

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

Secretary of Labor, Complainant v. NLJ Builders, Inc., Respondent.
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OSHRC Docket No. **11-3048**

Simplified Proceedings

Appearances:

Benjamin A. Stark, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Noel Levy, President, *pro se*, NLJ Builders, Inc., Plantation, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

NLJ Builders, Inc. (NLJ) is a construction contractor in Plantation, Florida. On October 26, 2010, the Occupational Safety and Health Administration (OSHA) compliance officer observed an employee for a subcontractor nailing exterior sheeting on a bank under construction in Boynton Beach, Florida. The employee was working from a fabricated frame scaffold owned by NLJ, approximately 15 feet above the ground. NLJ had contracted the subcontractor to perform the carpentry work. As a result of the OSHA inspection, NLJ received a serious citation for alleged scaffold violations on March 3, 2011. NLJ timely contested the citation.

The serious citation alleges NLJ violated 29 C.F.R. § 1926.20(b)(1) (item 1) for failing to prepare a worksite analysis and hazard prevention program; 29 C.F.R. § 1926.451(b)(1) (item 2) for failing to fully plank the scaffold platform; 29 C.F.R. § 1926.451(c)(2) (item 3) for failing to place the scaffold legs on base plates and mud sills or other firm foundation; 29 C.F.R. § 1926.451(f)(7) (item 4a) for failing to erect the scaffold under the supervision of a competent person; 29 C.F.R. § 1926.451(f)(3) (item 4b) for failing to inspect the scaffold for visible defects by a competent person; and 29 C.F.R. § 1926.451(g)(1)(vii) (item 5) for failing to provide the

employee on the scaffold with a personal fall arrest system or guardrail system. The citation proposes total penalties of \$ 16,800.00.

Designated for simplified proceedings pursuant to 29 C.F.R §2200.200 *et. Seq.* the hearing was held on April 6, 2012, in West Palm Beach, Florida.¹ NLJ was represented, *pro se* by its owner/president, Noel Levy. The Secretary withdrew item 1, alleged violation of § 1926.20(b)(1) (Tr. 6). Jurisdiction and coverage were stipulated (Tr. 8). The parties filed post-hearing position statements on May 4, 2012.

NLJ claims that it contracted the carpentry work to a subcontractor who, under the multi-employer worksite doctrine, was responsible for the alleged scaffold violations.² Although NLJ owned the scaffold, NLJ argues that it had not erected the scaffold and was not aware of the violative conditions. Also, NLJ did not have an exposed employee. NLJ asserts that, at the time of the OSHA inspection, Mr. Levy was in a parked truck, at least 151 feet from the scaffold, talking to his wife on the telephone. He had been parked in the adjacent lot for approximately fifteen minutes.

For the reasons discussed, the alleged violations are affirmed because of NLJ's control of the cited scaffold violations. Total penalties of \$ 8,500.00 are assessed.

The OSHA Inspection

NLJ, a Florida corporation, is a licensed construction contractor which principally performs residential concrete work. Mr. Levy started the company in September 2004. His office is in Plantation, Florida. In October 2010, Mr. Levy was the only employee of NLJ (Tr. 7-8, 219-220).

On October 15, 2010, NLJ contracted to perform “the installation and erection of the engineered wood truss system and sheeting of the roof” for the construction of a new bank in Boynton Beach, Florida (Exh. C-6; Tr. 194).³ NLJ's contract with the general contractor provided, under “Scope of Work” (paragraph 18), that:

¹ The citation was issued on March 3, 2011. However, the case was not docketed by the Commission until December 14, 2011. According to NLJ, the 9-month delay in docketing the case was caused by OSHA's loss or misplacement of its notice of contest (*See*, Notice of contest received by the Commission on November 28, 2011).

² Although identified in the Prehearing Conference Order dated March 30, 2012 and the Secretary's motion in limine, NLJ presented no evidence or post-hearing argument regarding the company's financial condition (Tr. 10-11). Therefore, the issue of the company's financial condition is deemed waived. Issues not briefed are waived. *See Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

³ The bank project was started on July 1, 2010. It was completed on February 16, 2011 (Tr. 177).

Subcontractor shall provide all scaffolding, man lifts, equipment lifts, ladders, etc., or any other equipment that may be required for completion of this scope of work. Any required equipment shall be erected and/or utilized and maintained in strict accordance with the latest OSHA standards.

Thereafter, NLJ verbally contracted the carpentry work to another subcontractor. As NLJ's only employee, Mr. Levy visited the project daily to monitor the subcontractor's progress. Also, a couple days prior to the OSHA inspection, Mr. Levy delivered to the subcontractor a fabricated frame scaffold, which NLJ owned. According to Mr. Levy, the scaffold was for the subcontractor's work in the bank's drive-thru (Tr. 46-47, 194, 200, 202).

On October 25, 2010, Mr. Levy was contacted by the general contractor that the subcontractor's employee was not properly utilizing fall protection while installing exterior sheeting from ladders and on the roof. Mr. Levy returned to the project and instructed the subcontractor's supervisor on how to secure the employee's safety lanyard and harness. There is no evidence that the scaffold was erected or was in use (Tr. 227-228, 234).

On October 26, 2010 at approximately 12:00 noon, the OSHA compliance officer, while driving past the bank project, observed the subcontractor's employee on a scaffold installing exterior sheeting. Because of a local emphasis program, the compliance officer took several photographs and entered the project to initiate an OSHA inspection of the scaffold (Exhs. C-1,⁴ C-2; Tr. 30, 37, 82, 172).

While driving through a parking lot adjacent to the project, the compliance officer observed a man, who was Mr. Levy, in a truck watching him. The truck was at least 151 feet from the scaffold. After the compliance officer initiated the inspection, Mr. Levy entered the project and was interviewed by the compliance officer. The compliance officer also interviewed the subcontractor's employee on the scaffold platform and his supervisor (Exhs. C-7, C-8, C-9; Tr. 89, 209).

Earlier the same day, Mr. Levy had been called by the general contractor about the subcontractor's employees not tying off while working on the roof. According to Mr. Levy, he telephoned the subcontractor's supervisor to correct the problem (Tr. 204, 240).

⁴ The overview map from "Google Maps" shows the bank location and adjacent parking lot on April 3, 2012, after the bank project was completed (Tr. 28).

The scaffold, a fabricated frame scaffold, was one scaffold section long and three sections high. The subcontractor's employee was standing on the second level platform, approximately 15 feet above the ground. The compliance officer observed that the scaffold's work platform was not fully planked. The planking covered less than one-half of the 5-foot width of the scaffold. He also observed that there were no guardrails around the scaffold platform and the safety lanyard attached to the employee's harness was not secured. The scaffold legs were not sitting on base plates and mud sills, but on unstable boards (Exhs. C-11, C-12, C-17, C-18, C-20; Tr. 77, 120).

As a result of the OSHA inspection, NLJ and the subcontractor received citations.⁵

Discussion

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 regarding the application of the scaffold standards at 29 C.F.R. § 1926.451 to the fabricated frame scaffold. NLJ also does not dispute that the scaffold was not fully planked; that it was not sitting on a firm base; that the subcontractor's employee was not utilizing fall protection; and, that Mr. Levy was not a competent person to erect scaffolds and inspect components for visible defects (NLJ's Position Statement; Tr. 210-211, 215).

Therefore, there is no dispute regarding the existence of the violations as alleged in the OSHA citation and the subcontractor's employee exposure to a hazard.

Serious Citation

Item 2 - Alleged Violation of § 1926.451(b)(1)

The citation alleges that "An employee performing carpentry work on the work level platform of a fabricated frame scaffold approximately 15 ft. above a lower level did not have that work level fully planked, on or about October 26, 2010."

Section 1926.451(b)(1) provides that:

⁵ The record does not show how the citation issued to the subcontractor was resolved. The compliance officer testified that the subcontractor denied the employees identified by OSHA were on its payroll (Tr. 174).

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

The photographs taken by the compliance officer clearly establish that the scaffold platform was not fully planked. The employee's work platform was only three planks wide. This was less than one-half of the scaffold 5-foot width. The employee working on the platform was exposed to a 15-foot fall hazard due to the lack of full planking (Exhs. C-5, C-12, C-13; Tr. 74, 77, 210).

Item 3 - Alleged Violation of § 1926.451(c)(2)

The citation alleges that "An employee performing carpentry work on the work level platform of a fabricated frame scaffold approximately 15 ft. above a lower level did not have the frame legs bearing on base plates and mud sills or other firm foundation, on or about October 26, 2010."

Section 1926.451(c)(2) provides:

Supported scaffold poles, legs, posts, frames, and uprights shall bear on base plates and mud sills or other adequate firm foundation.

The photographs taken by the compliance officer clearly establish the scaffold legs were not on base plates and mud sills. The scaffold legs were set on pressure treated boards which failed to provide a firm foundation. The legs were not centered on the boards but were on the edges. The boards were not level and there were visible gaps underneath them.

According to the compliance officer, the scaffold legs could twist off the boards due to scaffold's weight causing it to tilt, lean, or fall; exposing the subcontractor's employee to a 15-foot fall hazard. Mr. Levy agreed that NLJ did not provide base plates when the scaffold was delivered to the project (Exhs. C-12, C-17, C-18; Tr. 100-101, 104-105, 211).

Items 4a and 4b - Alleged Violations of § 1926.451(f)(7) and §1926.451(f)(3)

Item 4a alleges that "A fabricated frame scaffold being used by an employee performing carpentry work was not erected under the supervision and direction of a competent person qualified in scaffold erection and was not performed by experienced and trained employees selected for such work by a competent person, on or about October 26, 2010."

Item 4b alleges that “A fabricated frame scaffold and scaffold components being used by an employee performing carpentry work was not inspected for visible defects by a competent person before the work shift, on or about October 26, 2010.”

Section 1926.451(f)(7) provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

Section 1926.451(f)(3) provides:

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.

Mr. Levy concedes that he is not a competent person within the meaning of the scaffold standards at § 1926.450(b). A “competent person” is a person “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.” Mr. Levy testified that he was not involved in erecting the scaffold or inspecting the scaffold for visible defects (Exh. C-7; Tr. 112, 117-118, 189).

Item 5 - Alleged Violation of § 1926.451(g)(1)(vii)

The citation alleges that “An employee performing carpentry work on the work level platform of a fabricated frame scaffold approximately 15 ft. above a lower level was not protected from falling to that lower level, on or about October 26, 2010.”

Section 1926.451(g)(1)(vii) provides:

For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, 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 photographs taken by the compliance officer clearly establish that there was no guardrail system around the scaffold’s work platform where the employee was installing the sheeting. Also, the safety lanyard attached to the harness worn by the employee was not secured

and was 23 feet long. The employee was exposed to a 15-foot fall hazard because of the lack of fall protection (Exhs. C-3, C-5, C-20; Tr. 121, 123).

A violation of § 1926.451(b)(1) (item 2), § 1926.451(c)(2) (item 3), § 1926.451(f)(7) and § 1926.451(f)(3) (items 4a and 4b), and § 1926.451(g)(1)(vii) (item 5) is established if NLJ controlled the subcontractor's work and knew or should have known of the unsafe condition.

Multi-Employer Worksite Defense

NLJ claims the multi-employer worksite defense because it had contracted the carpentry work to a subcontractor. Mr. Levy argues that NLJ did not create or control the violative conditions and NLJ did not have an exposed employee.

An employer engaged in construction activities on a multi-employer construction work site may be held responsible under the Occupational Safety and Health Act for those hazardous conditions to which its own employees are exposed and those hazardous conditions to which it either creates or controls and to which employees of other contractors are exposed. *McDevitt Street Bovis, Inc.* 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000).

NLJ's only employee was Mr. Levy who visited the project daily. There is no dispute that NLJ had no employees, including Mr. Levy, exposed to any violative conditions. The exposed employee was employed by the subcontractor contracted by NLJ.

Also, the record fails to establish by a preponderance of the evidence that Mr. Levy was involved in erecting the scaffold or creating the hazards observed by the compliance officer (Tr. 84). The interview statement of the subcontractor's supervisor who stated that Mr. Levy assisted in erecting the scaffold is not given weight (Exh. C-8).

Mr. Levy specifically denied, under oath, that he was not involved in erecting the scaffold (Tr. 230-231). The supervisor's interview statement was not under oath and he did not testify at the hearing. The supervisor's statement was not corroborated by other witnesses at the hearing or by the written interview statements of Mr. Levy or the subcontractor's employee on the scaffold. Also, the supervisor may have used a fictitious name when interviewed by the compliance officer (Tr. 205, 246).

Although NLJ owned the scaffold, Mr. Levy denied that NLJ was the controlling employer. He claims that he did not know the scaffold was to be used on October 26, 2010 (Tr.

226). He had delivered the scaffold to the subcontractor a couple days prior to the OSHA inspection and expected it to be used in the drive-thru.

The record establishes NLJ's control of the violative conditions under the multi-employer doctrine. An employer is responsible for the violations of other employers "where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

In finding NLJ's control of the conditions of the scaffold, the court notes that NLJ owned the scaffold, NLJ's contract required that NLJ maintain the scaffold in compliance with OSHA standards, and NLJ demonstrated its supervisory authority to correct the subcontractor's noncompliance. NLJ contracted the subcontractor to perform the carpentry work (Tr. 85, 194). The carpentry work required the use of a scaffold which NLJ provided.

However, by virtue of its supervisory authority, the record shows that NLJ exercised supervisory control over its subcontractor to abate complaints by the general contractor. NLJ could have detected and abated scaffold violations at issue. NLJ owned and provided the scaffold to the project for the subcontractor's use. Under its contract with the general contractor, NLJ was specifically required to maintain the scaffold in accordance with OSHA standards (Exh. C-6). Mr. Levy admitted that NLJ was required "to ensure things were safe" (Tr. 238). According to the compliance officer, the subcontractor's employee identified Mr. Levy as the person in charge (Exh. C-9; Tr. 45, 51).

Mr. Levy visited the project daily to check on his subcontractor. Although he claimed that he was not overseeing the subcontractor's work, the record indicates more involvement than merely checking the progress (Tr. 202). Mr. Levy had received and corrected complaints from the general contractor of safety problems with the subcontractor (Tr. 203).

On the day prior to the OSHA inspection, Mr. Levy went to the project because of the general contractor's complaint that the subcontractor's employee was not utilizing fall protection. Upon arriving on the project, he stopped "everybody from working" (Tr. 240). He then corrected the problem by instructing the subcontractors' employees how to secure the safety lanyard inside the building (Tr. 228, 243).

On the day of the OSHA inspection, Mr. Levy contacted the subcontractor's supervisor regarding another complaint from the general contractor for the lack of fall protection. Mr. Levy telephoned the supervisor and instructed him to correct the problem. As a result of the OSHA inspection, Mr. Levy had the scaffold disassembled (Tr. 70).

NLJ maintained supervisory control of the subcontractor's work. However, NLJ can only be held responsible for violations which it knew or should have known with the exercise of reasonable diligence. To make that determination, consideration is given to the nature, location, and duration of the condition. *David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000).

NLJ's Knowledge of the Scaffold Conditions

At the time of the OSHA inspection, Mr. Levy was in his parked truck in an adjacent parking lot. Mr. Levy admitted that he had been parked for at least 15 minutes. There is no evidence the scaffold was used any day prior to the OSHA inspection. On the day of the inspection, the record shows that the scaffold had been in use for approximately four hours (Tr. 174). Mr. Levy claimed that he "had no knowledge of the scaffolding being used that day" (Tr. 226).

Where Mr. Levy was parked in an adjacent lot, the scaffold was obvious and in plain view. It was also in plain view when he accessed the parking lot as shown by the compliance officer's photographs and observations of the scaffold taken from the public roads around the bank project and the adjacent parking lot. NLJ owned and provided the scaffold to the project a couple days prior to the inspection. When he delivered the scaffold, Mr. Levy knew there were not a sufficient number of planks for the platform and no base plates (Tr. 200-201). Also, Mr. Levy knew the subcontractor intended to use the scaffold at least for the drive-thru (Tr. 200).

An employer who lacks actual knowledge can nevertheless have constructive knowledge of conditions that could be detected through an inspection of the worksite and the exercise of reasonable diligence to discover the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Mr. Levy made daily visits to the project (Tr. 46). When he received complaints from the general contractor, he took corrective action with the subcontractor. He was aware that the

subcontractor employees performing work on his behalf could not be trusted to do the work safely without supervision. Mr. Levy agreed that NLJ “was contractually obligated to ensure things were safe” (Tr. 238).

On the day of the OSHA inspection, the compliance officer identified the location of Mr. Levy’s parked vehicle and measured its distance to the scaffold to be 151 feet. From that location, the scaffold was in plain view from Mr. Levy’s truck.

Mr. Levy’s denial of the truck’s location is rejected based on the compliance officer’s demonstrated lack of bias and reason to fabricate. Also, Mr. Levy claim that he was at the project for approximately 15 minutes appears convenient and is not corroborated by any witness. His claims are given little weight and are considered self-serving.

However, even if it was only 15 minutes, Mr. Levy should have been aware of the subcontractor’s use of the scaffold and the violative conditions. Mr. Levy had not authorized the scaffold’s use and he was parked where the scaffold was in clear view. The photographs taken by the compliance officer show that the scaffold was visible from the truck. Mr. Levy was clearly able to see the scaffold and note that it was not fully planked, lacked a firm foundation, the employee’s failure to use fall protection. He knew that the scaffold lacked sufficient planks for the platform and base plates when he delivered it to the project a couple of days earlier (Tr. 200-201). Fifteen minutes was sufficient time to become aware of the scaffold’s unsafe conditions and to attempt to correct them. It was NLJ’s scaffold. Based on NLJ’s contract and the subcontractor’s history of unsafe conduct, NLJ through Mr. Levy should have taken action to confront the subcontractor’s use of the scaffold and abate the conditions.

Mr. Levy failed to take any action to ensure the subcontractor’s compliance and that the conditions were abated. Mr. Levy was aware of continuing safety problems caused by the subcontractor. Mr. Levy’s presence at the project before the OSHA inspection allowed NLJ time to know or should have known, with reasonable diligence, of the use of the scaffold and its unsafe condition. The scaffold’s conditions were in plain view. NLJ’s contract with the general contractor required compliance with the OSHA scaffold standards. The court is persuaded that NLJ, through Mr. Levy, should have known, with the exercise of reasonable diligence, of the violative conditions and could have detected and readily abated the conditions.

The record establishes that NLJ failed to act with reasonable diligence. Instead, Mr. Levy was in his truck talking on the telephone to his wife and watching the compliance officer driving around the project (Tr. 205).

NLJ's violation of the cited standards is established.

Serious Classification

The Secretary has classified NLJ's scaffold violations as serious. In order to establish that a violation is serious under § 17(k) of the Occupational Safety and Health Act, the Secretary must show that 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 determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020,1024 (No. 86-521, 1991).

NLJ's violations of § 1926.451(b)(1), § 1926.451(c)(2), § 1926.451(f)(7), § 1926.451(f)(3), and § 1926.451(g)(1)(vii) were properly classified as serious. The subcontractor's employee was exposed to a 15-foot fall hazard because of the scaffold's lack of full planking, firm foundation, fall protection and the erection and inspection by a competent person. Mr. Levy knew or should have known of these unsafe conditions based on NLJ's control of the scaffold, his proximity to the scaffold, and history of complaints by the general contractor regarding the unsafe conduct of the subcontractor.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Review Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

NLJ is a small employer with one employee, owner Mr. Levy. NLJ is entitled to credit for history based on not receiving prior citations. NLJ is also entitled to credit for good faith based on its cooperation during the inspection and its attempts to correct hazards brought to its attention. NLJ immediately had the scaffold disassembled during the OSHA inspection.

A penalty of \$ 2,500.00 is reasonable for serious violation of § 1926.451(b)(1) (item 2). One employee was exposed to the lack of full planking for less than four hours. The fall hazard was 15 feet to the ground.

A penalty of \$ 1,500.00 is reasonable for serious violation of § 1926.451(c)(2) (item 3). The scaffold legs were placed on boards, although not firmly set. There were no base plates or mud sills.

A grouped penalty of \$ 2,000.00 is reasonable for serious violations of § 1926.451(f)(7) and § 1926.451(f)(3) (items 4a and 4b). Mr. Levy admitted that he was not a competent person. However, NLJ owned the scaffold and as discussed, Mr. Levy did not erect the scaffold.

A penalty of \$ 2,500.00 is reasonable for serious violation of § 1926.451(g)(1)(vii) (item 5). The subcontractor's employee was not utilizing fall protection to protect against the 15-foot fall hazard from the scaffold. He was wearing a safety harness and lanyard but it was not secured and too long (23 feet) even if it was secured. There were no guardrails on the platform.

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

1. Item 1, serious violation of §1926.20(b)(1), is withdrawn by the Secretary;
2. Item 2, serious violation of §1926.451(b)(1), is affirmed and a penalty of \$2,500.00 is assessed;
3. Item 3, serious violation of §1926.451(c)(2), is affirmed and a penalty of \$1,500.00 is assessed;
4. Items 4a and 4b, serious violations of §1926.451(f)(7) and §1926.451(f)(3), are affirmed and a penalty of \$2,000.00 is assessed; and
5. Item 5, serious violation of §1926.451(g)(1)(vii), is affirmed and a penalty of \$2,500.00 is assessed.

Date: May 21, 2012

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