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| SECRETARY OF LABOR, Complainant, v. TEXAS A.C.A., INC., Respondent. | OSHRC Docket No. 91-3467 |

## *DECISION*

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

BY THE COMMISSION:

Respondent, Texas A.C.A., Inc. ("Texas") was the plastering contractor on a 4-story hospital building in Bedford, Texas. In order to perform its work, Texas erected tubular welded frame scaffolding around the building. At issue in this case are two items of the Secretary's citation, which allege violations of provisions of the construction safety standard pertaining to scaffolds at 29 C.F.R. § 1926.451(a)(4) & (a)(14).[1] Administrative Law Judge Stanley M. Schwartz found that Texas had

[1]The standard provides in pertinent part as follows:

> **§ 1926.451 Scaffolding**
> (a) *General requirements.* (1) . . . .
> . . . .
> (4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor . . . .
> . . . .
> (14) Scaffold planks shall extend over their end supports not less than 6 inches nor more than 12 inches.

failed to comply with the cited standards but vacated the citation items on the ground that it did not have knowledge of the violative conditions. For the reasons that follow, we affirm.

## FACTS

The scaffold platform on which employees were working did not have toeboards and did not extend all the way to the railings that formed the end of the scaffold, thereby leaving an unguarded open space. The compliance officer who conducted the inspection, Charles Moore, saw an employee on the "seventh level" of the scaffold—one level below the roof of the building—applying plaster. At this location there was a gap of 21 inches between the end of the boards and the scaffold rails. On the inside of the scaffold facing the building the planking overlapped the scaffolding supporting structure by about 2 inches, which presented the hazard that the boards could slip off the supports.

Although Texas erected the scaffolding, other contractors on the site also used it. In so doing, they often moved the planks around, and some contractors, particularly the sheetrock subcontractor, would remove planks without informing Texas. As a result, Texas continually had to restore the scaffold to its original condition. The glass subcontractor was working on the east end of the building at the same time as Texas, and its superintendent told Texas' personnel that he had moved some of Texas' boards in order to install the glass. George Adams, Texas' president, testified that the foreman who was in charge of the job until the day of the inspection, Tom Jordan, had to repeatedly "go behind" the glass subcontractor to reattach shoring that connected with the scaffolding.

On the day the inspection occurred Jordan was sent to a different job and was replaced as foreman by Michael Bilodeau, who had been a foreman on other jobs but had not previously acted as foreman on this particular site. On the evening preceding the day of the inspection he was informed that he was going to be filling in for Jordan. Bilodeau was aware that other contractors would move or remove Texas' planking, and he had actually observed other contractors doing so. He testified that the normal duties of a foreman include preparing the day's work, getting the employees organized and started, and inspecting the scaffolding. However, because Bilodeau was assigned to be foreman on such short notice, conditions on the worksite were more hectic than they would normally have been. When Moore commenced the opening conference with representatives of the various

contractors, Bilodeau was on the ground making preparations to start work, and he had not yet had a chance to go up on the scaffolding to check its condition. He also made no examination of the scaffolding after the plastering work itself started between 9:30 and 10:00 a.m., two to two and a half hours before Moore began his walkaround of the site, during which he observed the violative conditions.[2] However, Bilodeau, who had been doing plastering work on the scaffold at the end of the previous day, did not recall any defect with the scaffolding and did not have any recollection of the scaffolding having been disturbed. He also denied that he had any knowledge that the scaffolding was not as it should be. The first time he knew of any missing guardrails was at the closing conference, and Texas promptly corrected the condition. For his part, Moore conceded that other contractors may have moved planks around after Bilodeau left the scaffolding the day before.

The record further shows that Texas has a safety program including enforcement of safety rules and that Bilodeau was regarded as a safety-conscious employee. Adams testified that there had never been an accident on any job where Bilodeau was the foreman.

## DISCUSSION

On these facts Judge Schwartz concluded that the Secretary had failed to satisfy his burden to prove that Texas knew or with the exercise of reasonable diligence could have known of the existence of the violative conditions. Finding no evidence to show that Texas had actual knowledge of the absence of guardrail and toeboard protection and of the inadequate overlap in the planking, the judge considered whether Texas had exercised reasonable diligence to discover these conditions. He noted that Texas continually had to repair the displacements and disturbances in the scaffold planking caused by other contractors. The judge further found from Bilodeau's testimony that Bilodeau would have checked the scaffolding at the outset of the work had he not been distracted by the need to organize and prepare the job on his first day as foreman. Taking into account as well

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[2]Moore testified that he did not arrive at the worksite until 12:40 p.m. and did not start the walkaround portion of his inspection until 1:30 p.m. He took photographs C-1 and C-2 as soon as he arrived at the site. Bilodeau testified that based on the amount of completed plastering work shown in these photographs, they must have been taken earlier than 12:30 p.m.. The judge found that the walkaround began around noon and that Moore was mistaken about when he arrived at the worksite. In his reply brief the Secretary does not dispute this finding and concedes that he failed to introduce Moore's contemporaneous inspection worksheets as evidence of when Moore arrived and when he began his walkaround.

that Bilodeau had not noticed any defects in the scaffolding when work ended the previous day, the judge held that Texas had acted in a reasonably diligent manner. Review was directed on whether the judge erred in this conclusion.

As the judge correctly stated, proof that an employer knew, or with the exercise of reasonable diligence could have known, of the existence of a violative condition is one of the elements of the Secretary's case. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1032, 1991-93 CCH OSHD ¶ 29,325, p. 39,392 (No. 87-992, 1991).[3] As the judge also properly observed, there is no evidence, nor does the Secretary contend, that Texas was actually aware of the violative conditions. However, an employer also has a duty to inspect its work area for hazards, and an employer who lacks actual knowledge can nevertheless be charged with constructive knowledge of conditions that could be detected through an inspection or examination of the worksite.[4] As the Commission stated in

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[3]The Secretary contends in his petition for review that the element of knowledge is only an affirmative defense with the burden on the employer to prove lack of knowledge rather than on the Secretary to show the existence of employer knowledge. Additionally, the Secretary contends that in any event knowledge is an element only of a serious violation and, accordingly, the Commission could find a violation even in the absence of evidence of knowledge by reducing the characterization to nonserious. In the brief it filed before us, however, the Secretary notes that these issues were not directed for review, and therefore the Secretary does not address them. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992) (consolidated) (ordinarily the Commission will not decide issues not directed for review). In any event, this case arises in the Fifth Circuit, which has consistently held that knowledge is an element of a nonserious as well as serious violation and that the burden of proof is on the Secretary. *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564, 570-71 (5th Cir. 1976); *accord H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 819 n.17 (5th Cir. 1981); *Floyd S. Pike Electrical Contrac. v. OSHRC*, 576 F.2d 72, 76 (5th Cir. 1978). We note further that the law of the Fifth Circuit is consistent with long-standing Commission precedent in this area. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 n.5, 1993 CCH OSHD ¶ 30,148, p. 41,478 n.5 (No. 91-862, 1993).

Chairman Weisberg notes that, as acknowledged by the Secretary, the nature of the element of knowledge was not among the issues directed for review. Accordingly, the Chairman finds it unnecessary to reach that issue here.

[4]An employer is also chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998, 2000, 1994 CCH OSHD ¶ 30,554, pp. 42,273-74, 42,275 (No. 92-1022, 1994); *Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *aff'd without*

(continued...)

*Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980), an employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work." *See Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221, 1991-93 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991).

In this case, however, Texas did in fact have an established program for inspection of its scaffolding to detect displacement or disturbance of planking by other contractors. Both of its foremen at the worksite, Jordan and Bilodeau, were aware of Texas' requirement. In the absence of any evidence to the contrary, the fact that Jordan followed the glass subcontractor in order to reattach shoring which had been removed and that Bilodeau was similarly known to maintain a safe workplace establishes that Texas' rule was adequately communicated and implemented. In such circumstances, where the employer maintains an appropriate monitoring or inspection program, the burden is on the Secretary to demonstrate that the employer's failure to discover the violative conditions was nevertheless due to a lack of reasonable diligence. *Milliken & Co.*, 14 BNA OSHC 2079, 2083-84, 1991-93 CCH OSHD ¶ 29,243, pp. 39,177-78 (No. 84-767, 1991), *aff'd*, 947 F.2d 1483 (11th Cir. 1991); *General Electric Co.*, 9 BNA OSHC 1722, 1728, 1981 CCH OSHD ¶ 25,345, p. 31,455 (No. 13732, 1981).

Here, the evidence supports a finding that the scaffolding was in satisfactory condition at the close of the preceding work day. Although displacement or disturbance of the planking appears to

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[4](...continued)
*published opinion*, 28 F.3d 1213 (6th Cir. 1994). Compliance officer Moore was questioned as to whether any inadequacies in the scaffolding could have been seen from the ground. Although Moore's testimony is somewhat ambiguous, and the parties disagree on how it should be interpreted, Judge Schwartz found that the absence of proper guardrails could have been observed from the ground. The judge, however, did not refer to this finding in his discussion of the knowledge issue, and, as indicated, he decided the case entirely on the question of whether Texas exercised reasonable diligence through its efforts to inspect and monitor the worksite. On review, the Secretary argues that the judge construed Moore's testimony properly but does not contend that knowledge should be found because any of the violative conditions were in plain view or otherwise readily apparent from the ground. Rather, the Secretary petitioned for review solely on the question of whether Texas had a reasonably diligent inspection and monitoring program, and review was directed only on that issue. Accordingly, no issue of plain view is presented in the circumstances of this case.

have been a common occurrence at the site, the actual frequency with which the planking was likely to be moved or removed in the area where Texas' employees would be working is not shown in the record. More significantly, the Secretary has adduced no evidence to show what other contractors were present on the day of the inspection and when they began working or how long the violative conditions existed before Moore observed them during his walkaround. In sum, the Secretary has not established that Bilodeau should have inspected the scaffolding earlier or given it a higher priority. In these circumstances, we conclude that the Secretary has failed to satisfy his burden to demonstrate that Texas failed to act with reasonable diligence. *Compare Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2129-30 (No. 92-0851, 1994) (employer did not act with reasonable diligence where it admitted that it "got behind" in correcting floor opening and perimeter fall hazards created by other contractors, and the conditions existed for a "significant" period of time). Moreover, the employer's duty is to take *reasonably* diligent measures to inspect its worksite and discover hazardous conditions; so long as the employer does so, it is not in violation simply because it has not detected or become aware of every instance of a hazard. *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984); *see Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982).

Accordingly, for the reasons stated we affirm the judge's decision.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: February 1, 1995

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | Docket No. 91-3467 |
| TEXAS A.C.A., INC., | : | |
| Respondent. | : | |

## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 1, 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

Ray H. Darling, Jr.

February 1, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-3467

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
TEXAS ACA
Respondent.

OSHRC DOCKET
NO. 91-3467

# 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 April 21, 1993. The decision of the Judge will become a final order of the Commission on May 21, 1993 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 May 11, 1993 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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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.
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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: April 21, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-3467

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TEXAS A.C.A., INC.,<br><br>Respondent. | OSHRC DOCKET NO. 91-3467 |

APPEARANCES:

E. Jeffery Story, Esquire
Dallas, Texas
For the Complainant.

Robert E. Rader, Jr., Esquire
Dallas, Texas
For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz

## DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On October 17, 1991, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a hospital building construction project in Bedford, Texas, where Respondent was engaged in applying plaster to the walls of the building; as a result, Respondent was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.59(e)(1),

1926.59(g)(8), 1926.105(a), 1926.451(a)(4) and 1926.451(a)(14). Respondent contested the citation, and a hearing was held on October 23, 1992.[1]

Items 1 and 2 - 29 C.F.R. §§ 1926.59(e)(1) and 1926.59(g)(8)

Charles Moore is the OSHA compliance officer ("CO") who inspected the site. He testified he asked Michael Bilodeau, Texas A.C.A.'s foreman, to fill out R-1, an information sheet; when he inquired about the company's hazard communication ("HAZCOM") program and material safety data sheets ("MSDS's") for the paint and plaster being used at the site, Bilodeau told him they were in the office and not on the job. Moore said that Batten and Shaw, the general contractor, had a trailer at the site, and that other employers had their programs and MSDS's at the job. He also said the job superintendent did not show him Texas A.C.A.'s MSDS's, and that he did not recall seeing R-2. Moore did not consider either substance a serious hazard. He did not see the paint used, but the employee shown in C-6, whose name he did not remember, told him it was Texas A.C.A.'s. (Tr. 5-19; 66-72).

Michael Bilodeau testified that Texas A.C.A. has a master book of MSDS's in its office, that its procedure is to have the MSDS's pertaining to the job in the jobsite trailer, and that employees are informed of the procedure. He further testified the required MSDS's were at the site, and that he was there when "Bear" Allen, the general superintendent, told the CO the MSDS's were in his trailer and offered to show them to him. Bilodeau said when he wrote on R-1 that the MSDS's were in the office he meant the jobsite trailer.[2] He also said that although Texas A.C.A. was using a mud-like stucco at the site, it was not using paint; in his opinion, the mud was not hazardous. (Tr. 93-97).

George Adams is Texas A.C.A.'s president. He testified he personally delivered the MSDS's pertaining to the site to Bear Allen prior to beginning the job. He identified R-2 as the book of MSDS's he delivered, and said it was kept in Allen's office. He also said Texas A.C.A. used no paint at the site. (Tr. 121-23).

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[1]At the hearing, the Secretary amended the items involving 1926.59(e)(1) and 1926.59(g)(8) to allege "other" violations with no penalties.

[2]Bilodeau also indicated he may have been referring to the MSDS master book. (Tr. 96).

The subject standards provide as follows:

> 1926.59(e)(1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces.
>
> 1926.59(g)(8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

The testimony of Adams and Bilodeau, taken together, was that Texas A.C.A.'s procedure is to have the MSDS's pertaining to the job in the jobsite trailer, that employees are informed of the procedure, and that the MSDS's relating to the subject site were kept in the general superintendent's trailer. Adams specifically testified that he himself delivered R-2, which contains a written HAZCOM program and several MSDS's, to Allen before beginning the job. I observed Adams and Bilodeau as they testified, and found both witnesses credible. It is my finding that the evidence considered as a whole leads to only one conclusion. Respondent did indeed comply with the requirements of the subject standards, and the required documents were maintained at the worksite. For these reasons, the Secretary has not established violations of the standards, and these two citation items are vacated.

Item 3 - 29 C.F.R. § 1926.105(a)

Charles Moore testified he arrived at the site around 12:40 p.m., and that he took C-1 and C-2, which depict two workers on the edge of the roof of the four-story building without any visible fall protection, before talking to anyone on the job. He then met with representatives of all the contractors, after which he began his inspection about 1:30 p.m. There were employees applying plaster to the building at that time, and no one was on the roof; however, Moore took C-3, which shows the same area as C-1 and C-2 from a different angle, and C-5, which shows where the workers had been and the winch they had been using. Moore saw a worker in the same location on the roof later in his inspection, and again at the end of the day when he was talking to Bilodeau on the ground; he thought it was the same person because of his clothing but was not positive. Bilodeau told him the worker was his, identified him as Manuel Estrada, and called Estrada down so Moore could talk to him.

Bilodeau also told him the winch belonged to Texas A.C.A., that it was used to get buckets of plaster up to the employees, and that Estrada had been in the process of removing it. No one indicated anyone besides Texas A.C.A. used the winch, and the employee in C-6 was applying plaster from a bucket with a trowel and not a hose and gun. (Tr. 12-15; 19-33; 46-48; 66; 69; 72-80).

Michael Bilodeau testified that Texas A.C.A. was not using the winch or working on the roof the day of the inspection, that his employees had no reason to be there, and that he did not believe the employee operating the winch in C-1-2 was his; a pump and hose were used to get plaster to the scaffold that day, and the excess was put in buckets for later use, the normal procedure. Texas A.C.A. did not use its winch every day and did not put it up if it was not going to use it; however, nearly all the contractors at the site used it from time to time, and his company took it down at the end of each day to ensure it was not stolen.[3] Bilodeau said Texas A.C.A. did not install the winch the day of the inspection but that just about any of the other contractors could have. His employees use the winch from the scaffold with one of the pulley ropes inside the scaffold, and C-5 shows both ropes outside the scaffold; moreover, there is a place on the "gooseneck" of the winch for guardrails to be attached, and company practice is to do so every time the winch is installed. (Tr. 97-100; 103-05; 110-11; 115-19).

Bilodeau further testified that C-1 and C-2 had to have been taken before 12:30 p.m., and that Estrada could not have been the person in them; employees had plastered the middle section of the building about halfway down by the time they got off the scaffold around 2:30 p.m. that day, and the dark portion at the top of the section in C-1 and C-2, which indicates the part that had been freshly plastered, had to have been done before 12:30 because the employees could not have completed half of the section in two more hours. Bilodeau noted Estrada's job that morning was to pre-cut mesh, and the best place for him to have done so would have been the parking lot where he would have been out of the way of other workers. (Tr. 100-03; 119).

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[3]Bilodeau noted that the contractor who poured cement for the stairs, for example, would have used the winch to haul cement to the roof. (Tr. 104; 117-18).

Bilodeau sent Estrada up to take the winch down when they were getting ready to quit work that day; when the CO asked to speak to him, Estrada was sitting down on the scaffold removing the winch. Bilodeau said that this job, which takes five to ten minutes, was the only work done on that part of the scaffold that day. He did not remember if he told Estrada to use a safety belt and line to dismantle the winch, although he imagined he did, or recall if Estrada actually did so. Bilodeau noted safety belts are always available for use, that employees are told to not work near roof edges without fall protection, and that they are disciplined if observed doing so. (Tr. 105-06; 111-12; 119-20).

George Adams testified there was no reason for his employees to use the winch to haul up buckets of plaster because he had an FM-9 plaster pump on the job which got plaster up to the scaffold more quickly and saved on labor. He further testified there was a guardrail that should have been fastened to the gooseneck on the winch so as to be across the end of the scaffold, and that employees were instructed to put it in place when installing the winch. He said C-5 showed the guardrail, which he indicated with an arrow, and that it looked like it had been swung back and attached to the scaffold. (Tr. 123-25).

1926.105(a) provides as follows:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The subject citation item was based on the CO's observation of the two workers depicted in C-1 and C-2. These photos, which are clarified by C-5, a closeup of the roof area, show one employee operating the winch from the roof and another employee on a platform which is adjacent to the roof and part of the scaffolding. Although the CO concluded these two individuals were employees of Texas A.C.A., I find that the record does not support his conclusion, for the following reasons.

The CO's conclusion that the individuals were employees of Texas A.C.A. was based on the fact that the winch belonged to the company and on his determination that the workers, one of whom he believed was Manuel Estrada, were engaged in hauling plaster up to the scaffolding in buckets. However, Bilodeau testified that his employees had no reason to be on the roof or use the winch that day because the plaster was being pumped up

through a hose, and that there was plaster in buckets because that was where the excess was put for later use. He also testified that while his company did not install the winch that day, virtually any of the other contractors could have done so and been using it. Bilodeau's testimony is supported by that of Adams, and a finding that Respondent's employees were not using the winch is also bolstered by their explanations of how employees operate the winch and the company practice of putting the guardrail in place.

In regard to the identity of the individuals in C-1 and C-2, there is no evidence the worker on the platform was an employee of Texas A.C.A., and the CO himself acknowledged he was not sure the employee on the roof was Estrada. Moreover, Bilodeau's testimony about the progress of the work that day and Estrada's duties on the ground that morning convinces the undersigned the CO was mistaken about when he arrived and that Estrada was not the worker on the roof in C-1 and C-2.[4] Finally, while it is clear Estrada was the individual who removed the winch there is no conclusive evidence he was not tied off, and Bilodeau's testimony tends to show that he probably was. Based on the record, the Secretary has failed to demonstrate that Respondent's employees were exposed to the cited hazard; accordingly, this citation item is vacated.

Item 4 - 29 C.F.R. § 1926.451(a)(4)

Charles Moore testified the scaffolding on which Texas A.C.A. employees were working had open ends and one area with no fall protection; C-5 shows a platform with no protection, where one employee had been working, and C-6 shows an employee plastering on the seventh level in an area where the planking did not extend to the sides and ends of the scaffold. Moore marked an "X" on the areas to which he was referring in C-6, and said that while C-6 did not show the true picture, C-7, a different view of the same area, showed the gap between the planking and the end of the scaffold; at his request, the employee measured the gap and found it to be 21 inches. Moore at first indicated there were no guardrails in the C-6 area; he then indicated there were guardrails on the side but not on the end, but that the scaffolding was hazardous in any case due to the inadequate planking.

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[4]Adams, who was at the site the afternoon of the inspection, agreed with Bilodeau's testimony about the progress of the work that day. (Tr. 121-23).

Moore said the condition was visible from the ground, and that Bilodeau told him he had been working on the scaffolding. (Tr. 35-55; 62-65; 80-82; 85-86).

Moore further testified there were no toeboards in the areas depicted in C-5-7, which was a serious hazard because there were employees working below and going in and out of the building and materials could have fallen off and struck them.[5] He noted Texas A.C.A. was working on the middle section of the building, and that while a small portion of the scaffolding had a warning line to keep people from going under it he did not recall the entire middle section being roped off. (Tr. 35-41; 47; 51-58; 86-87).

Michael Bilodeau testified he had been working as a plasterer at the site, that October 17 was his first day as foreman, and that he had been notified the night before that Tom Jordan, the previous foreman, was going to a different job. Bilodeau said he had been a foreman on other Texas A.C.A. jobs, and that the normal procedure is to check the scaffold the first thing; however, he had not had a chance to do so before the inspection because he had been getting employees and materials lined up and the job ready to start. Bilodeau noted he got to the job about 6:45 a.m., that employees got up on the scaffolding at 9:30 or 10:00 a.m., and that the inspection began around noon. (Tr. 90-93; 106-07; 110; 113-15).

Bilodeau further testified Texas A.C.A. had to continually fix its scaffolding because the other contractors at the site used it and removed planks all the time without telling them. He noted the glass contractor had been working in the C-6 area at the same time his employees were there, that he pushed boards back all the time because that was the only way he could install glass, and that even the superintendent had told him such was the case. Bilodeau did not recall anything wrong with the scaffolding the day before, and first became aware there might be missing guardrails or toeboards when the CO brought the matter to his attention. Bilodeau said corrections were begun that day and completed the next. He also said there was yellow safety tape around the entire bottom of the scaffold, and that

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[5]Moore did not see workers going in and out of the building under the scaffolding, and did not know if the person on the ground in C-6 was connected with the construction work. (Tr. 56-57; 87).

people were not working under it or going under it to get in and out of the building. (Tr. 106-09).

George Adams testified he was at the site about three days a week, and that Bear Allen, the job superintendent, made sure his company had yellow caution tape around the entire scaffolding; people did not work or go under the scaffolding, and the tape did not show in the CO's photos because the building sat at the bottom of a 6-foot slope. Adams further testified other contractors at the site used the scaffolding and borrowed planks without telling his company; the sheetrocker used them to hang sheetrock, and Jordan told him the glass man was moving boards and other scaffold parts when he installed glass and that he was having to repair the scaffolding behind him. Adams said the glass man had been working in the area shown in C-6, and indicated the location of the guardrails in C-6 with arrows. Adams also said he had notified Bilodeau of his new assignment the night before the inspection, and that there had been no accidents on Bilodeau's jobs. (Tr. 121; 125-29).

1926.451(a)(4) provides, in pertinent part, as follows:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 20 feet above the ground or floor.

Based on the foregoing, the CO's primary concern was the lack of guardrails on the platform shown in C-5 and the planking not extending all the way to the side and end of the area shown in C-6 and C-7. It was found in the preceding discussion that other than Estrada's removal of the winch at the end of the workday there was no evidence Respondent's employees had been on the platform in C-5. It was also found that there was no conclusive proof Estrada was not tied off when he was on the platform. Accordingly, the only area at issue is the one in C-6 and C-7. The CO testified that the planking's failure to extend all the way to the side and end left gaps through which an employee could have fallen, as shown in C-7. It is concluded that this condition violated the standard, but that Respondent did not have the requisite knowledge of the condition.

It is the Secretary's burden to prove that the employer knew, or could have known with the exercise of reasonable diligence, of the presence of the violative condition. *See, e.g., A.P. O'Horo Co., Inc.*, 14 BNA OSHC 2004, 2007, 1991 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991), and cases cited therein. The issue of reasonable diligence is a question of

fact. *Martin v. OSHRC*, 947 F.2d 1483, 1484-85 (11th Cir. 1991); *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1013 (5th Cir. 1975). Since there is no evidence Respondent had actual knowledge of the violative condition, the issue is whether the company, under the facts of this case, exercised reasonable diligence to discover the condition.

The record shows that other contractors at the site used the scaffolding and moved platform boards on a regular basis, and that Respondent continually had to repair the scaffolding. The record also shows that the glass contractor had been working in the C-6 area at the same time as Texas A.C.A. and had moved scaffolding boards, and that while Bilodeau's normal procedure was to check scaffolding the first thing he had not had an opportunity to do so before the inspection's commencement around noon because it was his first day as foreman and he was trying to get workers and equipment lined up and the job started.[6] Finally, the record shows Bilodeau had not noticed anything wrong with the scaffolding the day before, and that he corrected the condition after the CO brought it to his attention. Under these circumstances, I find that Respondent used reasonable diligence at the site, and that it was not in violation of the guardrailing requirements of the cited standard.

The CO was also concerned about the lack of toeboards as depicted in C-5, C-6 and C-7. The testimony of Adams and Bilodeau in regard to the yellow caution tape encircling the bottom of the scaffold was credible. However, it was nonetheless reasonably predictable that employees working on the ground below, even if not directly underneath the scaffolding, could have been struck by materials or equipment falling from the scaffolding. *See Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). Regardless, the reasoning set out in the preceding paragraph applies equally to the missing toeboards; therefore, Respondent was not in violation of the toeboard requirements of the standard, and this citation item is vacated.

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[6]My conclusion that the inspection began around noon is based on Bilodeau's testimony, *supra*, and on my finding in the preceding discussion that the CO was mistaken about when he got to the site.

Item 5 - 29 C.F.R. § 1926.451(a)(14)

Michael Moore testified the employee in C-6 was crouched on one or two planking boards that overlapped approximately two inches over their end supports. He said the employee measured the distance for him, and that the planks were not actually depicted in C-6 because they were against the wall. He also said the condition was hazardous because the scaffolding could have moved, causing the boards to slip and the employee to fall; if only one board had slipped, the employee could have broken his leg in the resulting gap. Moore noted the condition was not visible from the ground. (Tr. 58-62; 83-86).

1926.451(a)(14) provides as follows:

> Scaffold planks shall extend over their end supports not less than 6 inches nor more than 12 inches.

Based on the CO's testimony, the record demonstrates a violation of the standard. However, for the same reasons set out *supra*, I find that Respondent did not have the requisite knowledge of the condition. Accordingly, this citation item is vacated.

Conclusions of Law

1. Respondent, Texas A.C.A., Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was not in violation of 29 C.F.R. §§ 1926.59(e)(1), 1926.59(g)(8), 1926.105(a), 1926.451(a)(4) and 1926.451(a)(14).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 through 5 of serious citation number 1 are VACATED.

Stanley M. Schwartz
Administrative Law Judge

Date: APR 12 1993