

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.

D & D Masonry Services, Inc.

Respondent.

OSHRC Docket No. **11-3050**

Appearances:

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

Richard Dye, *pro se*, D & D Masonry Services, Inc., Toccoa, Georgia  
For Respondent

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

**DECISION AND ORDER**

D & D Masonry Services, Inc., (D & D), is a masonry construction contractor in Toccoa, Georgia. In July 2011, D & D was performing masonry work at a jobsite in Brunswick, Georgia. An inspection of the jobsite was conducted by the Occupational Safety and Health Administration (OSHA) on July 13, 2011. As a result of the inspection, respondent was issued a citation on October 28, 2011.

Citation No. 1 alleges serious violations and proposes penalties as follows:

Item 1a: 29 CFR § 1910.1200(e)(1) for not maintaining a hazard communication program at its worksite.

Item 1b: 29 CFR § 1910.1200(g)(8), for not maintaining copies of MSDS sheets for Portland cement and gasoline at its worksite.

Item 1c: 29 CFR § 1910.1200(h)(1) for not providing employees training regarding specific hazards. The Secretary proposes a penalty of \$1,800.00 for the violations alleged in Items 1a, b and c.

Item 2a: 29 CFR § 1926.451(b)(1)(i), for not fully planking the second tier platform of a tubular

steel scaffold.

Item 2b: 29 CFR § 1926.451(f)(3), for not inspecting the scaffold for visible defects by a competent person.

Item 2c: 29 CFR § 1926.451(f)(4), for not replacing damaged, split or weakened lumber planks on the scaffold. The Secretary proposes a penalty of \$4,200.00 for the violations alleged in Items 2a, b and c.

Item 3: 29 CFR § 1926.451(c)(3), for scaffold legs that were not plumb and braced at base plates to prevent displacement. A penalty of \$3,000.00 was proposed for Item 3.

Item 4: 29 CFR § 1926.451(g)(1) for not providing fall protection for employees on the third tier platform 22 feet above the ground. A penalty of \$4,200.00 was proposed for Item 4.

Item 5: 29 CFR § 1926.451(g)(4)(iv), for not installing a midrail on a guardrail system on the section connecting two scaffold sections 15 feet above the ground. A penalty of \$4,200.00 was proposed for Item 5.

Item 6: 29 CFR § 1926.1053(b)(4), for using a stepladder in a closed position, a purpose for which it was not designed, on a scaffold platform. A penalty of \$4,200.00 was proposed for Item 6.

Item 7a: 29 CFR § 1926.454(a), for not effectively training employees working on a scaffold by a qualified person.

Item 7b: 29 CFR § 1926.1060(a), for not providing a training program for employees using ladders. The Secretary proposes a penalty of \$4,200.00 for the violations alleged in Items 7a & b.

A hearing was held in this matter in Brunswick, Georgia on March 15, 2012. D & D was represented *pro-se* by its owner, Richard Dye. The parties waived filing post-hearing briefs and agreed to a bench decision in this case.

Based on the record, the court vacates Items 1c, 2b and 7a of the Citation. The court affirms Item 1 as an other than serious violation. All other cited items are affirmed as serious violations as alleged. Totally penalties of \$1,900.00 are assessed.

### **Discussion**

The Review Commission has jurisdiction over this proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act). D & D is an incorporated company headquartered in Toccoa, Georgia, that was engaged in masonry construction in Brunswick, Georgia. It is a covered business under § 3(5) of the Act.

### **Citation No.1**

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

*JPC Group Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

It is uncontroverted that the standards cited are applicable to respondent's work. D & D is engaged in masonry construction work. Seven employees worked on the scaffold at issue, exposed to the alleged violative conditions. Respondent's owner, Richard Dye observed and supervised the work performed on this scaffold at the time of the inspection by OSHA. Remaining at issue is whether D & D failed to comply with the terms of the standards.

At the end of the hearing, the parties made oral closing arguments in lieu of filing post-trial briefs. A bench decision as entered following the hearing with the agreement of the parties.

Excerpts of relevant transcript pages and paragraphs, including the bench decision entered at the hearing, finding of facts and conclusions of law (Tr. 229-242) are included in this decision as follows:

### **BENCH DECISION**

This case came on for hearing here in Brunswick, Georgia on March 15, 2012. We're using the Glynn County Superior Court to hold our hearing. At the beginning of the hearing there was a stipulation as to jurisdiction and coverage in this case. The case arose as a result of an inspection by the Occupational Safety and Health Administration at a worksite in Brunswick, Georgia located at 440 Glynn Isles Road, the site of a potential Dick's Sporting Goods Store. An inspection was made of D & D Masonry Services, Incorporated, a masonry subcontractor on this site. The inspection was made by the compliance officer Mr. Szczepanik and the assistant area director Mr. Triplett.

The inspection was made as a result of an observation from the road that there was scaffolding work going on. The two individuals stopped to make an inspection, presented their credentials, and continued on with their inspection.

I find that the inspection of the job site was a reasonable inspection in accordance with the policies of the Occupational Safety and Health Administration.

As a result of this investigation and inspection a serious citation was issued to D & D Masonry Services alleging seven serious violations. Some included subparts.

After completing the hearing I've reviewed the evidence. All the evidence has been submitted coming to the final conclusion as to that evidence, and my findings are as follows:

With regard to item 1 of citation 1, that was an alleged violation of 29 CFR Section 1910.1200(e)(1) alleging that the employer did not develop, implement or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met.

The allegation is that this hazard communication program was not maintained at the job site. It is clear that there was no hazard communication program maintained at the job site.

Further, item 1(b) alleges a violation of 29 CFR 1910.1200(g)(8), respondent did not have material safety data sheets for Portland cement and gasoline at the job site.

From the evidence there was no hazard communication program or MSDS sheets at the job site at the time of the inspection. However, this was later provided to the Occupational Safety and Health Administration by the respondent.

Mr. Dye testified that he had left this in a truck, and he left that truck at home. He normally keeps it in the truck at the job site.

With regard to item 1(c) there's an alleged violation of 29 CFR 1910.1200(h)(1) that alleged that the employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) through (3) on hazardous chemicals in the work area.

With regard to the first two, item 1(a) and 1(b), I find that the Government has proven its case. It has proven a violation of the Act. With regard to item 1(c), that there was no training specifically on the chemicals, the respondent did some informal training and there's no evidence in the record that the complainant has proven there was no training. The conclusions were drawn but there was no evidence produced to show there was no training.

So, I'm going to affirm item 1(a) and (b) as one other than serious violation. I'm vacating item 1(c).

Now, with regard to the next alleged violation in item 2, this is the one -- violation 2(a) alleges a violation of 29 CFR 1926.451(b)(1)(i). That's on the tubular steel supported scaffold on the second tier platform, an allegation that the platform was not fully planked with spaces between the adjacent units exceeding one inch.

Clearly the planking was not in compliance with the standard. There were greater than one inch up to six-inch gaps, and Mr. Dye testified that he thought that six inches was okay.

With regard to item 2(b), the allegation is that the employer failed to inspect the scaffold and its components for physical defects. It's 29 CFR 1926.451(f)(3), scaffold and scaffold components were not inspected for visible defects by a competent person before each work shift. There's no evidence that was presented that there was no inspection by a competent person. Mr. Dye testified he was a

competent person and identified himself as such to the Government.

In support of that allegation Mr. Szczepanik testified -- he quoted the requirements of the standard, but there was no direct evidence there was no inspection.

Now, with regard to item 2(c) that's an alleged violation of 29 CFR 1926.451(f)(4), that scaffold parts that were damaged and/or weakened were not immediately repaired, replaced, or braced. The subpart of that was a competent person failed to take out of service damaged or weakened solid sawn lumber planks.

Well, this one, there were deteriorated planks. The testimony was they were on the other side of a guard rail, that this was used as a counterweight; but to counter that, the Government presented evidence that there were materials, equipment on those planks on the other side of the rail, and the logical inference to be drawn from that is that someone needed to go over there to put that material there.

So, when I look at item 2 of citation number 1, I'm affirming item 2(a) and 2(c) as one serious violation. I'm vacating item 2(b).

Next we'll look at item 3 of citation 1 alleging a violation of 29 CFR 1926.451(c)(3) alleging the scaffold legs were not plumb and braced. Further there's an allegation that the scaffold legs were not secured and level at the base plates to prevent displacement.

The evidence presented shows clearly that the scaffold legs and base plates were not braced. Some of the plates were not secured. Some of the plates were, in fact, off the edge of the mud sills. So, that renders some displacement as possible.

I find that the elements of the violation were proven there. I'm affirming item 3 of citation 1. In all these violations that I'm affirming, employee exposure has been shown because there were seven employees working on this scaffold. The standard clearly applies to scaffolding. The terms of the standard have been violated and the respondent's competent person and supervisor, Mr. Dye, was in the immediate area and did know of all the violations, at least should have known.

Next we move to item 4 of citation number 1 alleging a serious violation of 29 CFR § 1926.451(g)(1). It alleges that each employee on the scaffold more than ten feet above the lower level was not protected from falling to that lower level. This involves an employee that was working somewhere around 19 to 22 feet above the ground with no form of fall protection on the third tier scaffolding. There was no guardrail. There was no safety net. There were no harnesses and lifelines used. He was hanging out there with no protection up on that scaffolding and was exposed on two sides anyway.

The evidence that there was no protection for this individual is clear and not refuted, and I am affirming that item as a serious violation.

Item 5 alleges a violation of 29 CFR 1926.451(g)(4)(iv) which alleges mid-rails were not installed at a height approximately midway between the top edge of the guardrail and the platform surface.

Here there was a missing guardrail. The respondent has admitted the guardrail -- the mid-rail was not there. There was loading that went on of materials to this level that required the mid-rail to be removed, and it was not replaced immediately by the employee.

It was an exposure of short duration however. The rail was still up there in the area. It just wasn't put back in place. Materials between the employee and the end of the platform do not serve as a substitute for the mid-rail. So, I find that there was a violation. There was a serious violation that is affirmed as such.

Item 6 of citation 1 alleging a violation of 29 CFR § 1926.1053(b)(4) involves the use of a stepladder. The allegation is ladders were used for purposes other than purposes for which they were designed. A stepladder is designed to be open and stable. This was used in a leaning and closed position. It was definitely used for a purpose for which it was not designed.

The testimony here is variable. Respondent's employee, Mr. Houston testified that the stepladder was used like this before the inspection. However, at the time the inspection began there was no such ladder in place. Exactly how the employees got to that level is uncertain. It was unclear from the evidence. After some discussion with the compliance officer, Mr. Dye and his people put the stepladder back in place in part to abate the hazard, however it doesn't. It's still a violation.

Later the respondent put an extension ladder in place for access. There's some testimony that the employees used the lift to get to the scaffold instead of the stepladder from the roof.

While the testimony is inconsistent, I find that it's more likely than not that the stepladder was used at some point prior to the inspection and not just to abate the hazard. So, I am going to affirm that as a serious violation.

We're getting to the last two items. That's item 7(a) and 7(b). 7(a) alleges a violation of 29 CFR 1926.454(a) alleging that the employees performing the work on the scaffold were not trained by a person qualified in the subject matter to recognize hazards in the type of scaffold being used.

I find that these employees were, in fact, trained by Mr. Dye. Mr. Dye is a competent person. He trained his employees using a video and other instructional methods. He is not only a competent person but a person qualified to recognize hazards associated with this type of scaffolding. I am going to vacate item 7(a).

7(b), Respondent admitted that he did not have a ladder training program in accordance with 29 CFR 1926.1060(a), and that requires that an employer provide a training program for each employee using ladders and stairways that would train each employee in the procedures to be followed to minimize hazards.

There was no understanding by this respondent that the ladder training program was actually required. However, there was a violation of that, in fact, that there was no program in place, and so I'm going to affirm that as a serious violation for item 7(b).

I'm going to get to the penalties in just a second. In summary, Items 1(a) and 1(b) are affirmed as an other-than-serious violation. Items 2(a) and 2(c) are

affirmed as one serious violation. Item 3 is affirmed as a serious violation. Item 4 is serious. Item 5 is serious. Item 6 is serious. Item 7(b) is affirmed as serious.

I'm vacating items 1(c), 2(b), and 7(a). Now, this brings us to the consideration of appropriate penalty in this matter. In assessing penalties the Review Commission is assigned the responsibility to assess penalties. OSHA proposes a penalty. I have to consider the evidence, weigh all the evidence, and determine what is an appropriate penalty in this particular situation.

The Occupational Safety and Health Act itself requires that any penalty that's assessed be done with the consideration of the size of the company, the good faith of the company, and the history of the company. Here this company has no inspection history under OSHA. It has had no inspections by OSHA, but OSHA policy indicates that no credit for history is given where there's been no inspection under OSHA.

I see this a bit different. There's been no inspection under OSHA. Whether it's by luck or by the fact that there's been no reason for anyone to ask OSHA to come out and investigate your company. We don't know what that is, but there must be some consideration of your good history from the past.

As far as good faith goes, there was no consideration for good faith given here in the proposed penalty. However, I find that there was an attempt to comply with the OSHA standards in the spirit of the Act and to protect these employees.

You might not have achieved everything you set out to achieve, but you did have the intention to protect your people. With regard to size there were eight employees on this job site, seven that were on the scaffold of those eight employees. That's one element of the size of the company.

The Government argues that that's the only consideration that should be made as far as the size of the company. However, there was testimony as to your financial condition. We did not go into the great depths of that. You basically testify the company is broke. You're in debt to your banker in an extreme amount of money, and there are no jobs currently on the horizon. One or two small jobs are being done right now.

After viewing all of the evidence -- and I find credibility in your testimony, sir, as to where you are. Having considered all of the elements I'm required to consider I'm assessing the following penalties:

With regard to item 1(a) and 1(b) as an other than the serious violation, I assess no penalty, zero.

With regard to item 2(a) and 2(c) combined as one serious violation, I assess a total penalty for that item of \$200.

Item 3 which is affirmed as a serious violation, I assess \$300.

With regard to item 4, a serious violation, the individual was up on the upper level of that plank of the third tier approximately 20 feet above the ground with no fall protection. I assess a penalty of \$1,000.

Item 5, that serious violation has been affirmed. I assess a total penalty of \$100.

Item 6, a serious violation, I assess \$200, and item 7(b), a serious violation,

I assess \$100.

That brings the total, if I can add correctly, to a total penalty of \$1900.00. I vacated items 1(c), 2(b), and 7(a). I think I mentioned that earlier. Is there anything further that either side would like to state at this time?

MS. EGEMONYE: No, your Honor.

MR. DYE: Thank you, your Honor.

THE COURT: We are concluded. A written decision will follow

### **FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

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

### **ORDER**

Based on the foregoing decision, it is ORDERED:

1. Citation No. 1, Items 1a & b alleging a serious violation of 29 CFR §§ 1910.1200e(1) and 1910.1200(g)(8) are reclassified and affirmed as one other than serious violation and no penalty is assessed.
2. Citation No. 1, Item 1c alleging a serious violation of 29 CFR § 1910.1200(h)(1) is vacated.
3. Citation No. 1, Items 2a & c alleging serious violations of 29 CFR § 1926.451(b)(1)(i) and 1926.451(f)(4) are affirmed as one serious violation and penalty of \$200.00 is assessed.
4. Citation No. 1, Item 2b alleging a serious violation of 29 CFR § 1926.451(f)(3) is vacated.
5. Citation No. 1, Item 3 alleging a serious violation of 29 CFR § 1926.451(c)(3) is affirmed and a penalty of \$300.00 is assessed.
6. Citation No. 1, Item 4, alleging a serious violation of 29 CFR § 1926.451(g)(1) is affirmed and a penalty of \$1,000.00 is assessed.
7. Citation No. 1, Item 5 alleging a serious violation of 29 CFR § 1926.451(g)(4)(iv) is affirmed and a penalty of \$100.00 is assessed.
8. Citation No. 1, Item 6 alleging a serious violation of 29 CFR § 1726.1053(b)(4) is affirmed and a penalty if \$200.00 is assessed.
9. Citation No. 1, Item 7(a) alleging a serious violation of 29 CFR § 1926.454(a) is vacated.
10. Citation No. 1, Item 7(b) alleging a serious violation of 29 CFR § 1926.1060(a) is affirmed and a penalty of \$100.00 is assessed



Date: May 21, 2012  
Atlanta, Georgia

/s/ \_\_\_\_\_  
**STEPHEN J. SIMKO, JR.**  
Judge