

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

**Secretary of Labor,**

**Complainant**

**v.**

**Jesse Remodeling, L.L.C.,**

**Respondent.**

**OSHRC Docket No. 12-2086**

**Appearances:**

For Complainant:

Uche N. Egemonye, Esq.  
U. S. Department of Labor  
Office of the Solicitor  
61 Forsyth Street, Suite 7T10  
Atlanta, Georgia 30303

For Respondent:

Jesse Gamble, *pro se*  
Jesse Remodeling, LLC  
300 Bouldercrest Road  
Atlanta, Georgia 30294

**Before:** Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Jesse Remodeling, L.L.C. is a small commercial masonry and remodeling contractor with an office in Ellenwood, Georgia. On February 3, 2012, Jesse Remodeling's employees were on a scaffold filling cells in a block wall with concrete at a McDonald's under construction in Savannah, Georgia, when the work was inspected by the Occupational Safety and Health Administration (OSHA). As a result of the OSHA inspection, Jesse Remodeling received serious and willful citations on July 17, 2012.

Serious Citation No. 1 alleges that Jesse Remodeling violated § 5(a)(1) of the Occupational Safety and Health Act (Act) (item 1) for failing to install skid pins to secure the Grout Hog on the forklift; 29 C.F.R. § 1926.28(a) (item 2) for the forklift operator's failure to wear a seatbelt; 29 C.F.R. § 1926.451(b)(1)(i) (item 3) for allowing employees to work from the scaffold frame and cross braces; and, 29 C.F.R. § 1926.451(e)(1) (item 4) for allowing employees to descend the

scaffold platform by use of the cross braces and up-rights. The serious citation proposes total penalties of \$10,200.00.

Willful Citation No. 2 alleges Jesse Remodeling violated 29 C.F.R. § 1926.451(g)(4)(i) for allowing employees to work on the scaffold platform 13 feet above the ground, without a guardrail system at the open sides and ends of the platform. The willful citation proposes a penalty of \$11,000.00.

Jesse Remodeling's notice of contest to the citations was filed on October 15, 2012, which the Secretary moved to dismiss as late. After a hearing on January 28, 2013, Judge Stephen Simko denied the Secretary's motion to dismiss and accepted Jesse Remodeling's notice of contest as timely filed by Order dated January 30, 2013. When Judge Simko retired from the Commission, the case was reassigned to this court for a hearing on the alleged citations.

The hearing was held on July 12, 2013, in Atlanta, Georgia. Jesse Remodeling was represented *pro se* by its owner, Mr. Jesse Gamble. Jurisdiction and coverage were stipulated (Tr. 9). The parties filed post-hearing briefs on September 17, 2013.

Jesse Remodeling denies the alleged violations, the willful classification, and the proposed penalties. With regard to the alleged scaffold violations, Jesse Remodeling argues that it was dismantling the scaffold and, therefore, exempt from the cited scaffold requirements. Jesse Remodeling also claims the seatbelt was too tight for the operator to wear and the skid pins were inadequate to secure the Grout Hog to the forklift.

For the reasons discussed, the alleged seatbelt violation of § 1926.28(a) (Citation No. 1, item 2) is vacated. The remaining cited violations as classified are affirmed and total penalties of \$8,500.00 are assessed.

#### *The Inspection*

Jesse Remodeling, with its office in Ellenwood, Georgia, performs commercial masonry and remodeling work. Jesse Remodeling has been in business for twenty-six years and employs approximately nine employees. Mr. Gamble has been a competent person for fifteen years (Exh. C-9; Tr. 169, 205).

In January, 2012, Jesse Remodeling was contracted by the general contractor to install the brick and block foundation and walls for a McDonald's in Savannah, Georgia, that had been

demolished and was being rebuilt.<sup>1</sup> Jesse Remodeling began its masonry work on or about January 28, 2012. Mr. Gamble oversaw the work on the project. The masonry block work was completed on February 12, 2012 (Tr. 48-49, 55, 173-174, 200).

On February 3, 2012, the OSHA Assistant Area Director, while purchasing lunch at a restaurant across the street from the McDonald's worksite, observed three or four employees on a scaffold platform that lacked a guardrail system at its open sides. He took several photographs and telephoned the OSHA office to assign the inspection to a Compliance Safety and Health Officer (CSHO) (Exhs. C-1, C-2, C-3; Tr. 21-22, 54).

When the CSHO arrived at the worksite at approximately 1:34 p.m., he initiated an inspection pursuant to a Local Emphasis Program on fall hazards. During the inspection, the CSHO observed employees on the scaffold platform pouring concrete from a Grout Hog<sup>2</sup> into openings (cells) in the block wall. The Grout Hog was being elevated above the platform by a forklift operated by Mr. Gamble. The CSHO observed that the forklift lacked skid pins to secure the Grout Hog on the forks and that Mr. Gamble was not wearing a seatbelt (Exhs. C-7, C-10, C-13; Tr. 25, 48, 59, 69, 116, 206).

The CSHO also observed that the scaffold platform, 13 feet above the ground, lacked guardrails at its open sides and ends (Exh. C-3; Tr. 62). While the employees on the platform were filling the cells, two employees standing on the cross braces approximately 7 feet above the ground, began cleaning concrete droppings from the wall below the platform (Exh. C-4; Tr. 93). After the employees completed filling the cells, the CSHO observed the employees descend the scaffold by using the cross braces and uprights (Exhs. C-5, C-6; Tr. 37, 39).

Mr. Gamble testified that the employees had started to dismantle the scaffold on the back wall when the truck delivering concrete arrived and it was discovered that the cells in four blocks needed to be filled. Mr. Gamble stated that, as the competent person, he instructed the employees to fill the cells from the platform while he elevated the Grout Hog on the forklift. He testified that, in his opinion, there was more of a risk of falling when re-installing the guardrails than filling the cells which would only take fifteen minutes (Exh. C-22; Tr. 175-177, 183).

---

<sup>1</sup> The general contractor also received a citation which apparently was settled (Tr. 136).

<sup>2</sup> A Grout Hog is described as a material delivery piece of equipment that is "more like a hopper that is able to convey, with a screw auger, concrete up a tube and down a chute [that] can be manipulated so you can put it down through the top of the concrete walls" (Tr. 29-30).

As a result of the OSHA inspection, Jesse Remodeling received the serious and willful citations at issue.

*Discussion*

To establish a violation of the general duty clause, § 5(a)(1) of the Act, as alleged in Citation No. 1, item 1, the Secretary must prove that: (a) there was an activity or condition in the employer's workplace that constituted a hazard to employees; (b) either the cited employer or its industry recognizes that the condition or activity was hazardous; (c) the hazard was causing or likely to cause death or serious physical harm; and (d) there were feasible means to eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).

With regard to the cited standards in Citation Nos. 1 and 2, the Secretary has the burden of proving the violation and must establish:

(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).

Jesse Remodeling does not dispute the application of OSHA's scaffold standards to its construction work. Jesse Remodeling also does not dispute that the terms of cited standards were not complied with, including the lack of a guardrail system around the scaffold platform, the employees' use of the scaffold uprights and cross braces to work and descend the scaffold, the lack of skid pins to secure the Grout Hog, and the failure to use the seatbelt in the forklift (Exh. C-22; Tr. 179, 183, 185). Since Mr. Gamble was present and overseeing the work, Jesse Remodeling's knowledge of the conditions and employees' exposure are not disputed.

Jesse Remodeling argues that the cited scaffold standards do not apply because the scaffold was in the process of being dismantled. Also, he claims that the seatbelt did not fit him and the skid pins were inadequate to prevent the Grout Hog from slipping off the forks.

## **SERIOUS CITATION**

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

The citation alleges that the “Grout Hog, on or about February 3, 2012, the concrete/grout delivery system was being used without skid pins in place behind the lift channels securing the hopper to the lift forks, thus exposing employees working on and around the scaffold system to struck-by and crushing hazards.”

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

Each employer -

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

There are no specific OSHA standards that address the alleged hazard regarding the use of skid pins to secure a piece of equipment on a forklift (Tr. 73). Therefore, an alleged violation of § 5(a)(1) is deemed appropriate. In determining whether § 5(a)(1) was violated, the following considerations are made.

#### **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. *Morrisson-Knudson Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121-1122 (No. 88-572, 1993).

The Grout Hog in this case was being elevated by the forklift above the scaffold platform so that the employees could dispense concrete into the cells (Tr. 69). According to the owner’s manual, the Grout Hog weighs 1,436 pounds empty and 4,526 pounds maximum gross weight (Exh. C-11). The purpose of the skid pins, which are provided by the manufacturer and attached to the Grout Hog, is to prevent the Grout Hog from sliding off the forks and injuring employees and equipment (Exh. C-10; Tr. 185-186).

There is no dispute that the skid pins were not used when Mr. Gamble elevated the Grout Hog on the forklift (Tr. 59, 71-72). The Grout Hog was elevated in excess of 13 feet above a scaffold platform containing three or four employees (Tr. 79). According to the CSHO’s testimony and photographs, if the Grout Hog slipped off the forks, the employees on the scaffold

were exposed to struck-by, crushed by, and fall hazards (Exhs. C-3, C-7; Tr. 73). A hazard is established from Jesse Remodeling's failure to use the skid pins.

## **2. Recognized Hazard**

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

The record establishes that the failure to use skid pins is a recognized hazard. The manufacturer of the Grout Hog specifically instructs forklift operators to "always use skid pins and lynch pins or safety chains when the Grout Hog is on the lift forks." (Exh. C-11; Tr. 76). A warning label located on the fork pockets declares: "WARNING! Warning: Pins must be in place whenever Grout Hog is on lift forks" (Exh. C-11, p. 3). Jesse Remodeling owned the Grout Hog and should have been aware of the requirements in the owner's manual (Tr. 206). The skid pins were provided and attached to the Grout Hog by the manufacturer (Exh. C-11; Tr. 71-72, 185-186). The pins on the Grout Hog were in plain view (Exh. C-19). During his interview, Mr. Gamble admitted that he knew the skid pins were present and not used (Tr. 79).

Jesse Remodeling's arguments, regarding the size of the forks and Mr. Gamble's ability to maneuver the forklift to prevent the Grout Hog from slipping off, are rejected. According to Mr. Gamble, the forklift, rented for the project, had small forks which would slide over the skid pins (Tr. 126). He also asserts that he knew how to maneuver the forks without tilting the forklift forward (Tr. 80).

Mr. Gamble's claims are not supported by the record. He presented no evidence showing the size of the forks or the alleged inadequacy of the skid pins. Also, in addition to the use of skid pins, the manufacturer also permits the use of chains or other securing devices. There is no showing that the skid pins or other devices could not have been used. In fact, Mr. Gamble abated the condition immediately by installing the skid pins (Exh. C-11, p.1; Tr. 127). Also, with regard to his skill in maneuvering the forklift, the Grout Hog's manufacturer requires some device to prevent the Grout Hog from sliding off the forks instead of a reliance on the forklift operator's skill. The CSHO observed the forks tilting forward. He described the terrain at the construction site as uneven and sandy with pieces of scaffold components and debris lying on the ground (Exh. C-4; Tr. 80, 88).

### **3. Likelihood of Causing Serious Injury or Death**

The Grout Hog was elevated above the scaffold platform where three or four employees were filling the cells with concrete, 13 feet above the ground. If the Grout Hog slipped off the forks, the employees were exposed to serious injury from a struck-by, crushed by or fall hazard (Exhs. C-3, C-7; Tr. 73, 84). The Grout Hog, according to the manufacturer, weighs between 1,436 pounds and 4,526 pounds. The CSHO estimated the weight of the Grout Hog at the McDonald's project to be 3-4,000 pounds (Tr. 78-79).

### **4. Feasible Means to Abate**

As the final element in establishing a § 5(a)(1) violation, the Secretary must show that the proposed abatement will "eliminate or materially reduce the hazard." *Cardinal Operating Company*, 11 BNA OSHC 1675, 1677 (No. 80-1500, 1983).

The feasible means of abatement was to install the Grout Hog in accordance with the manufacturer's safe operating procedure which requires the use of the skid "pins or some type of securing chain geared to secure it to the forks during use" (Tr. 74). Mr. Gamble abated the problem by installing the skid pins. According to the CSHO, Mr. Gamble "continued to work with the skid pins in place supporting pouring above the cells at the jobsite" (Exh. C-12; Tr. 80-81). The installation of the skid pins or chains to secure the Grout Hog were not shown infeasible (Tr. 127).

Jesse Remodeling's violation of § 5(a)(1) of the Act is established. The violation was properly classified as serious.<sup>3</sup> Jesse Remodeling, through owner Mr. Gamble, knew the skid pins or other device to secure the Grout Hog on the forklift were not used (Tr. 126, 186). In a signed interview statement, Mr. Gamble acknowledged that it was an "oversight" the skid pins were not installed (Exh. C-22, p. 4). The Grout Hog was used for approximately fifteen minutes without the skid pins. The unsecured Grout Hog was in plain view. If the Grout Hog had fallen off the forks, it would likely have seriously injured the three or four employees on the scaffold platform, 13 feet above the ground.

---

<sup>3</sup> In order to establish that a violation is "serious" under § 17(k) of the Act, the Secretary must establish 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. *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996).

## Item 2 - Alleged Violation of § 1926.28(a)

The citation alleges that “Throughout jobsite, on or about February 3, 2012, the operator of a JCB 6K 4WD, telescoping rough terrain forklift was not wearing the attached seatbelt, thus exposing the operator to ejection, struck-by and crushing hazards.”

Section 1926.28(a) provides:

The employer is responsible for requiring the wearing of appropriate personnel protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

To establish a violation of § 1926.28(a), the Commission requires a showing by the Secretary that the employee is exposed to a hazard requiring the use of personal protective equipment and that Part 1926 indicates a need for using such equipment to reduce the hazard to the employee. *L.E. Myers Co., High Voltage Systems Division*, 12 BNA OSHC 1609, 1614-1615 (No. 82-1137, 1986), *rev'd on other grounds*, 818 F.2d 1270 (6<sup>th</sup> Cir. 1987).

There is no dispute that Mr. Gamble was not using the seatbelt that was properly functioning and available while operating the forklift (Exh. C-13; Tr. 87-89, 183-184). Mr. Gamble had operated the forklift for approximately one hour without securing the seatbelt. The terrain where the forklift operated was uneven, sandy, and littered with scaffold components and masonry debris (Exhs. C-4, C-22; Tr. 88, 100). Mr. Gamble was exposed to a hazard requiring the use of personal protective equipment.<sup>4</sup>

The second element (Part 1926 construction standards indicate a need for using such personal protective equipment), however, is not shown to establish a § 1926.28(a) violation in this case. Section 1926.28(a) has been applied to the use of seatbelts when operating earthmoving equipment (bulldozer). *Sweetman Construction Co.*, 3 BNA OSHC 2056, 2057 (No. 3750, 1976). Although the standard at § 1926.602(a)(2)(i) does not specifically state seatbelts must be

---

<sup>4</sup> Although not relevant to this decision, Jesse Remodeling’s argument that Mr. Gamble could not secure the seatbelt because of his size is not supported by the record. The CSHO observed Mr. Gamble with the seatbelt secured after completing his inspection. The CSHO agreed that the seatbelt “was tight, but you [Mr. Gamble] were able to snap it and continue to work” (Exhs. C-15, C-16; Tr. 122-123). Mr. Gamble’s discomfort in securing the seatbelt does not excuse his failure to wear it. Even if too tight, the forklift was rented and another seatbelt could have been installed such as done the next day (Jesse Remodeling’s Post Hearing Brief, p. 2). Also, there is no showing that the other employee, who had operated the forklift earlier in the day, could not have continued to operate the forklift (Tr. 122).



used when operating earth moving equipment, the failure to use seatbelts is citable under § 1926.28(a). Standard Interpretation, *Earthmoving equipment, use of seat belts*, § 1926.602(a)(2) (December 15, 2003).

Unlike earthmoving equipment and motor vehicles under § 1926.601(b)(9), there is no showing by the Secretary that a specific standard in Part 1926 involves the use of seatbelts by forklift operators. Therefore, § 1926.28(a) is not the appropriate standard to enforce the use of seatbelts while operating a forklift during construction activities. The proper enforcement of seatbelt use on forklifts in construction by OSHA is through the personal protective equipment standard at § 1926.95(a) or the general duty provision at § 5(a)(1) of the Act. OSHA's Directive, CPL 2-1-28A (November 30, 2000) states at page 3, that "OSHA's enforcement policy on the use of seat belts on powered industrial trucks is that employers are obligated to require operators of powered industrial trucks that are equipped with operator restraint devices including seat belts, to use the devices. The CSHOs will enforce the use of such devices under Section 5(a)(1) of the OSH Act in accordance with the October 9, 1996, Seat Belt Enforcement Memorandum." The 1996 Seat Belt Enforcement Memorandum provides that OSHA does not have a specific standard requiring the use of seatbelts on forklifts and therefore it will enforce the requirement through § 5(a)(1) of the Act. Standard Interpretation, § 1910.178 (October 9, 1996). Also, see Standard Interpretation, *Seat belts in construction* (February 4, 2004) (describes the application of § 1926.95(a)).<sup>5</sup>

Jesse Remodeling's serious violation of § 1926.28(a) is not established.

### **Item 3 - Alleged Violation of § 1926.451(b)(1)(i)**

The citation alleges that "1<sup>st</sup> level tubular welded scaffold system, on or about February 3, 2012, the employer allowed employees to work from the scaffold frame and cross bracing. The scaffold system was not fully planked, thus exposing employees to fall hazards up to 7 feet."

Section 1926.451(b)(1)(i) provides:

Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the

---

<sup>5</sup> In general industry, OSHA has clearly recognized that there are no specific standards requiring seatbelts and therefore their use is enforced through § 5(a)(1) of the Act. Standard Interpretation, § 1910.178 (May 22, 1998).

employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

The CSHO observed two employees standing on the cross braces and scaffold frame below the platform, approximately 7 feet above ground level. The two employees were not on a planked platform. The employees were observed cleaning the block wall of concrete droppings that had fallen from the employees filling the cells on the above platform. The employees were observed cleaning the wall for approximately fifteen minutes. The employees were in plain view and Mr. Gamble was operating the forklift in front of the scaffold (Exh. C-4; Tr. 93-94, 98).

Jesse Remodeling's argument that the employees were passing down planks to dismantle the scaffold is rejected based on the CSHO's observations and photographs. The exception for dismantling work at § 1926.451(b)(1)(ii) does not apply.<sup>6</sup> The exception applies only if the employees were "solely" performing scaffold erection or dismantling work. *Smoot Construction*, 21 BNA OSHC 1555 (No. 05-0652, 2006). Although Jesse Remodeling may have started dismantling the scaffold, it stopped the dismantling work in order to fill the cells when the concrete truck arrived. No dismantling work was observed by the CSHO nor shown in the photographs taken during the inspection. Mr. Gamble admitted on examination that the employees who "went up to pour the concrete" were working (Tr. 180). Similarly, the employees cleaning the wall below the platform were working (Tr. 94). Also, the employer under the exception at § 1926.451(b)(1)(ii) must show that less than full planking "is necessary to provide safe working conditions" for employees. No such showing was made in this case.

Jesse Remodeling's serious violation of § 1926.451(b)(1)(i) is established. Jesse Remodeling, through Mr. Gamble, knew that the two employees were working from the cross braces and frame and that the employees could have received serious injury from the 7-foot fall hazard.

---

<sup>6</sup> The party seeking the benefit of an exception has the burden to show that it is in compliance. An exception is to be narrowly construed. *Kasper Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

#### **Item 4 - Alleged Violation of § 1926.451(e)(1)**

The citation alleges that “Scaffold system, on or about February 3, 2012, employees were using cross bracing and scaffold up-rights to ascend and descend the first and second level scaffold system, thus exposing employees to fall hazards up to 13 feet.”

Section 1926.451(e)(1) provides:

When the scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stair-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The CSHO observed four employees descending the scaffold by the cross braces and uprights from the platform (Exh. C-5, C-6; Tr. 97, 178). The employees were exposed to a fall hazard for less than a minute (Tr. 97). There was a ladder installed on the scaffold but the employees did not use it (Tr. 141). The record establishes, without dispute, that the terms of § 1926.451(e)(1) were violated and that the employees were exposed to a fall hazard in excess of 2 feet because of the failure to use the ladder or other safe means to descend the scaffold (Exhs. C-5, C-6).

As discussed previously, the scaffold was not being dismantled when the employees were observed descending the platform during the OSHA inspection. Section 1926.451(e)(9)(i), the exception for dismantling a scaffold did not apply. The employees had filled the block cells with concrete which was not a dismantling activity. Regardless, the standard applicable to dismantling work prohibits the use of cross braces as a means of access. *See* § 1926.451(e)(9)(iv) which provides that “cross braces on tubular welded frame scaffold shall not be used as a means of access or egress.”

Jesse Remodeling’s argument that Mr. Gamble did not know the employees were using the cross braces is rejected (Tr. 186-187, 207). The employees descending the scaffold were in plain view. Mr. Gamble was operating the forklift and photographs show him looking in the direction of the employees immediately before they descended the scaffold (Exh. C-4; Tr. 188). In his interview statement, Mr. Gamble stated that “as the compliance officer was making entry, the workers were coming down from the scaffold” (Exh. C-22). Also, according to the CSHO, the

employees were told by Mr. Gamble that they were permitted to use the cross braces when descending the scaffold (Tr. 141). One employee in his interview statement stated that he used the cross braces “because [Mr. Gamble] said that I could work going up and down the cross bracing” (Exh. C-19; Tr. 154). Another employee descending on the cross braces was also a competent person for Jesse Remodeling (Exhs. C-6, C-20).

Jesse Remodeling’s serious violation of § 1926.451(e)(1) is established. Mr. Gamble was present on the worksite and directed the employees’ work on the scaffold. He should have known the employees used the cross braces to descend the scaffold. If an employee had fallen while descending the 13-foot high scaffold, the employee was exposed to possible serious injury.

### **WILLFUL CITATION**

#### **Item 1 - Alleged Violation of § 1926.451(g)(4)(i)**

The citation alleges that “Scaffold area, on or about February 3, 2012, employees worked from the second level scaffold platform and bracket with exposed sides and ends, thus exposing employees to a fall hazard up to 13 feet.”

Section 1926.452(g)(4)(i) provides:

Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erecting/dismantling crews.

The record, as discussed previously, fails to show that at the time of the OSHA inspection, the scaffold was being dismantled by Jesse Remodeling. The exception for dismantling work at § 1926.451(g)(2) is not applicable. The employees were filling the cells on the block wall with concrete which is masonry work (Tr. 102). The CSHO did not observe the employees performing dismantling activities. Even if Jesse Remodeling had begun dismantling the scaffold, the employees had stopped such activity when the concrete truck arrived and started filling the cells with concrete at the direction of Mr. Gamble.

The standard requires guardrails if the scaffold platform is “more than 10 feet (3.1 m) above the lower level.” The scaffold platform, in this case, was 13 feet above the ground. There is no dispute that there were no guardrails along the open side and ends (Tr. 101). There were three or four employees on the scaffold platform using the Grout Hog to dispense the concrete into the cells. Mr. Gamble, who was operating the forklift, oversaw and directed the employees’ work

on the scaffold platform (Exh. C-22; Tr. 166, 175). Mr. Gamble acknowledged that guardrail could have been re-installed before filling the cells (Tr. 166). He also admitted that the employees who “went up to pour the concrete” were working (Tr. 180).

Jesse Remodeling’s violation of § 1926.451(g)(4)(i) is established.

### **Willful Classification**

“It is well settled that 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).

Jesse Remodeling’s willful violation of § 1926.451(g)(4)(i) is established. Jesse Remodeling has been a masonry contractor for twenty-six years. Mr. Gamble, in addition to owning the company, has been a competent person for fifteen years. He knew the safety requirements for scaffolds (Tr. 137). Jesse Remodeling owned the scaffold (Tr. 201). Mr. Gamble oversaw and directed the work of the employees. He directed the employees to work on the platform without guardrails (Tr. 181). In his interview statement (Exh. C-22), Mr. Gamble stated, in part:

Once I positioned around the corner to fill the first cell I observed hand rails, post were missing – the scaffold had exposed sides and ends – It was not any need for me to stop the workers from filling the holes (cells) because I knew OSHA had already taken photographs of men being exposed on the scaffold – not provided with fall protection – I made the decision to continue the work because the scaffolding was fully planked...I made the decision as a competent person that the employee risk was very minimal – Either way a worker erecting or dismantling would be at risk – and I felt like decision I made minimize the employee exposure.

Although he knew the requirements for guardrails, Mr. Gamble elected to ignore the requirements. The CSHO surmised that Mr. Gamble was in a hurry because the concrete truck had arrived and the cells needed to be filled (Tr. 110-111, 176). An employee, who was also a competent person, stated in his interview statement that “the scaffold wasn’t ready for filling grout ... [Mr. Gamble] knew that the scaffold wasn’t complete but he told me to do it anyway and to fill the grout ... [He] told me to fill the grout even though we didn’t have the scaffold properly erected” (Exh. C-20).

Mr. Gamble's authority as a competent person did not permit him to ignore the scaffold requirements when employees are working on the scaffold. Mr. Gamble was present and directed the employees in filling the cells. He also operated the forklift holding the Grout Hogs (Tr. 109). He knew the scaffold lacked guardrails (Exh. C-22; Tr. 110). He chose to allow the employees on the platform. The guardrails had been removed before lunch. The employees were exposed to a 13-foot fall hazard and the job took approximately fifteen minutes.

In 2008 Jesse Remodeling received a serious citation for a similar violation of § 1926.451(g)(4)(i). The citation alleged that the scaffold platform, without a guardrail system, was 13 feet above the ground, as in this case (Exh. C-21). Jesse Remodeling contested the citation and argued that it was dismantling the scaffold. Judge Simko, by Decision and Order dated June 14, 2008, affirmed the citation and rejected the company's dismantling argument. The citation became a final order of the Commission on July 17, 2008.

Jesse Remodeling's willful violation of § 1926.451(g)(4)(i) is established.

#### **Penalty Consideration**

The Review Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Commission is required, pursuant to § 17(j) of the Act, 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 in considering a reasonable penalty.

Jesse Remodeling is entitled to credit for size because it is a small employer with approximately nine employees (Exh. C-22; Tr. 85). The company is not entitled to credit for history because of the OSHA citation in 2008 which became a final order after Judge Simko's Decision and Order. Based on having a written safety and health program including scaffold inspections and a tagging program, Jesse Remodeling is entitled to credit for good faith (Tr. 86). The other scaffolds at the worksite were acceptable to the CHSO. Jesse Remodeling prepares a daily checklist of scaffold inspections (Exh. R-1; Tr. 193, 195-196). Green and red tags are used to show if the scaffold is ready for use (Tr. 203-204). Its safety program also includes safety meetings and showing employees a training videotape (Tr. 202).

A penalty of \$500.00 is reasonable for Jesse Remodeling's serious violation of § 5(a)(1) (Citation No. 1, item 1). Skid pins were required and provided by the manufacturer. Four

employees on the scaffold were exposed by the lack of skid pins or other means to secure the Grout Hog on the forklift (Tr. 84). The employees were exposed for approximately fifteen minutes. Jesse Remodeling immediately installed the pins during the inspection.

A penalty of \$1,000.00 is reasonable for Jesse Remodeling's serious violation of § 1926.451(b)(1)(i) (Citation No. 1, item 3). Two employees were standing on the cross braces to clean the wall of excess concrete below the platform for approximately fifteen minutes. The employees were approximately 7 feet above the ground.

A penalty of \$1,000.00 is reasonable for Jesse Remodeling's serious violation of § 1926.451(e)(1) (Citation No. 1, item 4). The employees descended the scaffold by using the cross braces and uprights. Although there was a ladder attached to the scaffold, Mr. Gamble was present at the worksite and was aware that the employees were using the cross braces.

A penalty of \$6,000.00 is reasonable for Jesse Remodeling's willful violation of § 1926.451(g)(4)(i) (Citation No. 2, item 1). Three or four employees were on the scaffold platform which lacked guardrails at the open side and ends. The guardrails had been removed before the masonry work was completed. The employees were exposed to a 13-foot fall hazard for approximately fifteen minutes. According to Mr. Gamble, a spotter was assigned to keep the employees away from the open side.

**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 that:

1. Citation No. 1, Item 1, a serious violation of § 5(a)(1), is affirmed and a penalty of \$500.00 is assessed.
2. Citation No. 1, Item 2, a serious violation of § 1926.28(a)(4)(i), is vacated and no penalty is assessed.
3. Citation No. 1, Item 3, a serious violation of § 1926.451(b)(1)(i), is affirmed and a penalty of \$1,000.00 is assessed.

4. Citation No. 1, Item 4, a serious violation of § 1926.451(e)(1), is affirmed and a penalty of \$1,000.00 is assessed.
5. Citation No. 2, Item 1, a willful violation of § 1926.451(g)(4)(i), is affirmed and a penalty of \$6,000.00 is assessed.

SO ORDERED.

/s/

**KEN S. WELSCH, Judge**

Occupational Safety & Health Review Commission

Dated: November 12, 2013  
Atlanta, Georgia