



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

PYRAMID MASONRY CONSTRUCTORS, INC.
Respondent.

OSHRC DOCKET
NO. 93-1972

**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 15, 1994. The decision of the Judge will become a final order of the Commission on October 14, 1994 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 October 4, 1994 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 15, 1994

DOCKET NO. 93-1972

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Jaylynn Fortney
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Dion Y. Kohler, Esquire
Ogletree, Deakins, Nash, Smoak &
Stewart
3800 One Atlantic Center
1201 West Peachtree Street, N. W.
Atlanta, GA 30309

Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR,

Complainant,

v.

PYRAMID MASONRY CONTRACTORS,
INC.,

Respondent.

OSHRC Docket No. 93-1972

APPEARANCES:

Stanley E. Keen, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Dion Y. Kohler, Esquire
Ogletree, Deakins, Nash, Smoak & Stewart
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

Respondent, Pyramid Masonry Contractors, Inc. (Pyramid), a masonry contractor, was engaged in laying concrete block and brick on a construction site known as the Galleria project in Atlanta, Georgia. An inspection of the worksite was conducted by the Occupational Safety and Health Administration (OSHA) which resulted in the issuance of two citations.

The Secretary of Labor (Secretary) dismissed Citation No. 2 and item 1(a) of Citation No. 1, leaving in issue the alleged violation of the standard at 29 C.F.R. § 1926.451(d)(6). The standard, which pertains to tubular welded frame scaffolds, states: "Where uplift may occur, panels shall be locked together vertically by pins or other equivalent suitable means." The alleged violation is described in the citation as follows:

Tubular welded frame scaffold(s) were not locked together vertically by pins or other equivalent means:

(a) Construction site, 1 Galleria Parkway, west face of building - The entire erected scaffold was not pinned to keep the panels together.

The Commission has held that in order to establish a violation, the Secretary has the burden to prove by a preponderance of the evidence that:

(1) the standard applies, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited condition, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition.

Wheeling-Pittsburgh Steel Corporation, 16 BNA OSHC 1780, 1782, 1994 CCH OSHD ¶ 30,026 (No. 91-2524, 1994).

The Secretary agrees that "uplift" is not defined in the standards, and the question is whether "uplift may occur" under the facts presented. Compliance Officer Robert Ardizzoni conducted the inspection in this case. He testified that he observed an employee working on a scaffold that was not pinned (Tr. 13). This was not an issue as the parties stipulated the scaffolding was not pinned during the relevant period. Ardizzoni further testified that a Lull Lift was used to deliver material to the scaffold. He explained this was a type of forklift with an extending boom which allowed the placement of material on the scaffold from a distance. In observing the operation and, from his experience, Ardizzoni believed uplift could occur because the forks came so close to the scaffold (Tr. 16-17, 35).

Charles Fleming, a laborer, testified that he performed work on the scaffold and that often the lift operator was required to make adjustments to the height of the forks while

they were in close proximity to the scaffold. From time to time the load would bump or hit the scaffold (Tr. 68, 70-72).

Mr. Ardizzoni noted in his testimony that foreman Pat England told him the scaffolding should have been pinned (Tr. 15). It is, therefore, argued that Pyramid admitted uplift may occur. England denied that he told Ardizzoni the scaffolds were supposed to be pinned (Tr. 15). On cross-examination, Ardizzoni acknowledged that England stated at the closing conference that he did not believe the scaffold needed to be pinned because uplift could not occur (Tr. 48). On the basis of the record, Pyramid is not deemed to have admitted that uplift may have occurred.

Mr. John Doherty, president of Pyramid, testified that over the past fourteen years he has been engaged in approximately 1,500 projects with 90 to 95 percent involving multi-stage scaffolds (Tr. 76-77). He testified regarding his experience in the masonry industry and with trade associations, and that he is not aware of any contractor who pins multi-frame scaffolds (Tr. 78-80).

Doherty explained that each frame of the scaffold is approximately 5 feet wide and 6 feet high. The scaffold is secured to the wall at every third frame which is approximately 21 feet wide and 18 feet high. He stated each scaffold is double-braced on the inside as well as the outside. Masons work from outriggers that are attached to the scaffold and located between the scaffold and the wall. Materials are placed on the planked platform areas between the frames (Tr. 87-88).

Mr. Doherty acknowledged that a Lull Lift was used at the construction site. With its transverse carriage feature, the operator can move material on or off the scaffold without moving the vehicle. He explained the operating procedure whereby material is raised slightly above the scaffold planking as it reaches the scaffold. With use of the transverse carriage, it is then moved forward over the planking and lowered. The lifting forks, which are not raised during the procedure, are then retracted. When material is removed from the scaffold platform, the procedure is the same except the forks are raised a few inches off the platform before material is moved away. The material is clear of the scaffold before it is moved away with the transverse carriage (Tr. 88-94).

In its attempt to show the standard does not apply, Pyramid points out what is necessary in order for uplift to occur. Mr. Doherty states that a pallet carrying material would have to be raised approximately 6 feet before striking the planking on the stage above (assuming it was planked). If this occurred, the planking would be raised but not the scaffold frame because the planking is not secured to the frame. Frames can only be lifted when the planking is raised high enough to raise the cross bracing which is attached to the scaffold frame (Tr. 95). If the frames become dislodged, they would be held in place by the double bracing. In addition, the scaffold is self-supporting because it is attached to the building (Tr. 97-98).

Mr. Doherty pointed out that in the event of a malfunction in the Lull Lift, it would lock in place because there is a safety valve on each hydraulic cylinder on the lift (Tr. 98-99). Pyramid also shows that operators are instructed on the proper operation of the lifts and requires that they are experienced. The operator at the time of the inspection had been employed for twelve years (Tr. 101-102).

The basis for the alleged violation is the operation of the Lull Lift in close proximity to the scaffolds. Mr. Ardizzoni stated: "From my observations and experience in inspecting construction sites, a Lull Lift can and has caused uplift before" (Tr. 35). Although he observed the lift or material contact the scaffold several times, he admitted uplift did not occur (Tr. 33).

Pyramid shows that over the last fourteen years, it has been the subject of approximately thirty OSHA inspections and has not been issued a citation for failure to pin scaffolds (Tr. 81). Doherty states that Pyramid has never had an accident as a result of the Lull Lift striking or raising the scaffold, and he has not heard of this happening in the industry (Tr. 99-100).

The evidence of record is not convincing that uplift may occur under the circumstances of this case. Likewise, the Secretary has failed to establish, by a preponderance of the evidence, that there was noncompliance with the standard. Also, the evidence fails to disclose employees were exposed to a hazard or that Pyramid knew or could have known of the violative conditions.

The standard was not violated as alleged.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

That part of Citation No. 1 alleging a violation of 29 C.F.R. § 1926.451(d)(6) is hereby vacated.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: September 7, 1994