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SECRETARY OF LABOR, Complainant, v. R. G. FRIDAY MASONRY, INC., Respondent.	OSHRC DOCKET NOS. 91-1873 & 91-2027

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

The issues in these cases are whether the judge erred in: (1) affirming a violation of the scaffold guardrail requirement at 29 C.F.R. § 1926.451(d)(10)[1] in each case, (2) classifying those violations as repeated, and (3) assessing penalties greater than those proposed by the Secretary of Labor ("Secretary")--$14,000 in the first case and $21,000 in the second case. For the reasons set forth below, we uphold the judge's findings of repeated violations. On the facts of these cases, however, we modify his penalty assessments as discussed below.

[1]That standard provides:

> Guardrails . . . approximately 42 inches high, with a midrail . . . and toeboards, shall be installed at all open sides and ends on all [tubular welded frame] scaffolds more than 10 feet above the ground or floor.

I. Alleged violations

Friday was the masonry subcontractor at two construction worksites in Pittsburgh, PA. Compliance officers ("CO's") of the Secretary's Occupational Safety and Health Administration ("OSHA"), inspected those sites in mid-1991. At each site, the CO's found employees working on portions of tubular welded frame scaffolds that were between 12 and 16 feet above the ground and lacked standard guardrails. The disputed issues in each case are whether Friday's delay in installing guardrails was permissible under the terms of the standard, whether the Secretary established employee exposure to the hazards,[2] and whether Friday made out an affirmative defense.

A. Docket No. 91-1873

At a construction site at 11 River Avenue in Pittsburgh, a bricklayer and a laborer who supplied him with mortar were working from sections of tubular welded frame scaffolding that had no guardrails. There was cross bracing on the sides involved, except for one 30-inch section, but cross bracing does not meet the standard's specifications.[3] Although the laborer, Bob Barrett, and his foreman, John Greegus, believed that these conditions did not present a fall hazard, the evidence shows that Barrett regularly worked and walked beside the improperly guarded perimeter of the scaffold and therefore had access to the noncomplying conditions.[4]

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[2]There is no dispute that section 1926.451(d)(10) applies to Friday's scaffolds and that Friday had the requisite knowledge of the conditions on each site. Thus, the remainder of the Secretary's prima facie case of violations was established and is not in issue. *E.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991) (Secretary must establish applicability of cited standard, existence of violative condition, employee exposure thereto, and employer knowledge thereof).

[3]The end of the scaffold buck facing the river is not at issue. The mortar was resupplied to the laborer at that point and no other work was done on that portion of the scaffold.

[4]Friday's contention that union employees had the right to stop work if they deemed the conditions unsafe, and that there had been no complaints about guardrails or other safety matters on the site, is insufficient to rebut evidence showing that Barrett had access to the fall hazards.

Friday's claim that the standard permits an employer to delay installing guardrails long enough to "maintain an orderly work flow" lacks merit. While an employer's argument that it was in the process of abatement will be viewed in terms of the reasonableness of the circumstances, the employer may not, never the less, expose employees needlessly to the risks addressed by the standard. *See H.S. Holtze Constr. Co. v. Marshall*, 627 F.2d 149, 151-52 (8th Cir. 1980). *Accord, e.g., Floyd S. Pike Electrical Contrac., Inc.*, 5 BNA OSHC 1088, 1977-78 CCH OSHD ¶ 21,584 (No. 12398, 1977), *aff'd*, 576 F.2d 72 (5th Cir. 1978) (unnecessary employee exposure to cave-in hazards while installing required shoring in trench was violation). Here, we reject Friday's claim because while it may have been in the process of installing guardrails, we find that unreasonable delays resulted in the needless exposure of employees for a substantial period of time. Barrett acknowledged that during the inspection he was providing mortar to the bricklayers. The CO testified that during the 20 or more minutes that he was on the scene, he did not observe Barrett doing anything related to setting up guardrails.[5]

We also find without merit Friday's claim that literal compliance with the standard's terms was infeasible. In support of this defense, Friday claims that if mortar is not supplied to the bricklayers while the scaffold guardrails are being installed, "the bricklayer goes home while the laborers raise up [the scaffold]." However, Friday has not argued or shown that erecting the guardrails before the masonry work was done would have been infeasible. Nor has it shown that other, safer alternatives to its policy of delaying fall protection were infeasible. Both of these showings are required to make out a defense of infeasibility. *E.g., State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160, 1993 CCH OSHD ¶ 30,042, p. 41,226 (No. 90-1620, 1993).

Holtze, which Friday relies on, does not support its position. There, based upon finding the greater hazard defense proven, the court declined to enforce a guardrail standard

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[5]The cases on which Friday relies are unreviewed judge's decisions and therefore are not precedent binding on the Commission. *E.g., Mosser Constr. Co.*, 15 BNA OSHC 1408, 1411 n.3, 1990-93 CCH OSHD ¶ 29,546, p. 39,902 n.3 (No. 89-1027, 1991)). Those cases are also distinguishable on their facts. *E.g., Linden Store Front Corp.*, 86 OSAHRC 6/A3 (No. 84-838, 1986) (ALJ); *Masonry Constr. Co.*, 84 OSAHRC 12/A12 (No. 83-395-S, 1984) (ALJ).

where: (1) the employees were actively erecting a wall that would eliminate the hazards and would take only two hours to complete, and (2) installing an interim guardrail would be very impractical, complex, hazardous, and time-consuming. 627 F.2d at 151-52. By contrast, here the employees were not actively installing fall protection and there was no showing that installing it would be either impractical, complex, hazardous, or time-consuming.

It is also of insufficient consequence here that Friday's interest in an orderly work flow may have conformed to industry custom. The industry's general custom or practice does not alone excuse noncompliance with such a specific requirement. *E.g., Pyramid Masonry Constr.*, 16 BNA OSHC 1461, 1465, 1993 CCH OSHD ¶ 30,255, pp. 41,675-76 (section 1926.451(d)(10) specifically requires guardrails and is not to be limited by a "reasonable person or industry practice test"). *See State Sheet Metal*, 16 BNA OSHC at 1159, 1993 CCH OSHD at p. 41,225, and cases cited therein.[6]

Having found that the Secretary established all the necessary elements of a violation, and having found that Friday neither argued nor showed an affirmative defense, we affirm the judge's finding that Friday violated the cited standard in Docket No. 91-1873.

B. Docket No. 91-2027

The worksite was a new K-Mart under construction on McIntire Road in Pittsburgh. Three adjacent sections of the scaffold level 13 feet above the ground are in issue. The middle section had no railings. Friday's laborer Gordon Finlay shoveled mortar from a box that was set outside that section on a 20-inch wide "outrigger" plank that spanned all the sections at issue. Finlay delivered the mortar to the brick layers on the interior of the scaffold. The section on either side of the middle section had cross bracing, and the right-hand section had a horizontal railing about 45 to 50 inches above the floor. However, those sections lacked the standard guardrails required by the standard.

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[6]As Friday notes, the Commission has stated that OSHA consensus standards taken from private standard-setting organizations "were not intended to be used as mandatory, inflexible legal requirements." *Dun-Par Engd. Form Co.*, 12 BNA OSHC 1949, 1954, 1986-87 CCH OSHD ¶ 27,650, p. 36,021 (No. 79-2553, 1986). However, the Commission went on to conclude that allowing employers to defend by showing that compliance would be infeasible would cure the undue rigidity of enforcement. As mentioned above, Friday does not argue, and has not established, that compliance would be infeasible in these cases.

The CO, Michael Laughlin, testified that the laborer was exposed to an unprotected, 2-foot area when he stepped to either side of the mortar box. Laughlin testified that he observed the front of Finlay's shoes beyond the outrigger plank at one point. Although Finlay testified that he did not believe he was exposed to any hazards, this undisputed evidence establishes that he had access to them.

As in Docket No. 91-1873, we reject Friday's arguments that it was in compliance with the standard's terms because the exposed employees were in the process of installing guardrails on the scaffold. Because Friday presented no substantial evidence to rebut the CO's testimony that he observed the cited conditions for five to ten minutes on that project, and because there was no indication that any work relating to guardrail installation was being done, a preponderance of the evidence establishes that employees were needlessly exposed to the hazard for a substantial period of time.

We also find no merit to Friday's claim that compliance here was infeasible. Friday relies on the testimony of Severo Miglioretti, its field superintendent, and Finlay. Miglioretti testified that neither the mortar box nor the bricks could have been set in position with the relevant guardrails in place. Finlay testified that he had to remove the overlapping guardrails on all three scaffold sections to land the mortar box, which was refilled at least once an hour during the job.[7] Finlay further testified that he had tried to shovel mortar through guardrails in the past, and it did not work. "You bust up your hands, hit your head on the top [rail], the bottom one you're hitting your knuckles. You can't work."

CO Laughlin, who had been a brickmason prior to 1970, maintained that Finlay's work could have been performed with guardrails in place. Even if we were to assume for purposes of argument that guardrails would be infeasible in the specific situations about which Miglioretti and Finlay testified, that does not warrant Friday's failure to install guardrails on the left and right sections after the materials were landed. As the judge

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[7]Finlay testified that mortar boxes were changed "every twenty to 30 minutes," and were removed for periods of 2 to 10 minutes. On the other hand, Miglioretti testified that the mortar boxes were refilled every 45 minutes to 1 hour.

correctly noted, only the middle section was used for loading or unloading materials. Friday does not claim that it would have been infeasible to put guardrails in place on the other sections after the mortar box was landed.[8] Doing so might take a little longer, but that does not justify noncompliance with safety requirements.

Thus, Friday's defense is insufficient, if only because it failed to put the guardrails in place on the left and right sections after the necessary materials were landed outside the middle section. *See, e.g., Wheeling-Pittsburgh Steel Corp.*, 5 BNA OSHC 1154, 1155, 1977-78 CCH OSHD ¶ 21,630, p. 25,980 (No. 12982, 1977) (although safety brake had to be removed to repair crane, employer violated crane standard by not replacing brake before crane was used again).[9] Having found that the preponderance of evidence establishes a violation, and having rejected Friday's defense of infeasibility, we affirm the judge's finding that Friday violated the cited standard in Docket No. 91-2027.

II. Alleged repeated nature of violations

A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *E.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68, 1993 CCH OSHD ¶ 30,041, p. 41,219 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994). Unless the violation involves a general standard, the Secretary establishes substantial similarity, prima facie, by showing that both violations are of the same standard. *Id.*

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[8]Friday notes that its practice of removing scaffold guardrails from the time the mortar box is raised until it is emptied and lowered is in accord with construction practice in the area. Again, as in Docket No. 91-1873, those factors alone would not negate a violation here.

[9]Again, the cases Friday relies on are all unreviewed judge's decisions that have no precedential value (see *supra* n.5). *E.g., R.M. Shoemaker Co.*, 90 OSAHRC 53/C8 (No. 90-468, 1990) (ALJ); *J.L. Foti Constr. Co.* 77 OSAHRC 180/C9 (No. 76-4077, 1977) (ALJ). Furthermore, the judge correctly found such cases inapposite because they allowed guardrail removal only for the time needed for actual loading or unloading. Unlike in *Foti*, there was no evidence here that guardrails could pose greater hazards if installed.

In Docket No. 91-2027, evidence was submitted of seven previous final orders against Friday over the previous ten years for violations of the same standard cited here. The parties stipulated to five of those final orders. The Secretary submitted in evidence a computer printout showing two others. Friday did not present contrary evidence.[10] We therefore find that the Secretary has shown that the violations here were repeated under the Commission's test, based on seven prior violations of the same standard.

We also find that the Secretary has established that these violations are repeated under the test adopted by the U. S. Court of Appeals for the Third Circuit. *E.g., Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32 (3d Cir. 1980) (Commission erred in applying its own definition of repeated violation rather than Third Circuit's definition). These cases may be appealed to that circuit, as Friday's principal office is within it. The Commission has noted,

> [The Third Circuit] stated that repeatedly means "constantly, frequently, occurring again and again." [*Bethlehem Steel Corp. v. OSHA*, 540 F.2d 157, 162 n.11 (3d Cir. 1976)]. Moreover, *Bethlehem* indicated that to support a repeat violation, the Secretary would have to show a "flaunting" [*i.e.*, flouting] of the Act similar to that required for a willful violation.

Jersey Steel Erectors, 16 BNA OSHC at 1167, 1993 CCH OSHD at p. 41,220. In determining whether the Act was flouted, the Third Circuit considers the following factors:

> the number, proximity in time, nature and extent of violations, their factual and legal relatedness, the degree of care of the employer in his efforts to prevent violations of the type involved, and the nature of the duties, standards or regulations violated.

Bethlehem Steel, 540 F.2d at 162. We agree with the judge that in regard to "the number, proximity in time, nature and extent of the violations" in Docket No. 91-2027:

> Respondent's record shows a highly unusual number of citations for non-compliance with the scaffolding standard. Rather than diminish in frequency as would be expected, the frequency of such violations appears to be on the rise, Respondent having now been cited for the same standard in each of the past three years and twice within fourteen days in July 1991.

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[10]The computer printout was generated by OSHA's national office, based on information from field offices, and was kept in the regular course of agency business. The printout showed that the two citations involved were issued in 1986 and that they were not contested.

The judge also found that "[a] high degree of 'relatedness' of all the violations is reasonably implied because the requirements imposed by [the] cited standard are specific and quite narrow."

As to the employer's degree of care, the judge found it deficient. He noted Miglioretti's testimony that he visited the site at least three times a week and that on each visit he inspected the scaffold and checked the guardrails and base of each scaffold for stability. However, the judge noted that Friday's safety program was not initiated until 1989, eight years after the first citation for violation of section 1926.451(d)(10), and after numerous others had become final orders. Further, the judge stated that Friday's safety program:

> has thus far failed to prevent Respondent from being cited at least three times in the last three years for violations of the scaffolding standard at issue. . . . Having written safety rules which contain nothing specific about guardrails and relying on people at each job site for compliance and having OSHA standards at the job site . . . are meager efforts in light of numerous prior citations regarding scaffolding which is basic to Respondent's business.

In evaluating the nature of the duty involved, the judge found that "the assurance of proper guardrails being in place is a simple matter." Thus, he found that Friday had flouted the Act's requirements and found the violation repeated under the Third Circuit test. In Docket No. 91-1873, the judge made comparable findings. He also noted the evidence in that case that Friday was aware that its laborers would choose to re-supply bricklayers with mortar rather than complete the installation of guardrails first.

Friday provides us with no reason to modify the judge's findings. The fact that it had installed proper guardrails on other sections of the scaffold, or that the exposed employee knew where the unguarded areas were and did not believe he was in danger, may suggest that Friday did not ignore employee concerns over the hazards or display a general indifference to guardrail requirements. On the other hand, as discussed above, Friday's policy of delaying guardrail installation as necessary to ensure an "orderly work flow" was not supported by Commission case law, and Friday had many prior citations under the same standard. It is not the exposures in these cases, by themselves, that suggest Friday flouted the cited standard. It is the persistence of such violations over a long period of time, despite numerous citations.

In light of that long history, we affirm the judge's finding that Friday's conduct flouted the Act. The Commission recently found a repeated violation under the Third Circuit test, including flouting of the Act's requirements, based on a less aggravated history of violations. *Jersey Steel Erectors*, 16 BNA OSHC at 1167-68, 1993 CCH OSHD at p. 41,220. There, the construction employer had three previous final orders for substantially similar violations of the same standard (requiring hard hats). The previous citations had been issued three to five years before the current one, and two of those violations had been classified as repeated. Here, as there, the employer's "history satisfies both the requisite 'again and again' and 'flaunting' standards set by *Bethlehem*." *Id.* at 1168.[11]

III. Penalties

The judge roughly doubled the Secretary's proposed penalties in each case, from $7,500 to $14,000 in Docket No. 91-1873 and from $10,000 to $21,000 in Docket No. 91-2027. While the Act gives the Secretary the power to propose a penalty for a violation, "in the event the citation and proposed penalty are contested, the Act expressly grants to the Commission the sole authority to determine penalties[.]" *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621, 1994 CCH OSHD ¶ 30,363, p. 41,881 (No. 88-1962, 1994), citing 29 U.S.C. § 666(j). The Commission's authority includes the power to assess a penalty that is higher than that proposed by the Secretary. *E.g., Long Mfg. Co. v. OSHRC*, 554 F.2d 903, 908 (8th Cir. 1977); *Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451, 456 (10th Cir. 1976); *Delaware and Hudson Ry.*, 8 BNA OSHC 1252, 1256, 1980 CCH OSHD ¶ 24,422, p. 29,788 (No. 76-787, 1980) (collecting cases).[12]

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[11]In *Bethlehem*, the court stated that "the objective conduct which 'repeatedly' encompasses must be similar to that which would raise an inference of willfulness." 540 F.2d at 162. Friday argues that under the Third Circuit test, the Secretary essentially must show willfulness, that is, "defiance or reckless disregard," in order to establish a repeated violation. However, flouting the Act's known requirements is sufficiently similar to willfulness to satisfy the Third Circuit's test.

[12]Friday argues that the Commission should defer to the Secretary's proposed penalty. Friday further argues that the Commission has no statutory authority to increase a proposed

(continued...)

The Commission has exercised that power very sparingly, however. It has assessed higher penalties than those proposed in rare instances where facts adduced at the hearing expose circumstances previously unknown to the Secretary that clearly call for a higher penalty. *E.g., Mosser*, 15 BNA OSHC at 1416, 1991-93 CCH OSHD at p. 39,907-08. These are not such cases. All of the prior violations were known by the Secretary well in advance of the hearings, and the Secretary never applied to increase the proposed penalties during the proceedings before the judge.[13]

In assessing a penalty, the Commission is to give due consideration to the appropriateness of the penalty with respect to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *E.g., Nacirema Operating Co.*, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). Friday's history of violation is extensive. It had been found in violation of the same specific standard seven times before either of these violations occurred. Further, we find little evidence of Friday's good faith in these records. Friday was first cited under the same standard ten years earlier, but its written safety rules still contained no reference to guardrails.

Despite the above, we cannot agree with the judge that penalties in excess of the $7,500 and $10,000 proposed in these two cases are appropriate. Generally speaking, the gravity of a violation is the primary element in penalty assessment. *Trinity Indus.*, 15 BNA OSHC 1481, 1483, 1991-93 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992). The

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[12](...continued)
penalty, relying on former Chairman Moran's dissent in *M. A. Swatek & Co.*, 1 BNA OSHC 1191, 1198-1200, 1971-73 CCH OSHD ¶ 15,672, pp. 20,961-62 (No. 33, 1973). We reject those arguments for the reasons stated, for example, in *Hern*.

[13]Commissioner Montoya notes that in support of his increases, the judge apparently relied on that part of OSHA's Field Operations Manual that permits its Regional Administrators to multiply a gravity-based penalty ten times where "it is appropriate to achieve the necessary deterrent effect." *See Field Operations Manual*, Ch. VI, § (B)(14)(b)(1). She also notes that due process may require either an application by the Secretary to amend his pleadings pursuant to Fed. R. Civ. P. 15(a) or some form of notice from the Commission with opportunity to respond before penalties can be raised above the amount originally proposed.

gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1993 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Here, the violations were of relatively low gravity--they involved limited areas of the scaffolds at relatively low height. The laborers who shoveled mortar were the only employees whose exposures were specifically explained in each case, and the mortar containers were between them and the unguarded edges as they shoveled. In the first case, one, sometimes two, employees had access to the hazards; in the second case, four employees had access.

We also give more weight than the judge did to Friday's relatively small size. The judge noted that Friday was the second largest masonry contractor in the Pittsburgh area. However, we do not consider an employer of 95 or 114 employees, as here, to be a large employer.

Accordingly, in light of the fact that penalties assessed to Friday for violation of the standard previously never exceeded $800, we find that penalty levels in excess of those proposed by the Secretary are not appropriate under the section 17(j) criteria, nor necessary to achieve a deterrent effect. In the circumstances, we assess a penalty of $7,500 in Docket No. 91-1873 and $10,000 in Docket No. 91-2027.[14]

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[14]Chairman Weisberg agrees with his colleagues that the measure of gravity in the instant case and the relatively small size of the employer do not warrant penalties as large as those assessed by the judge. However, noting Friday's history of prior violations (seven prior violations of the same specific standard) and its lax response to those citations, he would assess higher penalties than those originally proposed by the Secretary. In the Chairman's view the essence of the Commission's authority to determine the penalty de novo is that the Commission examine all the facts in applying the section 17(j) factors. Accordingly, while the proposed penalty and the Secretary's reasons for it are clearly a point of departure in the Commission's analysis, it may assess a penalty either less or more than the Secretary proposed even where the hearing reveals no facts unknown to the Secretary when proposing the penalty. There is no basis, statutory or otherwise, for limiting the Commission's ability to assess a penalty that is higher than that proposed by the Secretary to those cases where facts are adduced at the hearing that were not known to the Secretary. The Commission's determination of penalties should not turn on the question of what did the Secretary know and when did he know it, but rather should be based on an application of the 17(j) factors

(continued...)

Thus, we affirm a violation of section 1910.451(d)(10) in each case, find the violations repeated, and assess an appropriate penalty of $7,500 in 91-1873 and $10,000 in 91-2027.

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Commissioner

Dated: February 16, 1995

[14](...continued)
to the facts of each case. Moreover, Chairman Weisberg notes that the hearing in this case did reveal that the Respondent actually had a *policy* of delaying installation of guardrails to ensure an "orderly work flow," rendering its long and abundant history of scaffolding violations more significant than if it had merely resulted from a series of inadvertent lapses.

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SECRETARY OF LABOR, Complainant, v. R. G. FRIDAY MASONRY, INC., Respondent.	:	Docket Nos. 91-1873 & 91-2027

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 16, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

February 16, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket Nos. 91-1873 & 91-2027

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SECRETARY OF LABOR
Complainant,
v.
R. G. FRIDAY MASONRY
Respondent.

OSHRC DOCKET
NO. 91-2027

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 4, 1992. The decision of the Judge will become a final order of the Commission on October 5, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 24, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2027

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SECRETARY OF LABOR,

Complainant,

v.

R. G. FRIDAY MASONRY, INC.,

Respondent.

Docket No. 91-2027

Appearances:

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U. S. Department of Labor
For the Complainant

Richard R. Nelson, Esq.
Cohen & Grigsby
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29. U.S.C. § § 651 - 678 (1988) ("the Act").

An inspection of a construction site on McIntyre Road in Pittsburgh, Pennsylvania, was conducted on June 6 and 7, 1991, by Michael McLaughlin, Compliance Officer ("CO") of the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA"). As a result of that inspection, two citations, one alleging a serious repeat violation and one alleging an other-than serious violation of the Act, were issued on July 17, 1991, to the Respondent, R. G. Masonry, Inc., which was the masonry subcontractor at the site.

Respondent filed a timely notice of contest. Issue was joined by the pleadings and the case came on for hearing in Pittsburgh, Pennsylvania, on April 29, 1992. No affected employees sought to exercise their right to party status. Both parties filed timely post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent concedes that it is engaged in the business of masonry construction, that it has employees, and that it has used materials and products which have moved in interstate commerce. (Complaint; Introduction, ¶¶ I, II and III; Answer; ¶¶ 2, 3 and 4.) I so find.

Based on the above finding of facts, I conclude that Respondent is an employer within the meaning of § 3(5)[1] of the Act. Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Background

Respondent was the masonry contractor for the construction of a K-mart building in Pittsburgh, Pennsylvania. As a part of its construction duties, respondent had assembled tubular steel frame scaffolding from which its laborers and bricklayers did their work. At the time of the inspection, the scaffolding along the east wall was three sections high. Each section of the scaffolding is 7 feet in length, 5 feet in width and 6'6" feet high. An "outrigger" approximately 20" wide was added between the inside edge of the scaffolding and the wall which the masons were building. In addition, along the outside edge of the scaffolding, another "outrigger," also 20" wide, considered to be a "landing platform" was added to several sections to assist in the placement of both mortar and bricks and blocks which were raised up into position and placed on the scaffold by a loader similar to a fork lift. (C-1, C-2; TR 61-2, 77-8, 107)[2]

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[1] Title 29 U.S.C. § 652(5).

[2] This decision will refer to portions of the record as follows: Transcript of Hearing = TR; Complainant's Exhibit = C; Respondent's Exhibit = R; Complainant's Post-Hearing Brief = CB; and, Respondent's Post-Hearing Brief = RB.

Discussion

Citation 1
Alleged Serious Repeat Violation
29 C.F.R. § 1926.451(d)(10)

Citation 1 alleged a violation of the standard at 29 C.F.R. § 1926.451(d)(10) on or about June 6, 1991, in that an employee handling mortar on a scaffold approximately 13' above ground level was not protected by a standard guardrail.

The cited standard, 20 C.F.R. § 1926.451(d)(10), states, in pertinent part;

> (10) Guardrails...approximately 42 inches high, with a midrail. . .and toebaords, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) ("*Astra*"); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989).

There is no challenge to the allegation that the standard is applicable. (Answer, ¶ VI(b)) The Compliance Officer testified that he observed and photographed several laborers and masons working on a platform atop the second level of tubular scaffolding. (TR 14-6: C-1, C-2) He considered three adjoining horizontal "sections" of the scaffolding to be in violation of the cited standard. A mortar box had been placed in the center of the middle of the three cited sections at the outer edge of the platform. There were no guardrails at all at the outside edge of the platform in this section. (TR 18-9) There were no guardrails on the section to the left of the mortar box (TR 19) while the section to the right of the mortar box had in place only one guardrail, approximately 45" to 50" above the surface of the platform. (TR 19) The Compliance Officer stated that in order to distribute the mortar which had been prepared on the ground and delivered into place in the mortar box to each

of the masons, the laborer had to reach down with a shovel and scoop mortar from the mortar box to each of three buckets which had been placed beside, to the right and to the left of the mortar box. According to the Compliance Officer, as the laborer reached down, and then stepped to the right or to the left to deliver the mortar, he was exposed to an unprotected area. The Compliance Officer opined that even in the section which contained the mortar box there was such exposure because the mortar box did not take up the full width of the scaffold section, leaving an unprotected area between each end of the mortar box and the scaffold frame at the end of the scaffold section. (TR 19-21, 46, 49-50, 53, 125) Indeed, on rebuttal, the Compliance Officer testified that the laborer had been so close to the unprotected outside edge of his work platform that his toes hung over the edge of the scaffold. (TR 121). The Compliance Officer stated that he discussed the situation with Respondent's foreman, whom he identified as Mr. Vince Mascaro. According to the Compliance Officer, this foreman indicated that the guardrails had been in place earlier but were removed so the mortar box could be put into position and they had forgotten to replace the rails. (TR 22-3)

On cross examination, the Compliance Officer conceded that he observed the operation for only 5 or 10 minutes (TR 37) and that he did not go up on the scaffold (TR 38). He explained his understanding that the mortar box was placed on and removed from the scaffolding several times each day and that it remained in place for about 30 minutes for each delivery of mortar. (TR 40-2) He also agreed that the laborer on the scaffold had told him that the guardrails had been removed to accommodate the mortar box. (TR 44) He maintained that the work could have been performed with the guardrails in place. (TR 120-22).

Respondent's field superintendent and safety director, Severo Miglioretti testified that a 20" wide landing platform had been added to the usual width of the scaffold platform to accommodate the placement of the mortar box (TR 125) which was 40" wide, 5' long and 16" deep. (TR 61-2). He stated that neither the mortar box nor bricks needed for construction could have been placed into the necessary position if the guardrails remained in place. (TR 62-3) He stated that Respondent followed the area practice of removing guardrails when the mortar box was delivered and leaving them down while it was in place.

He stated that the rails would be replaced when the mortar box was removed. (TR 64). Based on the number of brick layers and laborers, he estimated that the mortar box would have to be refilled with mortar every 45 to 60 minutes throughout the work day. (TR 64) He conceded that sections of the scaffolding shown in photographs in evidence depicted areas without guardrails. (TR 73-4, 76)

One of the laborers shown in the photographs in evidence, Mr. Gordon Finlay, testified that scaffolding braces had to be removed to place the mortar box on the platform. (TR 87). He stated that he shoveled mortar out of the mortar box delivering it to each of the bricklayers. He noted that mortar boxes were changed "every twenty to 30 minutes" (TR 88) and were removed for periods of 2 to 10 minutes. (TR 100) He testified that it is his usual procedure to remove rails when the mortar box is delivered, distribute the mortar to the brick layers until the box is empty, then replace the rails after the empty box is removed. (TR 87) This process, he asserted, is repeated numerous times each day. Similarly, he stated that guardrails had to be removed to land brick and block. (TR 92). He detailed the difficulties of hitting his hands or head should the distribution of brick and mortar proceed with rails in place. (TR 92-3) He also stated that the bottom rail of the section to the right of the mortar box had been removed although no materials were landed there. (TR 94)

Respondent's masonry foreman, who had first line responsibility for safety at the site, stated that when mortar was being used, the railings were constantly being taken down and replaced. (TR 115-17)

None of Respondent's employees knew of anyone named Vince Mascaro. (Tr 68 80, 112).

There is virtually no dispute that the conditions which existed at the time of the inspection and which were photographed by the Compliance Officer show areas of a scaffold more than 10 feet above the ground which did not have standard guardrails in place. Thus, the Secretary has established non-compliance with the cited standard.

The Secretary has also shown through unrebutted testimony of the Compliance Officer as well as photographs that employees of Respondent were exposed to the unguarded edges of the scaffold. The issue of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their

means of ingress-egress, and their comfort activities." The question is whether employees, within reasonable predictability, were within the zone of potential danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263 (4th Cir. 1974), *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 14909 (No. 3042, 1976); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). Moreover, "[i]t is well settled that brief exposures involved in passing or standing near an open edge constitute access [to a falling hazard.]" *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991).

As is obvious from the photographs in evidence in this case, the mortar box, being 5 feet in length, did not completely fill the entire width of the scaffold section in which it was placed. There was approximately 2' of unguarded open platform edge between each end of the mortar box and the nearest scaffold support. (TR 49-50) The Secretary's post-hearing brief takes the position that the laborer was exposed to the hazard created by a lack of guardrails in the section in which the mortar box was located as well as the sections both to the right and to the left. The laborer's work of distributing mortar from the mortar box to the bricklayers required him to move laterally along the work platform beyond either end of the mortar box into an area of the middle section which was unguarded. (TR 20) Moreover, exhibit C-2 clearly shows the laborer in the section of scaffolding to the right of the mortar box, which does not have standard guardrails. The arguments of Respondent in its post-hearing brief that the laborer knew the locations of the unprotected areas and thought there was no hazard are rejected. The standard's presumption of a hazard where there is non-compliance cannot be outweighed by the opinion of an employee exposed to the very hazard sought to be eliminated.

Accordingly, the Secretary has demonstrated employee access to the zone of danger created by the lack of guardrails.

The fact that the conditions were in plain view and could have been seen by a foreman or supervisor is sufficient to show that Respondent knew or reasonably should have known of the existence of the violative condition.

I conclude that Respondent was in violation of the cited standard.

Respondent argues basically that there was no violation because 1) guardrails had to be removed while materials were delivered to or distributed from the scaffold and 2) the

absence of guardrails is not a violation where the scaffold in is the process of being erected, modified or dismantled. (RB 10-2) Neither argument is consistent with the facts in this case.

First, while the Commission has held that the removal of guardrails for the purpose of loading materials on to scaffolds is not a violative condition, such holdings have been limited to the time necessary for the actual loading and unloading of materials. In this case at least one section of the scaffold (to the right of the mortar box) where an exposed employee was photographed (C-2) has not been shown to have been used for loading or unloading at any time. The section to the left of the mortar box is shown in exhibits C-1 and C-2 to be without supplies sitting on the work platform.

Respondent's reliance on several Commission cases is misplaced. There is virtually no evidence in this case that Respondent was in the process of installing, erecting, building another tier, modifying or dismantling its scaffolding as in the cases on which it relies in its post-hearing brief.[3] In this case, as in another involving the same respondent being issued today[4], assuming *arguendo* that the scaffolding was being modified, Respondent has failed to establish that the exposed employees were in the process of installing, modifying or dismantling any portion of the scaffolding or its guardrails. An employer's "in-the-process-of-raising-scaffolding" argument has been rejected on finding that employees had engaged in actual construction of the masonry wall for a substantial period of time. *Vanas Constr. Co.*, 13 BNA OSHC 1346 (No. 86-924, 1987). See also *Dovin Constr. Co.*, 9 BNA OSHC 1218 (No. 79-6671, 1980) (finding employer was not erecting guardrails and employee was

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[3] *Linden Store Front Corp.*, 12 BNA OSHC 1714 (No. 84-838, 1986); *J.L. Foti Constr. Co., Inc.*, 12 BNA OSHC 1097 (No. 83-1126, 1984), *affirmed in part and reversed in part*, 12 BNA OSHC 2172 (6th Cir. 1986) ("*Foti*"); *Masonry Constr. Co.*, 11 BNA OSHC 1923 (No. 83-395-S, 1984); *Marr Scaffolding Co.*, 9 BNA OSHC 2184 (No. 80-5537, 1981), *Thomas Constr. Co., Inc.*, 8 BNA OSHC 1804 (No. 77-3646, 1980); *McGuire and Bennett, Inc.*, 7 BNA OSHC 1041 (No. 76-5134, 1978); and *Superior Masonry Builders Inc.*, 3 BNA OSHC 1129 (No. 8696, 1975). Moreover, all of the above, with the exception of *Foti*, are unreviewed decisions of administrative law judges which are accorded no precedential weight by the Commission.

Similarly, Respondent's claim that the Secretary must show that a reasonably prudent person familiar with the industry would have had guardrails installed also rests on the unreviewed administrative law judge's decision in *James Luterbach Constr. Co.*, 13 BNA OSHC 1552 (No. 87-69, 1987). It is rejected.

[4] *R.G. Friday Masonry, Inc.*, No. 91-2027.

performing work unrelated to guardrail installation). It is undisputed here that masonry work was being performed and that mortar was being distributed by the laborer.

Respondent's additional argument, also made in the companion case, is rejected here for the same reasons. Respondent, emphasizing the "work-in-progress" nature of a construction project, contends that a reasonable length of time must be allowed for completion of safety features required by OSHA standards. *Masonry Constr. Co.*, 11 BNA OSHC 1923 (No. 83-395-S, 1984). Respondent further avers that this proposition has impliedly been endorsed by the Commission in *Oscar J. Boldt Constr. Co.*, 5 BNA OSHC 1577 (No. 16106, 1977) (ALJ), *aff'd without review* ("*Boldt*") .

In *Boldt*, no violation was found for failure to provide guardrails while scaffolding was being dismantled, even though an employee performed work unrelated to dismantling. Respondent contends that even though its allegedly exposed laborer may have engaged in work unrelated to installing guardrails, under *Boldt* no violation of the scaffolding standard should be found. Respondent's reliance on *Boldt* is misplaced. The case here may be distinguished from *Boldt* for several reasons. First, and foremost, Respondent is incorrect in stating as fact that the guardrails here were removed only for the delivery of materials to the work platforms or the distribution of such materials. Further, unlike *Boldt* the masonry wall here was incomplete and was being worked on at the time of the alleged violation. Additionally, in *Boldt*, the employee's performance of work unrelated to dismantling could not have been anticipated by the employer; here, Friday clearly had reason to know of the laborer supplying mortar since keeping the bricklayers supplied is one of the laborers' functions. Moreover, the unrelated activity in *Boldt* caused exposure for only a "fragmentary period" of time; here, the CO's uncontroverted testimony established employee exposure to the fall hazard for some 5 to 10 minutes. (TR 14) Finally, *Boldt* noted that the appearance of the unguarded sections was consistent with dismantling in progress "and nothing else." Respondent cannot so claim. To the contrary, the photos of the unguarded sections coupled with the testimony of record plainly establish that the laborer was in the process of supplying the bricklayer. Respondent's arguments that reasonable time be allowed to complete safety

features and that periodic servicing of bricklayers is consonant with an orderly flow of construction work are unpersuasive under the facts of this case.[5]

I thus conclude that Respondent failed to comply with the standard at 29 C.F.R.§ 1926.451(d)(10), as alleged.

Alleged Repeat Serious Classification

The Secretary has alleged that this violation is repeat within the meaning of § 17(a) of the Act, 29 U.S.C. § 666(a).[6] The Commission has held that:

> a violation is repeated. . .if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.

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[5] The affirmative defenses of infeasibility, impossibility and greater hazard were raised by Respondent in its answer. These defenses are not argued by Respondent in its post-hearing brief and are regarded as having been abandoned by Respondent.

Even if considered on their merits they would be rejected. Respondent's argument that the "delivery and distribution" of materials with the guardrails in place would have been impossible, infeasible or created a greater hazard would not prevail as a defense. First, of the three sections of scaffolding which lacked proper guardrails only two, the middle and left, were used for the "delivery and distribution of materials." Second, as to one section of scaffolding, the left, the distribution of the previously delivered materials had been completed at the time of the inspection and the taking of the photographs in evidence. Finally, Respondent has not fulfilled its burden of proving each of the elements of these affirmative defenses. See, *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1219, 1224-25 (greater hazard) and 1225-28 (infeasibility) (No. 88-821, 1991).

[6] Title 29, U.S.C. Section 666(a) provides:

> Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

29 U.S.C. § 661(a) (1988), as amended by Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (Nov. 5, 1990) (Penalty amounts increased).

Potlach Corp., 7 BNA OSHC 1061 (No. 16183, 1979). While the Commission precedent has been accepted by most of the courts of appeals which have had the issue before them,[7] the Third Circuit rejects Commission precedent and requires the Secretary to show that a respondent violated the Act more than twice and that the employer's conduct amounted to "flaunting" the Act's requirements. *Jones & Laughlin Steel Corporation v. Secretary of Labor*, 636 F.2d 32, 33 (3rd Cir. 1980); *Bethlehem Steel Corp. v. OSHRC*, 540 F.2d 157 (3d Cir. 1976) ("*Bethlehem*"). The Third Circuit considers the following factors in finding whether the Act was violated in such a way as to amount to a "flaunting";

> the number, proximity in time, nature and extent of violations, their factual and legal relatedness, the degree of care of the employer in his efforts to prevent violations of the type involved, and the nature of the duties, standards, or regulations violated.

Bethlehem, 540 F.2d at 162.

In her post-hearing brief the Secretary relies solely on the number of prior violations of the same standard to support the conclusion that the violation was repeated.[8] Is the showing of six or seven prior violations of the scaffold guardrail requirements over a period of several years (1986-1990)[9] sufficient to demonstrate that the employer flaunted the requirements of the Act? I conclude that, under the facts on this record, it does.

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[7] *See J.L. Foti Construction Co. v. OSAHRC*, 687 F.2d 853 (6th Cir. 1982); *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333 (10th Cir. 1982); *Communications, Inc. v. Marshall*, 672 F.2d 893 (D.C.Cir. 1981); *Bunge Corp. v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981).

[8] The Secretary looks to seven prior violations of the cited standard. She notes the stipulation that Respondent was previously issued five citations for violations of 29 C.F.R. § 1926.451(d)(10) and that those citations became final orders of the Commission. (Tr. 25) (The citations were issued as follows; March 14, 1990; September 28, 1989; January 21, 1988; April 29. 1985; and November 27, 1981.) In addition, the Secretary points out that the record shows two additional, uncontested citations for violations of the cited standard were issued on November 5, 1986 and October 2, 1986. (Tr. 25-9; CX-3). The Secretary makes no mention of the repeat citation issued to Respondent on July 3, 1991, which is the subject of Docket No. 91-1873, being issued simultaneously with this Decision and Order.

[9] The Complaint (¶ V) alleged seven prior violations of this standard. Respondent's answer admits the existence of at least six of those citations but argues that they cannot form the basis of a repeat finding here. (Answer, ¶ V).

Respondent's record shows a highly unusual number of citations for non-compliance with the scaffolding standard. Rather than diminish in frequency as would be expected, the frequency of such violations appears to be on the rise, Respondent having now been cited for the same standard in each of the past three years and twice within fourteen days in July 1991.

Next to be considered in determining whether Respondent's course of conduct amounted to "flaunting" are the factual and legal relatedness of the violations. There is nothing specific in the record as to the "nature and extent of violations." There is no evidence that any or all of the prior violations consisted of a few rails missing in a small number of sections of scaffolding, as in this case. A high degree of "relatedness" of all of the violations is, however, reasonably implied because the requirements imposed by cited standard are specific and quite narrow. While violations might occur due to missing toeboards, mid-rails or top rails, or any combination of the three, by virtue of the narrowness of the standard's requirements serial violations may be inferred to be substantially related.

The testimony of Friday's safety director is particularly relevant in evaluating the degree of care Respondent took in its efforts to prevent violations of the scaffolding standard. Mr. Miglioretti testified that as field superintendent and safety director (TR 55) his responsibilities include visiting the job sites, supervising the foremen, making safety inspections and "writing up" any safety violations (TR 55-6). He testified that he visited the site at least three times a week and that on each visit he inspected the scaffold and checked the guardrails and base of each scaffold for stability. (TR 58-9). The record as a whole establishes a deficient "degree of care of the employer in his efforts to prevent violations of the type involved." While initiation of a safety program is one measure of an employer's degree of care in prevention efforts, the effectiveness of Friday's program is certainly questionable. The program, initiated in 1989, has thus far failed to prevent Respondent from being cited at least three times in the last three years for violations of the scaffolding standard at issue. Moreover, as Friday's safety director since 1989, Mr. Miglioretti is the same individual who was responsible for ensuring compliance with the standard when multiple earlier citations were issued for violation of 451(d)(10). Having written safety rules which contain nothing specific about guardrails and relying on people at each job site for

compliance and having OSHA standards at the job site (TR 74) are meager efforts in light of numerous prior citations regarding scaffolding which is basic to Respondent's business. Finally, the nature of the duty required for compliance, the assurance of proper guardrails being in place is a simple matter. It requires having a proper procedure for employees to follow and ensuring its enforcement. Mr. Miglioretti's testimony as to Respondent's vague company safety rules (TR 74) and a laborer's testimony as to reminders received from foremen regarding the need for guardrails (TR 98-9) demonstrates the laxity of Respondent's response to numerous guardrail citations which clearly have not prevented re-occurrences of the same violative conditions.

Mr. Miglioretti also testified that Respondent is considered the second largest masonry company in the Pittsburgh area, handling approximately 40 to 60 projects per year (TR 56). It had approximately 114 employees at the time. (TR 32) Respondent initiated its safety program some four years after the second scaffolding citation and nearly eight years after the 1981 citation. Friday's recent string of citations for violations of the same standard coupled with its marked delay in initiating a safety program following its earlier citations strongly suggest that Respondent is not exercising a sufficient degree of care in its prevention efforts. It is not difficult to understand how Respondent's vague safety program could have resulted in an increased frequency of violations of the scaffolding standard. The continuing failure of employees to assure that guardrailing is in its proper place prior to commencing or continuing bricklaying lies at the heart of this violation. It is indicative of the lack of Respondent's emphasis on employee training and prevention efforts. Accordingly, I conclude that Respondent has exercised an insufficient degree of care to prevent violations of the cited standard.

Finally, consideration of the nature of the standard violated reaffirms that the scaffolding violation here is serious within the meaning of section 17(k) of the Act. 29 U.S.C. § 666(j). Under section 17(k), a violation is serious where there is a substantial probability that death or serious physical injury could result from the violative condition. The Commission has held serious violations to have been demonstrated under circumstances where the fall hazard was 10 to 15 feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980). Moreover, full compliance with the scaffolding regulation is neither a difficult

nor costly process since, under Respondent's standard procedure, it involves merely removal of cross bracing and horizontal installation of that bracing as guardrails during the process of raising scaffolding.

In conclusion, given that the purpose of the scaffolding standard is to prevent death or serious harm to employees, an employer must exercise a sufficient degree of care in its efforts to prevent re-occurrences of the violation. That degree of care is not evident here. Respondent's safety program, safety director, and "standard operating procedure" for raising scaffolding, loading and distributing materials and installing guardrails have collectively failed to prevent numerous and repetitive violations of the scaffolding standard. I find that Respondent's lack of sufficient care as well as the number and proximity in time of the violations further establish that Respondent's continuing failure to comply with the scaffolding standard constitutes a "flaunting" of the Act's requirements. It is likely that serious injury or death could occur if an employee fell from an unguarded area of the scaffold. Accordingly, I conclude that Respondent's violation is properly classified as repeated and serious.

Appropriate Penalty

The Secretary proposed a penalty of $10,000.[10]

In assessing penalties, the Commission considers the gravity of the violation, the size and prior history of Respondent, and the employer's good faith. 29 U.S.C. § 666(j). The determination as to what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC,* 554 F.2d 902 (8th Cir. 1977). The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1971). In considering the gravity of a violation the Commission has stated that it will take into account the number of employees exposed to the risk of

[10] The Secretary instructed Compliance Officers that penalties under section 17 of the Act as amended with increased penalty amounts would apply to all violations existing on or after November 5, 1990, found on inspections initiated on or after March 1, 1991. *Field Operations Manual*, Chap. VI, *as amended*, OSHA Instruction CPL 2.45B, CH-2 (March 1, 1991). The inspection in this case took place on June 6 and 7, 1991, and the citation was issued on July 17, 1991. It appears that the penalty proposed was calculated according to the updated Field Operations Manual. (TR 29 - 33)

injury, the duration of the exposure, the precautions taken against injury and the degree of probability of occurrence of injury. *National Realty and Constr. Co.*, 1 BNA OSHC 1049 (No. 85, 1972).

The gravity of the violation in this case is relatively moderate. The record shows as many as four employees exposed to the violative condition. (C-1, C-2) The result of a fall from the unguarded area of scaffold could be serious injury. Other than the time spent by the CO in observing the condition, there is no record as to the duration of exposure although the testimony of the laborer clearly implies that the Compliance Officer observed his usual operating procedures. The minimal nature of the precautions taken by Respondent has been discussed *infra*. There was a low degree of probability of the occurrence of an injury. There were relatively small areas unguarded and the employee primarily exposed was aware of the locations of the unguarded areas. In sum, I find that the gravity of the violation is moderate.

As to size, Respondent is the second largest masonry contractor in the area employing about 114 employees. (Answer; TR 32) Respondent is thus a large employer.

It also has an extensive history of prior violations. In addition, approximately two weeks earlier it had received a citation alleging a repeat violation of the same standard. In addition, there is an apparent lack of diligent effort to prevent violations of the same nature which calls into question Respondent's good faith concern for employee safety. Imposing a monetary penalty which is small in proportion to the size of Respondent where there have been numerous prior violations does little to accomplish the goals of the Act which is "[t]o assure so far as possible. . .safe and healthful working conditions . . . ."[11] Assessing a significant monetary penalty where, as here, the same violation is repeated several times would seem to be required to accomplish the necessary deterrence.[12] Thus, while the gravity of this particular violation is moderate, Respondent's history of prior violations and

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[11] Act, § 2(a), 29 U.S.C. § 651.

[12] The Field Operations Manual also provides that an OSHA Regional Administrator may multiply a gravity based penalty 10 times where "it is appropriate to achieve the necessary deterrent effect." *Field Operations Manual*, Chap. VI, § (B)(14)(b)(1). This multiplier was apparently not applied here.

its lax response to those citations must be the overriding considerations if future employee safety is a primary concern. Since it is, I find that a civil penalty of 30% of the maximum allowable amount for a repeated violation[13] is appropriate. Accordingly, I conclude that a penalty of $ 21,000 is appropriate.

Citation 2
Alleged Other-Than-Serious Violation
29 C.F.R.§ 1926.451(a)(2)

Citation No. 2, Item 1, alleged an other-than-serious violation of the standard at 29 C.F.R. § 1926.451(a)(2).[14] It is alleged that Respondent used an unstable object to support scaffolding along the east wall. More specifically, the citation alleged that a piece of scrap lumber 2" x 4" approximately 10" long was used to support the scaffold.

In support of this alleged violation the Compliance Officer testified that he found a piece of 2" x 4" lumber placed underneath one of the scaffold footings. He described the scaffold has having some movement which might allow the piece of wood to slip out. He asserted that a photograph was taken but it "did not turn out" (TR 33-5) Respondent's foreman denied using any 2" x 4" lumber to support the scaffold and maintained that the scaffold was checked for stability daily. (TR 114)

The Compliance Officer's testimony standing by itself and contradicted as it is, does not constitute a preponderance of the evidence. Accordingly, I conclude that the Secretary has failed to demonstrate the existence of the non-complying condition as alleged. The item is vacated.

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[13] See Note 6, *supra.*

[14] The standard provides;

> (2) The footing or anchorage for scaffolds shall be sound, rigid, and capable of carrying the maximum intended load without settling or displacement. Unstable objects such as barrels, boxes, loose brick or concrete blocks, shall not be used to support scaffolds or planks.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in repeated serious violation of § 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.451(d)(10) as alleged.

4. A civil penalty of $ 21,000 is appropriate for the repeated serious violation.

5. Respondent was not in violation of § 5(a)(2) of the Act for failing to comply with the standard at 29 C.F.R. § 1926.451(a)(2), as alleged.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: September 3, 1992
Washington, D.C.

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SECRETARY OF LABOR
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R. G. FRIDAY MASONRY
Respondent.

OSHRC DOCKET
NO. 91-1873

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 4, 1992. The decision of the Judge will become a final order of the Commission on October 5, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 24, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 4, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-1873

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SECRETARY OF LABOR,

Complainant,

v.

R. G. FRIDAY MASONRY, INC.,

Respondent.

Docket No. 91-1873

Appearances:

Joseph T. Crawford, Esq.
Office of the Solicitor
U. S. Department of Labor
For Complainant

Richard R. Nelson, Esq.
Cohen & Grigsby
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 - 678 (1988) ("the Act").

As a result of a worksite inspection conducted by a Compliance Officer ("CO") of the Occupational Safety and Health Administration ("OSHA"), a citation alleging a repeat violation of the Act was issued on July 3, 1991, to Respondent R.G. Friday Masonry, Inc. ("Friday"), which was the masonry subcontractor at the site.

Respondent timely filed a notice of contest. Issue was joined by the pleadings and a hearing was held in Pittsburgh on April 22, 1992, at which affected employees did not exercise their right to party status. Both parties filed timely post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent concedes that it is engaged in the business of masonry construction, that it has employees, and that it has used materials and products which have moved in interstate commerce. (Complaint ¶¶ I and II; Answer ¶¶ I and II.) Accordingly, I conclude that Respondent is an employer within the meaning of § 3(5)[1] of the Act. The Commission thus has jurisdiction over the parties and the subject matter.

Facts

The relevant facts of the case are undisputed. On June 17, 1991, Compliance Officer Thomas Tully conducted an inspection of Respondent's worksite at 11 River Avenue in Pittsburgh, Pennsylvania. As masonry subcontractor, Respondent had erected three levels of welded tubular steel scaffolding on both the Allegheny River ("river") and Sixth Avenue Bridge ("bridge") sides of the building (C-3, C-4, R-7)[2]. Each level or "lift" was approximately 6 feet, 6 inches in height (TR 80). An approximately 30 inch gap where the two lengths of scaffolding met at the southeast corner of the building was bridged by planks. The scaffolding on the bridge side of the building extended past the end of the river side scaffolding. Located on this extended end was a mechanical hoist used to transport a wheelbarrow between the scaffold and the ground, where the wheelbarrow was refilled with mortar (TR 25, 123).

Two employees were working on the second lift of the river side scaffolding: a bricklayer standing on an outrigger between the building wall and the scaffold and a laborer using a wheelbarrow on the scaffold (TR 44-45, 48; C-3; C-4). To obtain mortar, the laborer would have to walk out on the extended end of the scaffold buck to reach the hoist, which was operated by an employee standing on the ground. When the filled wheelbarrow was raised, the laborer would guide it onto the scaffold buck (TR 123-25).

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[1] 29 U.S.C. § 652(5) (1988).

[2] Within this opinion, references to documents are as follows: TR = Hearing Transcript; C = Complainant's Exhibit; RB = Respondent's Brief; etc.

The CO testified that the laborer using the wheelbarrow was exposed to a fall hazard of 16 feet[3] from four unguarded areas: the 30 inch opening where the two lengths of scaffolding met at the corner of the building; the two sides of the protruding end of scaffolding facing east; and the side of the protruding end of the scaffolding facing west (TR 24, 26, 46-48). Although cross bracing was in place in these areas (with the exception of the 30 inch opening), such railing does not satisfy the definition of a standard guardrail (TR 27-28, 128). The end of the protruding scaffold buck facing the river is not at issue (TR 48, 62-63).

Discussion

Complainant alleges that Respondent failed to comply with the standard at 29 C.F.R. § 1926.451(d)(10) in that an employee handling mortar on a scaffold approximately 16 feet above the ground was not protected by standard guardrails. The cited standard, in pertinent part, provides:

> (10) Guardrails . . . shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989).

There is no dispute as to the applicability of the cited standard which regulates tubular welded frame scaffolds of the type Respondent erected at the site. See 29 C.F.R.

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[3] The CO testified that the 12 foot fall hazard was increased by four feet due to a change in elevation at the end of the scaffolding where the laborer was working (TR 26).

§ 451(d). The Secretary has established non-compliance with the standard through the CO's testimony and by photographs taken by the CO which show unguarded areas of the scaffolding more than 10 feet above the ground (TR 26, C-3, C-4). Testimony by both parties established employee exposure to the hazard in that the laborer with the wheelbarrow was working in the unguarded areas in order to supply mortar to the bricklayers (TR 24-25, 123-25). Finally, Respondent's knowledge of the condition may be imputed from the knowledge of its field superintendent and safety director, Severo Miglioretti, and the job foreman, John Greegus. The former is responsible for making daily safety inspections and supervising the foremen; the latter is responsible for ensuring that scaffolding complies with OSHA regulations and supervising laborers and bricklayers (TR 74-75, 95). Both testified to being familiar with OSHA scaffolding standards (TR 88, 95-96). Moreover, the unguarded portions of the scaffolding were in plain view of the safety director and the job foreman, both of whom admitted on cross examination that the area where the laborer was working should be guarded (TR 88, 107). Thus, I find that Respondent knew or, with the exercise of reasonable diligence, could have known of the violative condition. Accordingly, I conclude that Respondent failed to comply with the cited scaffolding standard.

In its post-hearing Brief, Respondent concedes its failure to comply with the cited standard but argues, instead, that the mere absence of guardrails does not constitute a violation of the standard even where there is employee exposure to a fall hazard (RB 9). In support of this proposition, Respondent has cited various Commission final orders finding no violation of the scaffolding standard where the employer is in the process of raising scaffolding or installing guardrails (RB 9-10). While Respondent's contention is correct, the operative facts necessary for vacation of the citation on that basis are not present in this case.

Central to the decisions cited by Respondent is the finding that the employer was, *in fact*, in the process of raising or dismantling scaffolding.[4] Respondent asserts that it, too,

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[4] *See e.g., Marr Scaffolding Co.*, 9 BNA OSHC 2184 (No. 80-5537, 1981) (vacating citation where scaffold incomplete at time of inspection); *Superior Masonry Builders, Inc.*, 3 BNA OSHC 1129 (No. 8969, 1975) (finding standard inapplicable to scaffolding in the process of being raised); *Thomas Constr. Co.*, 8 BNA OSHC 1804 (No. 77-3646, 1980) (holding employer cannot be charged with employee exposure to hazard it is in the

(continued...)

was in the process of raising scaffolding and installing guardrails at the time of the inspection (TR 71-72). Respondent further avers that the "undisputed evidence" demonstrates that on the morning of the inspection the bricklayers had just completed their work on the first level of the scaffold (RB 6). These assertions, however, are not supported by the record.

Respondent cites *Linden Store Front Corp.*, 12 BNA OSHC 1714 (No. 84-838, 1986), where the citation was vacated on finding that the unguarded scaffold had been erected on the morning of the inspection. It was noted, however, that had inquiry revealed that the job had begun earlier, a different result might have been found. *Id.* at 1715. In the present case, the record strongly suggests that work on the second lift had begun considerably earlier than Respondent asserts. Testimony by Friday's field superintendent and safety director runs counter to Respondent's argument that it was in the process of raising scaffolding. Mr. Miglioretti explained that the sequence of construction at the site was first, the stairwell; next, the block work on the building's second level; and finally, the brick veneer application (TR 76). On the date of the inspection, brick veneer work was being done because "the block work was just about 90 percent completed" (TR 77).

Exhibits C-3 and C-4 support this testimony, undermining Respondent's contention that it had just begun raising the scaffolding. From the level of completed brick veneer work shown in the photos, it is a reasonable inference that the bricklayers responsible for that work had been serviced by a laborer working from the second lift of scaffolding and using the wheelbarrow and hoist in the same areas of the scaffold at issue.[5] If that is the case, and I so find, then Respondent was not in the process of raising up the scaffolding at the time of the inspection.

Moreover, assuming *arguendo* that the scaffolding was being raised, Respondent has failed to establish that it was in the process of installing guardrails. An employer's "in-the-

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[4](...continued)
process of eliminating); *McGuire & Bennett, Inc.*, 7 BNA OSHC 1041 (No. 76-5134, 1978) (accepting necessity of guardrail removal in order to move landing to another level).

[5] Although bricklayers may be serviced by laborers at lower levels, called a "mid-hop," the photographic evidence would rebut a contention that the brick and block work shown on the second level was substantially established by laborers servicing the bricklayers from a mid-hop (TR 80).

process-of-raising-scaffolding" argument has been rejected on finding that employees had engaged in actual construction of the masonry wall for a substantial period of time. *Vanas Constr. Co.*, 13 BNA OSHC 1346 (No. 86-924, 1987). See also *Dovin Constr. Co.*, 9 BNA OSHC 1218 (No. 79-6671, 1980) (finding employer was not erecting guardrails and employee was performing work unrelated to guardrail installation). It is undisputed here that masonry work was being performed and that mortar was being distributed by the laborer. The CO testified that the laborer was providing concrete to the bricklayer pictured in exhibit C-3 (TR 24). Both the job foreman and the laborer admitted that the latter would periodically stop erecting scaffolding and provide mortar to the bricklayers (TR 103, 106, 111). Furthermore, as discussed, *supra*, it can reasonably be inferred from the appearance of the masonry wall that the brick veneer work had taken place over a significant period of time. Finally, Respondent was unable to rebut the CO's assertion that during the 20 to 25 minute inspection the allegedly exposed laborer did not install guardrails or perform any activity consistent with installing guardrails (TR 58). Indeed, the testimony of Friday's employees merely confirmed that the laborer was handling mortar and supplying the bricklayer (TR 87-88, 106-07). Thus, Respondent has failed to present any evidence that it was in the process of installing guardrails at the time of the inspection.[6]

Notwithstanding its failure to establish that guardrail installation was taking place, Respondent argues that the fact that the laborer "stopped" installing guardrails does not mean that a violation of the standard occurred (RB 9).[7] Emphasizing the "work-in-progress" nature of a construction project, Friday contends that a reasonable length of time must be allowed for completion of safety features required by OSHA standards. *Masonry Constr. Co.*, 11 BNA OSHC 1923 (No. 83-395-S, 1984). Respondent further avers that this

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[6] Respondent emphasizes that its employees "intended" to install guardrails and that the CO admitted to being apprised of their intention to do so (RB 6, 11). While evidence of such intent may be considered as probative of the likelihood that the particular act will be performed, the facts here diminish any weight to be accorded such intent.

[7] Respondent cites for support *J.L. Foti Constr. Co.*, 12 BNA OSHC 1097 (No. 83-1126, 1984), where the duty to comply was held suspended when guardrail removal was necessary to perform work. This case is inapposite because *Foti* involved guardrail removal and because no masonry work was being performed in the area where the guardrail was missing.

proposition has impliedly been endorsed by the Commission in *Oscar J. Boldt Constr. Co.*, 5 BNA OSHC 1577 (No. 16106, 1977), ALJ *aff'd without review* ("*Boldt*") .

In *Boldt*, no violation was found for failure to provide guardrails while scaffolding was being dismantled, even though an employee performed work unrelated to dismantling. Respondent contends that even though its allegedly exposed laborer may have engaged in work unrelated to installing guardrails, under *Boldt* no violation of the scaffolding standard should be found. Respondent's reliance on *Boldt* is misplaced. The case here may be distinguished from *Boldt* for several reasons. First, unlike *Boldt* where the masonry wall was complete at the time of the alleged violation; here, completion of the wall required that the laborer service the bricklayer (TR 75, 103, 110-11). Second, in *Boldt*, the employee's performance of work unrelated to dismantling could not have been anticipated by the employer; here, Friday clearly had reason to know of the laborer supplying mortar since keeping the bricklayers supplied is one of the laborers' functions.[8] Third, the unrelated activity in *Boldt* caused exposure for only a "fragmentary period" of time; here, the CO's uncontroverted testimony established employee exposure to the fall hazard for 20 to 25 minutes. Finally, *Boldt* noted that the appearance of the unguarded sections was consistent with dismantling in progress "and nothing else." Respondent cannot so claim. To the contrary, the photos of the unguarded sections coupled with the testimony of record plainly establish that the laborer was in the process of supplying the bricklayer. Respondent's arguments that reasonable time be allowed to complete safety features and that periodic servicing of bricklayers is consonant with an orderly flow of construction work are unpersuasive under the facts of this case.

Moreover, the testimony of Friday's employees does little to dispel the inference that its employees *chose* to supply mortar to the bricklayers rather than finish putting up guardrails. Mr. Greegus plainly acknowledged that the laborer must interrupt his work installing guardrails to service the bricklayer because "[i]t is either that or the bricklayer goes home while the laborers raise up." (TR 103) Similarly, the alleged exposed laborer, Robert

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[8] Respondent's witnesses testified that, in addition to installing guardrails, laborers supply bricklayers mortar and bricks, build and tear down scaffolding, and clean up jobsite areas (TR 75, 101-03, 109).

Barrett, testified that he had not moved the guardrail up because "[he has] to get ready for the bricklayers." (TR 115) Furthermore, although Mr. Barrett stated that he has to make sure it is safe for the bricklayers to work, he did not know if the unguarded areas should be "guarded first" (TR 116-17). It is a reasonable inference from such testimony that Respondent's employees consider keeping the bricklayers supplied more important than installing guardrails. This inference is strengthened by Respondent's assertion that requiring all scaffolding to remain up until all work has been completed "would create an unnecessary economic burden on the owner and the contractor . . . ." (quoting *Boldt*) (RB 11). Thus, the record strongly suggests that it is the economics of complying fully with the safety standard that operates to give priority to supplying bricklayers over completing guardrail installation.

I find that Respondent has failed to establish that at the time of the inspection it was in the process of raising the scaffolding and installing guardrails. The argument that the absence of guardrails does not constitute a violation of the standard even where there is employee exposure to a fall hazard is rejected. All of the elements of the alleged violation have been shown. Accordingly, I conclude that Respondent failed to comply with the standard at 29 C.F.R. § 1926.451(d)(10).

Alleged Repeat Classification

The Secretary has alleged that this violation is a repeat violation within the meaning of § 17(a) of the Act. 29 U.S.C. § 666(a) (1988).[9] The Commission has held a violation to be repeated under Section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). Within the Third

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[9] Section 666(a) provides:

> Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

29 U.S.C. § 661(a) (1988), as amended by Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (Nov. 5, 1990) (Penalty amounts increased).

Circuit, however, the definition of repeated follows the standard developed in *Bethlehem Steel Corp. v. OSHRC,* 540 F.2d 157, 4 BNA OSHC 1451 (3d Cir. 1976) ("*Bethlehem*").

Under the *Bethlehem* test, to establish a repeated violation, the Secretary must show that the employer has violated the Act more than twice and that the employer's conduct amounts to a "flaunting" of the Act's requirements. *Bethlehem*, 540 F.2d at 162, 4 BNA OSHC at 1454-55.

More than two violations of the Act

The parties stipulated that two prior citations had been issued to Respondent for alleged violations of the same standard at issue in this case (TR 5-6, 30). A March 14, 1990, citation included an alleged repeat violation of 29 C.F.R. § 451(d)(10), was uncontested, and became a final order of the Commission. The September 28, 1989, citation alleged a serious violation of the same standard, was settled by a stipulation of settlement, and also became a final order of the Commission. In that Respondent has been cited twice before for violation of the Act and that the two citations became final orders of the Commission, I conclude that the Secretary has satisfied the first prong of the *Bethlehem* test.

Employer conduct amounts to "flaunting" of the Act

To determine whether an employer's course of conduct amounts to a "flaunting" of the Act, the following factors are to be considered:

> (1) the number, proximity in time, nature and extent of violations, (2) their factual and legal relatedness, (3) the degree of care of the employer in his efforts to prevent violations of the type involved, and (4) the nature of the duties, standards or regulations violated.

Bethlehem Steel, 540 F.2d at 162, 4 BNA OSHC at 1455 (numbering added).

Compliance Officer Tully recommended the current citation as a repeated violation following a review of Respondent's case history (TR 30).[10] In addition to the 1989 and 1990 citations stipulated to by the parties, the CO found two other citations issued for

[10] Over the Secretary's objections, OSHA area office history reports, exhibits C-5 and C-6, were admitted into evidence as being relevant to Respondent's history and only as to the two 451(d)(10) citations (TR 32-35).

violation of the same standard at issue; the first was issued on November 17, 1981, the second, on April 24, 1985, (TR 32, C-5, C-6). Although the citations issued in 1981 and 1985 do not form a basis of the Secretary's complaint, they are clearly relevant to an evaluation of Respondent's history of OSHA violations and subsequent prevention efforts.

The OSHA history reports establish that prior to the current citation, Respondent was cited four times in the past ten years for violation of the same scaffolding standard at issue (TR 5-6, C-5, C-6). The citations were issued in 1981, 1985, 1989, and 1990; each was uncontested and became a final order of the Commission (TR 5-6, 65-66). The 1989 and 1990 citations were issued only six months apart; the current citation was issued less than a year and a half after the 1990 citation. Respondent's record thus shows a significant number of citations for non-compliance with the scaffolding standard. Moreover, rather than diminish in frequency as would be expected, the number of such violations appears to be on the rise, Respondent having now been cited for the same standard in each of the past three years. The Secretary presented no specific evidence as to the nature or extent of the prior violations.

Next to be considered in determining whether Respondent's course of conduct amounted to "flaunting" are the factual and legal relatedness of the violations. The Secretary has established that Respondent's four previous citations were for violation of the same scaffolding standard at issue, 29 C.F.R. § 451(d)(10). The Secretary, however, failed to offer specific evidence concerning the factual relatedness of the violations. Nevertheless, the requirements of the standard are quite specific. While violations might occur due to missing toeboards, mid-rails or top rails, or any combination of the three, by virtue of the narrowness of the standard's requirements serial violations may be inferred to be substantially related.

In evaluating the degree of care of Respondent in its efforts to prevent violations of the scaffolding standard the testimony of Friday's safety director is particularly relevant. Mr. Miglioretti testified that as a result of previous citations for violation of the scaffolding standard, Respondent initiated a safety program in June of 1989 with himself as safety director (TR 74). Among his responsibilities are visiting the job sites, supervising the foremen, and making daily safety inspections (TR 75). He testified that he visited the site at least three times a week and that on each visit he inspected the scaffold and found

guardrails always in position (TR 82). Describing the company's practice with respect to guardrail installation, he stated that guardrails are put on "all scaffolding that is over two frames high" and that they are installed "automatically" as the scaffolding is being raised (TR 81).[11] With respect to Respondent's practice of installing standard guardrails, Mr. Miglioretti's statements were supported by the testimony of Mr. Greegus and Mr. Barrett (TR 96, 101-02, 110-11).

While initiation of a safety program is one measure of an employer's degree of care in prevention efforts, the effectiveness of Friday's program is certainly questionable. The program, initiated in 1989, has thus far failed to prevent Respondent from being cited three times in the last three years for violation of scaffolding standard at issue. Moreover, as Friday's safety director since 1989, Mr. Miglioretti is the same individual who was responsible for ensuring compliance with the standard when the earlier citations were issued for violation of 451(d)(10). Mr. Miglioretti, as well as the job foreman and the laborer, testified to familiarity with OSHA scaffolding requirements (TR 88, 95, 109). Despite this familiarity, Respondent has not prevented re-occurrences of the same violative conditions.

Mr. Miglioretti also testified that Respondent is considered the second largest masonry company in the Pittsburgh area, handling approximately 30 to 35 projects per year (TR 74). Given its relative importance in the local masonry business, it is worth noting that Respondent initiated its safety program some four years after the second scaffolding citation and nearly eight years after the 1981 citation. Friday's recent string of citations for the same standard coupled with its marked delay in initiating a safety program following its earlier citations strongly suggest that Respondent is not exercising a sufficient degree of care in its prevention efforts. It is difficult to understand how Respondent's safety program, if initiated and maintained with the proper degree of care, could have resulted in an increased frequency of violations of the scaffolding standard. Finally, as discussed previously, there is much on this record to suggest that Respondent's management was well aware that its

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[11] Mr. Miglioretti gave a detailed description of the company's procedure for raising the scaffolding. Because the bricklayers need access to materials on the scaffold, the interior cross or "X" bracing of the scaffold is removed and then re-installed horizontally as guardrails (toprail and midrail) on the opposite side of the scaffold (TR 81, 85-87). This process, which is apparently the local custom and practice, is a continuous one, working from the bottom of the scaffold to the top (TR 79, 104).

laborers, when faced with the necessity of having to make a choice, would chose to re-supply bricklayers with mortar rather than complete the installation of guardrails. The continuing failure of employees to assure that guardrailing is in proper place prior to commencing or continuing bricklaying lies at the heart of this violation. It is indicative of the lack of Respondent's emphasis on employee training and prevention efforts. Accordingly, I conclude that Respondent has exercised an insufficient degree of care to prevent violations of the cited standard.

Finally, consideration of the nature of the standard violated reaffirms that the scaffolding violation here is serious within the meaning of section 17(k) of the Act. 29 U.S.C. § 666(j). Under section 17(k), a violation is serious where there is a substantial probability that death or serious physical injury could result from the violative condition. The Commission has held serious violations to have been demonstrated under circumstances where the fall hazard was 10 to 15 feet. *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980). Moreover, full compliance with the scaffolding regulation is neither a difficult nor costly process since, under Respondent's standard procedure, it involves merely removal of cross bracing and horizontal installation of that bracing as guardrails during the process of raising scaffolding.[12]

In conclusion, given that the purpose of the scaffolding standard is to prevent death or serious harm to employees, an employer must exercise a sufficient degree of care in its efforts to prevent re-occurrences of the violation. That degree of care is not evident here. Respondent's safety program, safety director, and "standard operating procedure" for raising scaffolding and installing guardrails have collectively failed to prevent violations of the scaffolding standard. I find that Respondent's lack of sufficient care as well as the number and proximity in time of the violations further establish that Respondent's continuing failure to comply with the scaffolding standard constitutes a "flaunting" of the Act's requirements. Accordingly, I conclude that Respondent's violation is properly classified as repeated.

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[12] *See* Note 11, *supra*.

Appropriate Penalty

The Secretary proposed a penalty of $7,500.[13]

In assessing penalties, the Commission considers the gravity of the violation, the size and prior history of Respondent, and the employer's good faith. 29 U.S.C. § 666(j). The determination as to what constitutes an appropriate penalty is within the discretion of the Review Commission. *Long Manufacturing Co. v. OSHRC,* 554 F.2d 902 (8th Cir. 1977). The gravity of the offense is the principal factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001 (No. 4, 1971). In considering the gravity of a violation the Commission has stated that it will take into account the number of employees exposed to the risk of injury, the duration of the exposure, the precautions taken against injury and the degree of probability of occurrence of injury. *National Realty and Constr. Co.*, 1 BNA OSHC 1049 (No. 85, 1972).

The gravity of the violation in this case is relatively minor. The record shows one (the laborer) or possibly two (a bricklayer) employees exposed to the violative condition. The result of a fall from the unguarded area of scaffold could be serious injury. Few employees were exposed to the violative condition. Other than the time spent by the CO in observing the condition, there is no record as to the duration of exposure. The minimal nature of the precautions taken by Respondent is more thoroughly discussed *infra.* There was a low degree of probability of the occurrence of an injury. There were relatively small areas unguarded and the employee primarily exposed was aware of the locations of the unguarded areas. In addition, the employee, at least when photographed, had a wheelbarrow between himself and the open, unguarded side. In sum, I find that the gravity of the violation is very low.

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[13] The Secretary instructed Compliance Officers that penalties under section 17 of the Act as amended with increased penalty amounts would apply to all violations existing on or after November 5, 1990, found on inspections initiated on or after March 1, 1991. *Field Operations Manual*, Chap. VI, *as amended*, OSHA Instruction CPL 2.45B, CH-2 (March 1, 1991). The inspection in this case took place on June 17, 1991, and the citation was issued on July 3, 1991. It appears that the penalty proposed was calculated according to the updated Field Operations Manual.

As to size, Respondent is the second largest masonry contractor in the area employing about ninety-five employees and had an average of eight employees at the work site (Answer, ¶ II). Respondent is thus a large employer.

It also has a considerable history of prior violations at least one of which is itself repeated. In addition, there is an apparent lack of diligent effort to prevent violations of the same nature which calls into question Respondent's good faith concern for employee safety. Moreover, imposing a monetary penalty which is small in proportion to the size of Respondent where there have been several prior violations does little to "[t]o assure so far as possible. . .safe and healthful working conditions . . . ."[14] Assessing a significant monetary penalty where, as here, the same violation is repeated several times would seem to be required to accomplish the necessary deterrence.[15] Finally, the evidence that employees were allowed the choice to delay installation of safety devices such as guardrails to prevent short term idleness of bricklayers raises the inference that the practice was condoned by Respondent's managers because it was economically advantageous to Respondent. Under such a circumstance, the most effective way to achieve the goal of the Act is to make the cost of violating it greater than the financial savings a Respondent might reap from its violations. For these reasons, I find that a civil penalty of 20% of the maximum allowable for repeated violations[16] is appropriate. Accordingly, I find a penalty of $ 14,000 to be appropriate.

FINDINGS OF FACT

Findings of fact relevant and necessary for a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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[14] Act, § 2(a), 29 U.S.C. § 651.

[15] The Field Operations Manual also provides that an OSHA Regional Administrator may multiply a gravity based penalty 10 times where "it is appropriate to achieve the necessary deterrent effect." *Field Operations Manual*, Chap. VI, § (B)(14)(b)(1). This multiplier was apparently not applied here.

[16] See Note 9, *supra.*

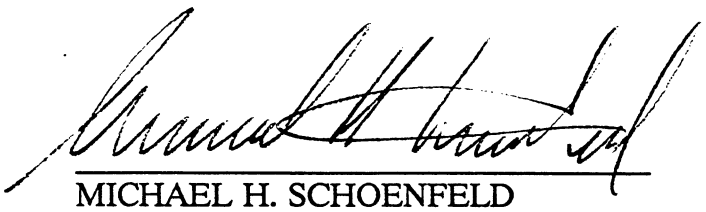
CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in repeated violation of § 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.451(d)(10) as alleged.

4. A civil penalty of $ 14,000 is appropriate for the violation.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: September 3, 1992
Washington, D.C.