

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

Secretary of Labor,

Complainant,

v.

Frazier Masonry Corporation,

Respondent.

OSHRC DOCKET NO. 09-1352

Appearances:

Jeremiah Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, WA
For Complainant

Robert D. Peterson, Esq., Robert Peterson Law Corporation, Rocklin, CA
For Respondent

Before: Administrative Law Judge Benjamin R. Loye

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 Frazier Masonry Corporation (“Respondent”) worksite in Boise, Idaho on June 22, 2009. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one violation of the Act. Citation 1 Item 1 alleged a serious violation of 29 C.F.R. §1926.451(g)(1) with a proposed penalty of \$4,500.00. Respondent timely contested the citation and an administrative trial was conducted on March 30, 2010 in Boise, Idaho. Both parties submitted a post-trial brief and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all

times relevant to this action, Respondent was 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). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations

The parties stipulated to the following:

(1) The Occupational Safety and Health Administration had jurisdiction over Respondent's worksite at issue in this case (Tr. 7);

(2) The Occupational Safety and Health Review Commission has jurisdiction to adjudicate this matter (Tr. 7);

(3) Compliance Safety and Health Officer Patrick Nies was a duly authorized representative of the Secretary of Labor at the time of this inspection (Tr. 7);

(4) Michael Walczyk and Scott Fromme were supervising foremen employed by Respondent at this worksite at the time of the inspection (Tr. 8);

(5) If an employee fell from the scaffold at issue, there was a substantial probability that the fall would have resulted in serious injury or death (Tr. 6, 23);

(6) The proposed penalty was computed in accordance with Federal OSHA policy and procedures and was properly calculated for the proposed violation (Tr. 24).

Additional Factual Findings

On June 22, 2009, Compliance Safety and Health Officer ("CSHO") Patrick Nies, of the Boise Area Office of the Occupational Safety and Health Administration, was conducting personal business when he observed, from a business across the street, individuals working on a 38-foot scaffold at a construction site. (Tr. 12, 19). He saw three individuals receiving a masonry mortar tub where two sections of scaffold guardrails had been removed. (Tr. 12-13). The tub of mortar was being lifted with a telehandler, a type of construction vehicle equipped with a telescoping forklift. (Tr. 28-29). The three individuals were observed working near the

unguarded portion of the scaffolding for approximately fifteen minutes. (Tr. 20). No alternative forms of fall protection were being used during the period in which the guardrails were removed. (Tr. 22-23).

Pursuant to his office's Local Emphasis Program on fall hazards, he entered the jobsite, contacted the General Contractor, and initiated an OSHA inspection. (Tr. 13). After his initial attempts to take photographs with his mobile phone failed, he left the site to obtain a camera from his office. (Tr. 16). After approximately one hour, he returned with the camera and continued with the inspection. (Tr. 31). The condition no longer existed at that point, and neither of the photographs introduced by Complainant depicts the alleged violation. (Ex. C-3-1, C-3-2). In fact, the telehandler seen on the ground in one of Complainant's photographs is not the same telehandler used by Respondent at the time CSHO Nies observed the violation. (Ex. C-3-1). It belonged to another contractor working at the site, indicating the presence of other companies and employees working in and around the area. (Tr. 29-30).

Mike Walczyk, Respondent's Foreman, was present at the worksite during CSHO Nies's initial entry and subsequent visit with the camera. (Tr. 31-32). However, Mr. Walczyk was not working near the scaffold at issue during the alleged violation. (Tr. 33). He was located on another side of the building during the fifteen minutes in which the scaffold guardrails were removed. (Tr. 33). Although Respondent asserts a Fourth Amendment violation as a defense, there is no evidence in the record that any person on the jobsite, from either the General Contractor or Respondent, objected to OSHA's presence or to the inspection.

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 employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1 that:

29 C.F.R. 1926.451(g)(1): Each employee on a scaffold more than 10 ft. above a lower level was not 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. East side of structure, exterior at close proximity to roof level, outboard side of the scaffold; on or about 6/22/09 and at times prior thereto, three employees removed two sections of guardrail and a post while assisting a tele-handler in placing a loaded mortar bucket onto the platform of an elevating scaffold. The employees were standing/walking at the immediate edge of the platform with no means of fall protection.

The cited standard provides:

(g) Fall protection. (1) 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 parties stipulated to the serious classification of the proposed violation and the appropriateness of the proposed penalty. The standard governs fall protection requirements for scaffolds more than ten feet high, and therefore, clearly applies to the cited condition. The standard was violated in that two sections of guardrails were removed from a 38-foot scaffold for fifteen minutes, with no alternative fall protection methods having been implemented.

Complainant failed to introduce *any* evidence identifying the three individuals working near the guardrails. Complainant also failed to introduce any evidence indicating that the three unidentified individuals were actually employed by Respondent. Furthermore, CSHO Nies conceded that the three unidentified individuals were the only people exposed to this condition. (Tr. 26). Considering the fact that Respondent was one of many subcontractors on this site, and Complainant's own photograph revealed the presence of a different employer operating in this same area, the court will not assume that the three unidentified individuals observed by CSHO Nies from across the street were Respondent's employees. See *Bethlehem Steel Corp.*, 1976-77 CCH OSHD ¶21,147 (No. 16311, 1976). Since Complainant failed to present any evidence that one or more of the three exposed individuals were employed by Respondent, Complainant failed to establish a prima facie violation.

Based on the court's finding that Complainant failed to prove all of the elements necessary for a prima facie violation, Respondent's Fourth Amendment argument will not be addressed.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1 Item 1 is hereby VACATED.

Date: July 1, 2010
Denver, Colorado

_____/s/_____
BENJAMIN R. LOYE
Judge, OSHRC