

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant,  
v.  
Lee Builders, Inc.,  
Respondent.

OSHRC Docket No. **10-1510**

Appearances:

Willow Fort, Esquire, Nashville, TN  
For Complainant

C. Sean Lee, Huntsville, AL  
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

**DECISION AND ORDER ON REMAND**

This matter was remanded for reconsideration of my decision as to whether a *sua sponte* amendment of the citation which alleged a violation of 29 CFR § 1926.451(g)(1)(vii) to an alleged violation of 29 CFR 1926.451(g)(2) is proper and appropriate here.

The Secretary did not seek to amend her citation to allege a violation of 29 CFR § 1926.451(g)(2), which addresses fall protection for employees erecting supported scaffolds. At the end of the hearing, I entered a bench decision, discussing the testimony and documentary evidence, analyzing the facts under 29 CFR § 1926.451(g)(2). Through inadvertence, I did not *sua sponte* amend the citation to allege a violation of that subsection of the standard. For the reasons that follow, I now amend *sua sponte* the citation from alleging a violation of 29 CFR § 1926.451(g)(1)(vii) to allege a violation of 29 CFR § 1926.451(g)(2).

Amendment here is both proper and appropriate in this case. The parties tried issues relating to this standard and consented to do so. Rule 15 (b)(2) of the Federal Rules of Civil Procedure allows issues not raised in pleadings to be amended when those issues are tried by express or implied consent.

Five witnesses testified at the hearing. All five testified on direct and cross examination regarding issues relating to the requirements of the standard at 29 CFR § 1926.451(g)(2). Issues relating to the standard were addressed by both parties during closing arguments at the end of the hearing prior to entry of my bench decision. The Secretary's compliance officer, Jennifer McWilliams, testified initially to matters relating to competent person, feasibility and greater hazard. Respondent actively sought to show the applicability of this standard rather than the standard cited by the Secretary in her citation.

After thorough review of testimony, exhibits and closing arguments, I find that both parties tried the unpleaded issues relating to the applicability and the provisions of the standard at 29 CFR § 1926.451(g)(2). While the parties did not expressly consent to try these issues, all issues were tried by implied consent at all stages of the hearing, including direct and cross examination of all witnesses and during closing arguments. Both parties addressed the requirements of this standard through questioning of witnesses and during closing. Since the parties tried these issues by implied consent, amendment to allege a violation of 29 CFR § 1926.451(g)(2) is proper.

Amendment is also appropriate here. The standard at 29 CFR § 1926.451(g)(2) addresses protection for employees erecting supported scaffolds. Here, respondent's employees were found to be erecting this scaffold. This standard requires that a competent person make a determination as to the feasibility and safety of providing fall protection for erecting employees. An employer is required to provide fall protection for these employees only where this protection is feasible and does not create a greater hazard.

As discussed more fully in my initial decision, Charlie Redifer, Respondent's job superintendent and competent person, did not make an initial determination of feasibility of fall protection including the use of tie-off cables. Shane Campbell, Respondent's safety director, testified that you should always check with a structural engineer to determine feasibility. Respondent's failure to determine feasibility and safety of fall protection for erecting employees is in direct violation of the requirements of 29 CFR § 1926.451(g)(2).

The facts relating to and supporting a violation of 29 CFR § 1926.451(g)(2) were analyzed and detailed in the bench decision. I find that amendment to allege a violation of this standard is proper and appropriate.

