional engineer (PE) and were marked “PRELIMINARY Not for Construction.” The willful citation proposes a penalty of \$63,000.00.

The hearing was held on November 9 and 10, 2009, in Biloxi, Mississippi. The parties stipulated jurisdiction and coverage. The Secretary withdrew Citation no. 1, item 1, alleged violation of § 1926.451(f)(4). The parties have filed post hearing briefs.

LCI denies the alleged violations. LCI argues that there is no evidence damaged scaffold components were used on the scaffold inside the boiler. LCI claims it relied upon the scaffold drawings from Patent Construction Systems (Patent) and the scaffold components supplied by Patent to ensure the scaffold was properly erected. Also, LCI asserts unpreventable employee misconduct as to the alleged training violation.¹

For the reasons discussed, Citation no. 1, item 2 and Citation no. 2, item 1, are affirmed as serious and total penalties of \$8,000.00 are assessed.

BACKGROUND

LCI is an industrial specialty contractor which started in business in 1973. LCI’s CEO is Robert M. Morton, son of the company’s founder. LCI employs approximately 800 employees. As a specialty contractor, LCI installs scaffolds, insulation, paint, fire proofing, industrial coatings, and performs heat, electric or steam tracings. Scaffolding is approximately 65 percent of LCI’s business (Tr. 285, 287, 332).

In 2008, PIC Group, Inc. (PIC), a service provider, contracted LCI to, among other things, erect the scaffold inside a boiler at Mississippi Power, Plant Daniel, in Moss Point, Mississippi. PIC was responsible for changing the high temperature water tubes in the boiler during the plant outage. LCI’s project superintendent was Donald Sullivan. The shift supervisors were brothers, Carlos and Alfonso Galvan, who were also the designated competent persons for erecting the scaffold. LCI utilized approximately 50 scaffold builders and helpers on the project (Tr. 26, 47, 303, 326, 333).

¹Issues not briefed are deemed waived. See *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

Prior to erecting the scaffold, LCI contracted Patent to provide the engineering drawings for the scaffold system inside the boiler because the scaffold was designed to be higher than 125 feet above the base. Patent was also contracted to supply the scaffold components (Tr. 334-335).

On August 19, 2008, Patent provided LCI with an initial set of scaffold drawings. On September 26, 2008, Patent prepared a second set of scaffold drawings, consisting of seven sheets. These drawings were given to superintendent Sullivan who gave copies to Mississippi Power and PIC. On each sheet of the second set of drawings, there was a copy of the PE's seal and the words, in bold print, "PRELIMINARY Not for Construction." The seal was not signed or dated by the PE. The drawings also called for the use of approximately 210 plate trusses including 14 of the plate trusses to be used at levels 14 and 16, where the vertical posts could not be continuous to the ground. At these levels, the posts had to be relocated to fit around the "bull nose" inside the boiler (Exhs. C-2, R-3, Tr. 58, 118, 279, 312).

On October 13, 2008, pursuant to its contract, Patent began delivering scaffold components to the project. According to Patent's shipping invoice, 115, 8-foot heavy horizontals "substituted for the 8-foot plate truss" were among shipped components. On October 16, the invoice shows that 59, 8-foot plate trusses were shipped to the project (Exhs. C-4, R-6).

Thereafter, LCI began erecting the scaffold. At levels 14 and 16, day shift supervisor Carlos Galvan used heavy horizontals instead of the plate trusses in relocating the vertical posts around the "bull nose." By using the heavy horizontals, Galvan had to install the bracing in a different configuration, above the heavy horizontal as opposed to underneath the plate truss (Exh. C-4).

On November 4, 2009, at approximately 5:40 a.m., the scaffold inside the boiler collapsed. The scaffold was approximately 165 feet above the scaffold base. After the collapse, the scaffold components were removed from the boiler and placed in the "lay down yard" (Tr. 27, 37, 103).

OSHA compliance safety and health officer Henry Rust initiated an inspection into the scaffold collapse at approximately 4:00 p.m., on November 4, 2009. His inspection took several days and involved interviewing employees and taking photographs. Rust was unable to identify the cause of the collapse (Tr. 28-29, 47, 110).

As a result of OSHA's inspection, LCI received the serious and willful citations at issue.

DISCUSSION

The Alleged Violations

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

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

There is no dispute the scaffold erected inside the boiler was a "system scaffold" (Tr. 300, 302). A "system scaffold" is defined as "a scaffold consisting of posts with fixed connection points that accept runners, beams, and diagonals that can be fixed connected at predetermined levels" (§ 1926.450(b), *Definitions*).

Serious Citation No. 1

Alleged Violation of §1926.454(b)(Item 2)

The citation alleges that "[O]n or about November 4, 2008, at Mississippi Power Plant Daniel in Moss Point, MS, employees were not sufficiently trained to a level of proficiency to recognize hazards such as damaged scaffold components." Section 1926.454(b)(1) provides:

The employer shall have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. The training shall include the following topics as applicable:

The topics for such training include the nature of scaffold hazards, the correct procedures for erecting and disassembling the type of scaffold in question, the design criteria for the scaffold, the maximum intended load-carrying capacity and intended use of the scaffold, and any other pertinent requirements of Subpart L.

Although an employer is free to train by any method, the training must be modeled on the applicable OSHA requirement and "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 nn 6 & 7 (No. 90-1106, 1993). The instruction must be more than "vague advice." *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892 (No. 92-3684, 1997).

The Secretary alleges that LCI did not train employees to recognize the hazard associated with using damaged components. Section 1926.451(f)(4) requires the immediate repair, replacement, adequate bracing, or removal of any part of a scaffold damaged or weakened. Employees, therefore, need training on hazards associated with damaged scaffold components.

Although the standard does not define what constitutes a damaged component, it defines a weakened component, pursuant to 29 C.F.R. 1946.451(a), as:

. . . each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it.

No testing was performed to determine whether any scaffold component fell below the 4:1 standard. The Secretary has withdrawn the allegation of LCI using damaged components (citation no. 1, item 1- alleged violation of § 1926.451(f)(4)).

According to the Secretary, damaged components included bent, broken, pitted, rusted, or corroded components. Such components were photographed by Rust in the “lay down yard” after the collapse (Exh. C-1; Tr. 87). He testified that Sullivan and Carlos Galvan agreed that the components shown in the photographs should not have been used to erect the scaffold in the boiler (Tr. 45, 47).

A determination of whether damaged components were used in erecting the scaffold in this case is not required. The issue before the court is whether “each” employee was trained by a competent person in the recognition and avoidance of damaged components. The standard at issue places the responsibility to train “each” employee on the employer.

To show LCI’s lack of training, the Secretary offered the testimony of two former employees and friends, Matthew Krause and Michael Burkes (Tr. 201). Krause and Burkes worked two shifts for LCI at Plant Daniel before the scaffold collapse and were told not to come back unless called by LCI.

Matthew Krause testified that LCI hired him as a scaffold builder at the end of October 2008. His duties consisted of “passing up materials and helping put the bracing on, helping put the planking together, and building the scaffold to the immediate top up there to where they needed to work off of the scaffold and the boiler” (Tr. 193). He testified that LCI did not train him to recognize the

hazards associated with damaged scaffold components. He said LCI's orientation consisted of "where to go, where not to go, stay out of the areas with red tape, stay out of the enclosed areas, confined spaces, and more or less just staying in the area where LandCoast employees were working in the boiler room and outside the boiler room" (Tr. 194). During the only tool box meeting he attended, he was instructed to "watch our pinch points, and make sure we were tied off, 100 percent tied off safety-wise" (Tr. 196). Krause said he spoke with Carlos and Alfonso Galvan to no avail about damaged scaffold components which he described as "the parts were rusted, the tubing was damaged, the lock pins were no good, boards were split, boards were cracked, some of the planks were damaged and everything else" (Tr. 195).

Michael Burkes corroborated Krause's testimony regarding the lack of training on the hazards associated with damaged scaffold components. Burkes testified that LCI hired him as a helper around November 1, 2008. LCI then assigned him to build scaffolds. He testified that he received no training related to scaffold hazards. He was not trained how to identify and discard scaffold components that were bent, cracked, corroded, or otherwise damaged (Tr. 203-204). When he left the project, the scaffold was more than 100 feet high, "almost to the top" (Tr. 207).

CEO Morton testified that scaffold builders carry a card certifying their qualifications from LCI or other scaffold company. Based on the card, scaffold builders are presumed to be trained when hired (Tr. 319-320). According to Morton, the employees involved in erecting scaffolds would just know which parts to discard. He testified:

Oh, yes. Well, it's going to be whether the supervisor or the actual guys erecting scaffold, you're going to know. I mean, when you go to stab a leg or something and that thing is bent or you've got rings that are bent on it, then it's coming back down. You know, it can't be used. (Tr. 300-301).

Superintendent Sullivan testified that LCI had a policy regarding discarding damaged scaffold components. The components would be inspected, and if damaged, would be set aside and not used (Exh. R-22, p. 33). He testified that there were daily toolbox meetings and supervisors communicated this policy to employees (Exh. R-22, p. 14). Section 1926.451(f)(3) requires that scaffolds and scaffold components are inspected for visible defects by the competent person before each work shift.

Although LCI has an extensive training programs including written safety policies, employees' safety handbook, daily toolbox meetings, and a safety officer on site, its training program was shown lacking on instructing each employee on the hazards associated with damaged scaffold components and the means to avoid the hazards. Despite LCI's reliance upon the scaffold builders to carry a card and competent persons to discard damaged components, the standard requires training to "each" employee on the recognition and avoidance of the hazards associated with damaged components. The employees need instruction on, among other things, what constitutes a damaged component, the reason(s) the damaged components should not be used, and if a damaged component is found, what action to take.

Morton's testimony that employees are "going to know" is not the training contemplated by the standard (Tr. 300, 302). It was not shown that LCI had a policy to train employees on not using damaged components. No record that such instruction was given during an LCI training program or toolbox meeting was offered and no supervisor or instructor testified to providing such training to the employees. Although they worked only two days, the testimony of Krause and Burkes establish LCI's lack of training on the general hazards associated with scaffolds including damaged components.

LCI's violation of § 1926.454(b) for inadequate training is established by the record. Even though the scaffold components were provided by Patent and scaffold builders carried cards, the responsibility remained with LCI to train each of its employees in recognizing and avoiding the hazards associated with damaged components.

Serious Classification

LCI's violation of § 1926.454(b) was properly classified as serious. A "serious" violation under § 17(k) of the Act is established if there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation.

In this case, LCI knew the training requirements. Section 21, paragraph 5 of LCI's "Safety Policies and Procedures" entitled "Scaffolds and Ladders" addresses scaffold training to include fall hazards, fall protection, electrical hazards, safe handling, load-carrying capacities, and "any other pertinent requirements" (Exh. R-15). Scaffolds constitute in excess of 60 percent of LCI's business (Tr. 332). Although this is a training violation, if a scaffold accident occurred such as in this case,

the likely result would clearly be serious injury or death. See *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996) (the occurrence of an accident does not have to be the substantial probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur).

Unpreventable Employee Misconduct

As an affirmative defense, an employer, in order to establish “unpreventable employee misconduct,” must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated these rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

LCI argues that several safety policies and procedures were in place to prevent the lack of training and it has a written disciplinary program to ensure compliance (Exhs. R-12 thru R-16). The safety rules were given to each employee and safety toolbox meetings were held at the beginning each shift (Exhs R-17 thru R-20).

Despite LCI’s written safety program, LCI’s unpreventable employee misconduct defense is rejected. LCI failed to identify the employee(s) it alleges caused the misconduct, specify the safety rule(s) the employee(s) allegedly violated, the alleged communication provided to the employee(s) on the rule and the discipline administered showing enforcement of the safety rule(s). LCI merely identified general policies and procedures including a rule mandating that all employees be trained. The written rule, however, does not specifically identify training on the hazards associated with damaged components. Sullivan testified that he discussed the training policy with Carlos Galvan and asked him “to pass it on” (Exh R-22, p. 33). He did not see Galvan providing the instruction and no record was offered showing the training occurred. Also, LCI failed to show enforcement of its disciplinary policy. There was no evidence that LCI disciplined employees for violating the training rule and, in fact, there was no showing an employee at Plant Daniel was disciplined as a result of the scaffold collapse.

Willful Citation No. 2

Alleged Violation of § 5(a)(1) of the Act (Item 1)

The citation, as amended, alleges that “[O]n or about November 4, 2008 at Mississippi Power, Plant Daniel in Moss Point, MS, scaffold had been erected over 125 feet above the base without using the critical components listed on the prints that were designed by a registered professional engineer” or in the alternative, “using scaffold plans that were marked PRELIMINARY NOT FOR CONSTRUCTION. One feasible and useful abatement method to correct this hazard was to follow the prints as designed by a registered professional engineer.”

Preliminary Issues

1. Judicial Estoppel

LCI claims the Secretary’s alternative allegations are inconsistent and confusing because on one hand, she claims the scaffold drawings were preliminary and should not have been used by LCI to erect the scaffold, and, on the other hand, she claims LCI should have followed the drawings by using only plate trusses. LCI argues judicial estoppel precludes the inconsistent positions taken by the Secretary. “Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” 18 Federal Practice and Procedure, 4477, p. 782 (Wright, Miller & Cooper, 2002). Also see, *New Hampshire v Maine*, 121 S.Ct. 1808 (2001) (judicial estoppel is invoked where “intentional self-contradiction is being used as a means of obtaining unfair advantage”).

As discussed in *New Hampshire v Maine*, judicial estoppel is an equitable doctrine invoked in the court’s discretion. The doctrine protects the integrity of the judicial process from clear, inconsistent positions in different forums. Judicial estoppel generally applies when a party who has won a judgment on one ground takes a contradictory position in a subsequent litigation in an effort to obtain a second judgment.

This case involves a single action under the Act where the Secretary has asserted two alternative theories for the violation of §5(a)(1), the general duty clause. The Commission has long recognized the Secretary’s authority to plead in the alternative, particularly in alleged § 5(a)(1) violations. See Commission Rule 2200.30(e); *Paschen Contractors, Inc.*, 14 BNA OSHC 1754, 1757 (No. 84-1285, 1990). Also, the two legal theories asserted by the Secretary are not contradictory, *i.e.*,

LCI should not have used the drawings because they were marked “PRELIMINARY Not for Construction,” and if it did use the drawings, LCI should not have deviated from their specifications.

LCI’s judicial estoppel argument is rejected.

2. Mohammad Ayub’s Testimony

LCI argues that Mohammad Ayub’s testimony, as an expert witness, should be stricken because the State of Mississippi requires an individual practicing engineering in the State of Mississippi to be licensed by the state (Miss. Code Ann. 73-13-3). Mr. Ayub is a federal employee with the Directorate of Construction, U.S. Department of Labor, Washington, D.C. He is a certified PE registered in the States of Maryland and Virginia, as well as, a registered structural engineer in the State of California (Tr. 345).

According to LCI, the state’s definition of the “practice of engineering” includes giving expert testimony. There is no dispute that Mr. Ayub is not a licensed PE in the State of Mississippi and that he had not received permission by the Mississippi Board of Licensure to testify.

The Act is a federal law and this OSHA proceeding, pursuant to the Act, is governed by federal law and not the laws of a state. Mr. Ayub was not practicing engineering in the State of Mississippi. He was in the State of Mississippi only to testify in this OSHA proceeding.

LCI’s argument regarding striking Mr. Ayub’s testimony is rejected.

Section 5(a)(1) Violation

Section 5(a)(1) of the Act provides:

Each employer -

shall furnish to each of his employees employment and place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

To establish a violation of § 5(a)(1), the Secretary must show that (1) there was an activity or condition in the employer’s workplace that constituted a hazard to employees, (2) either the employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to

eliminate the hazard or materially reduce it. *Waldon Healthcare Center*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).²

1. The Hazard

A “hazard” is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control. *Morrison-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993).

The hazard in this case is identified as using preliminary drawings to erect the scaffold without approval by a PE and not following the drawings when substituting scaffold components. Such conditions are deemed hazardous because there is no assurance that proper load calculations had been performed to ensure the stability of the scaffold or the suitability of the substituted component.

The scaffold drawings utilized by LCI to erect the scaffold were prepared by Patent. Although the drawings contained Patent’s preprinted PE’s name and copy of his seal, the drawings were not shown to be final because the drawings were not signed or dated by the PE and each sheet contained in bold designation “PRELIMINARY Not for Construction.”

Also, substituting heavy horizontals for the plate trusses shown in the scaffold drawings is a hazard. LCI acknowledges that a heavy horizontal has a lesser strength capacity than a plate truss (Tr. 274). Patent’s scaffold drawings called for 14, 8-foot plate trusses at scaffold levels 14 and level 16 because the vertical posts were no longer continuous to the ground (Tr. 58-59, 280). The posts had to be relocated to fit around what was referred to as the “bull nose” in the boiler. Also, the scaffold drawings showed the bracing placed below the plate trusses. Instead, LCI had to place the bracing above the heavy horizontals because of the configuration of the horizontals (Tr. 256-258). LCI’s expert, PE Allen Palmer conceded that the plate trusses to be used on levels 14 and 16 were “in more critical locations because of the weight distribution” (Tr. 282).

Although Patent’s shipping invoice shows that heavy horizontals were substituted for some of the plate trusses, the scaffold drawings were not modified to reflect the substitution and no

²LCI agrees that the scaffold in this case was to be designed by a registered PE because it was to stand higher than 125 feet above the adjustable base (Exh. C-3; Tr. 53, 334). Neither party asserts the application of a specific standard such as §1926.451(a)(6) which requires that scaffolds such as a system scaffold “shall be designed by a qualified person and shall be constructed and loaded in accordance with that design.” *Also see* §1926.452. If a specific standard is applicable, the use §5(a)(1) is not appropriate. *See* §1926.20(d). However, since the issue was not raised by either party, it is deemed waived.

information was provided by Patent to show where the heavy horizontals could be utilized instead of the plate trusses. A substitution shown in a shipping invoice does not amend or modify the scaffold drawings. There was no evidence Patent's PE approved the substitution.

LCI's argument that there was no hazard created by the substitution of heavy horizontals is rejected. PE Palmer's testimony that the heavy horizontals with additional bracing accomplished the same goal as the plate trusses was not based upon appropriate calculations for such opinion (Tr. 260). Also, the hazard is deviating from drawings not approved by the PE, and not whether, by chance or accident, the substitution provided levels 14 and 16 with the same strength capacity.

The lack of calculations by the Secretary regarding the structural integrity of the scaffold system as built by LCI does not show a lack of a hazard. "[T]here is no requirement that there be a 'significant risk' of the hazard coming to fruition, only that if the hazardous event occurs, it would create a 'significant risk' to employees." *Waldon Healthcare Center*, 16 BNA OSHC at 1060. The hazard was using scaffold drawings, not finalized by a PE, and making a substitution not approved by a PE.

As the scaffold contractor, it was LCI's responsibility to erect the scaffold in accordance with final drawings certified by a PE. A PE was used by LCI to prepare scaffold drawings for a scaffold system more than 125 feet high because "as you get higher . . . there's more weight to the scaffold system, and it requires a professional engineer to design that to make sure that the scaffold has the strength to withstand the load" (Tr. 55).

The hazard of utilizing "Preliminary" scaffold drawings and not complying with the drawings is established.

2. The Hazard was Recognized

A hazard is deemed "recognized" when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry *Pepperidge Farm Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997).

Using scaffold drawings not approved by a PE and carrying the "preliminary" designation to erect a system scaffold 165 feet in height is recognized as a hazard by the construction industry as well as by LCI. Under ANSI/ASSE A10.8-2001. "Safety Requirements for Scaffolding- section 9.13, states in part; "System scaffolds erected higher than 125 feet above the adjustable base shall be designed by a qualified registered professional engineer . . ." (Exh. C-3). PE Mohammed Ayub,

OSHA's Director of the Office of Engineering, testified that in erecting a scaffold based on drawings, it was:

The industry practice is that if they get a drawing at a site that has a notation in bold, "not for construction" everything freezes. Everything has to stop in its tracks, and they have to wait until they get a new drawing which does not have that title, "not for construction." So, "not for construction," regardless of the fact that it has a stamp or not, whether it is signed or not, whether it is dated or not, "not for construction" is a directive to the contractor not to use that drawing for the construction. Period. That is an industry practice. (Tr. 354-355).

LCI's expert, Alan Palmer, a PE licensed in the State of Mississippi, agrees that at a minimum, there was a contradiction on the face of the drawings. He testified that "... you do not want to have that wording 'not for construction' on the drawings you are using" (Tr. 268). At the minimum, he agreed that the drawings presented LCI with "conflicting information" which should have been resolved before erecting the scaffold (Tr. 245, 268). It should have been clarified by the designer of the scaffold before LCI began erecting the scaffold. CEO Morton recognized the role of the PE when he testified that the drawings are only final if "they say it's good" (Tr. 318).

Shift Supervisor Carlos Galvan, who had previously worked for Patent, knew the difference between preliminary drawings and final drawings (Exh. C-4). He knew the drawings needed to be signed, dated, and certified by the PE. He stated that for the drawings to be used for construction, a PE had to date and put his signature on the drawings. He recognized the importance of following drawings approved by a PE. "[The drawings] are required for the safety of the people working on [scaffolds;] OSHA requires it" (Exh. C-4).

Substituting components not shown on scaffold drawings is also a recognized hazard by the industry and LCI. PE Ayub testified the construction industry practice mandates that only the PE, who designed the scaffold, could make substitutions of components. He explained "that is a very complex issue because a truss has a different load carrying capacity, much larger than a heavy [horizontal]. And, no one should make the decision for the substitution [except] by the engineer who had designed the scaffold" (Tr. 357). The substitution of components in Patent's shipping invoice was not shown to be approved by the PE and does not alter or modify scaffold drawings.

Patent's PE Ken Chevis, whose copied seal is on the scaffold drawings, testified; "you come up with a final design, you seal it, and you deliver it to the site. If a substitution happens, then that request would be given back to the engineer, and then the drawings would have to be modified to distinguish where he wants the substitutions. Need to know where in the plans to make the substitution, not just that it is a substitution" (Tr. 179). Patent's designer Charles Knight, who prepared the preliminary scaffold drawings, described the shipping invoices as "a preliminary list, so if any substitutions had been made, that would have come to my attention; and, then, therefore, through the regularly submitted drawings for engineering approval, the changes would have been made for the allowable substitutions to be made. Now, that something not to take lightly" (Tr. 158).

Utilizing scaffold drawings not approved by the PE and substituting heavy horizontals for trusses shown on scaffold drawing is a recognized hazard. The confusion and contradictions in the drawings and invoices as acknowledged by Palmer should have been clarified with Patent before erecting the scaffold.

3. Likelihood of Serious Injury

The criterion is not the likelihood of an accident or injury, but whether, if an accident occurs, would the results likely cause death or serious injury. *Waldon Healthcare Center*, 16 BNA OSHC at 1060.

The recognized hazard of erecting a scaffold system in excess of 165 feet high with preliminary scaffold drawings not approved by a PE and substituting components not shown on the drawings could result in serious injuries to employees from a scaffold collapse or struck by falling components, if an accident occurred (Tr. 56). The death of an LCI employee and the serious injury to other employees are evidence of the hazard associated with a scaffold erection. *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970, 1973-1974 (No. 78-4555, 1982), *aff'd* 729 F.2d 317 (5th Cir. 1984) (an accident may demonstrate that a condition presents a hazard to an employee). LCI does not dispute the likelihood of death or injury.

4. Feasible Abatement

As the final element in establishing a § 5(a)(1) violation, the Secretary must show that the proposed abatement of the recognized hazard will "eliminate or materially reduce the hazard." *Cardinal Operating Company*, 11 BNA OSHC 1675, 1677 (No. 80-1500, 1983). The Secretary's identified abatement measure need not be shown to have prevented the accident.

In this case, the Secretary's abatement measures involve erecting the scaffold based on final drawings approved by the scaffold designer and the employer should adhere to the drawings, not substituting components, unless approved by the scaffold designer. LCI does not dispute the feasibility of the abatement measures.

LCI's § 5(a)(1) violation is established.

Willful Classification

LCI's violation of § 5(a)(1) of the Act is classified as willful. A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). A willful classification is more than a showing that an employer was aware of the conduct or conditions constituting the alleged violation. There must be a showing of "heightened awareness." Also, "[T]he Secretary has a more stringent and more difficult burden of proof to show willfulness where the employer is charged with a violation of section 5(a)(1) A more concrete evidentiary showing is required." *Ho*, 20 BNA OSHC 1361, 1378 (Nos. 98-1645, 98-1646, 2003), *aff'd*, 401 F.3d 355 (5th Cir. 2005).

Although LCI's knowledge of the recognized hazard is established, the record fails to show that LCI acted with heightened awareness that a hazardous condition existed and that employee safety was at risk due to the hazardous condition. LCI contracted Patent to design the scaffold system because it wanted a PE to design and make load calculations on a scaffold in excess of 125 feet in height. Project manager Sullivan denied being told the drawings were preliminary when he received them from Patent (Exh. R-22, p. 25; Tr. 77). Patent had already provided LCI with an initial set of scaffold drawings which did not contain a PE's seal (Exh. R-3).

The second set of drawings given to Sullivan contained the PE's seal. Sullivan testified that he did not see the "PRELIMINARY Not for Construction" on the drawings. He also gave copies of the drawings to PIC and Mississippi Power who did not advise LCI not to use the drawings. Mississippi Power gave LCI the "go-ahead" to start construction of the scaffold after receiving the drawings and periodically inspected the scaffold at various levels during erection (Tr. 312, 334). LCI had worked with Patent on prior scaffold projects.

LCI's expert Allen Palmer, a PE licensed in the State of Mississippi, testified that "the presence of the seal there indicates that the drawings have been reviewed in this case by Mr. Chevis"

(Tr. 244). He testified that in the State of Mississippi, construction drawings should never be released with an engineer's seal unless those drawings were reviewed by the engineer (Tr. 245-246, 251-252).

On the substitution of components, LCI relied upon Patent to ship the proper components. Patent's shipping invoice showed the heavy horizontals were substituted for plate trusses. Such substitution by Patent could infer to LCI approval by the PE. Also, the record indicates the horizontals were installed in conformity with industry practice. PE Palmer testified the horizontals with bracing provided the same strength and stability capabilities as the trusses.

Although LCI should have resolved the contradictions on the scaffold drawings and shipping invoices before erecting the scaffold, such failures do not rise to the level of intent or plain indifference to employee safety. The scaffold drawings contained the PE's seal and his name. It was the second set of drawings Patent had prepared. Patent made the substitution to heavy horizontals which LCI could have assumed was approved by the PE. Scaffolding accounts for over 60 percent of LCI's business.

A serious violation of § 5(a)(1) is established.

Penalty Consideration

In determining an appropriate penalty, consideration of the size of the employer's business, history of the employer's previous violations, the employer's good faith, and the gravity of the violation is required. Gravity is the principal factor.

LCI is not entitled to credit for size because it employs approximately 800 employees (Tr. 78, 332). LCI is entitled to credit for history and good faith because there is no evidence LCI received prior serious citations within the proceeding three years. Also, LCI has a written safety program, daily toolbox meetings and a project safety manager on site (Exhs. R-11 thru R-21).

A penalty of \$1,000.00 is reasonable for LCI's serious violation of § 1926.454(b) (Citation 1, Item 2). As admitted by Morton, LCI relied upon the scaffold builders to just know which damaged components to remove and not utilize. Such reliance does not equate to the training of "each" employee as contemplated by the standard. Although LCI has a training program including tool box meetings, such training was inadequate. There was no showing that employees were trained to recognize and avoid the hazards associated with damaged scaffold components.

A penalty of \$7,000.00 is reasonable for LCI's serious violation of § 5(a)(1) of the Act (Citation 2, Item 1). The use of drawings not approved by a scaffold designer and using components

contrary to the scaffold drawings are contrary to good construction practices. Fifty LCI employees were exposed to the hazard.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Serious Citation No. 1

Item 1, serious violation of § 1926.451(f)(4), is withdrawn by the Secretary.

Item 2, serious violation of § 1926.454(b), is affirmed and a penalty of \$1,000.00 is assessed.

Willful Citation No. 2

Item 1, willful violation of § 5(a)(1), is affirmed as serious and a penalty of \$7,000.00 is assessed.

/s/Ken S. Welsch
KEN S. WELSCH
Judge

Date: May 5, 2010