

The employer's vice president, Jimmy Ezzell, testified that he was at the site the morning after the inspection and that the anchorage of the two scaffolds was not connected. He also asserted that the photographs in evidence show the same thing. The judge found that he could draw no conclusion on that issue from the photographs. He resolved the contrasting testimony with a credibility finding in favor of the CO's testimony.

Our detailed review of the photographic evidence convinces us, however, that the two scaffolds were not connected. Ex. C-2 shows the south scaffold, with the west scaffold to the far left. That photo shows that the two scaffolds were not connected at any point above the ground.

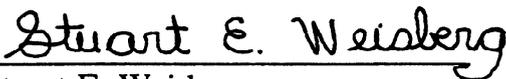
Ex. C-3 shows the haphazard anchorage under the upright at the outside corner of the west scaffold. Ex. C-4 shows that a part of that anchorage, a 4 x 4-inch piece of lumber that ran east-west, also anchored the upright on the inside front corner of the west scaffold. However, the Secretary does not allege a violation as to that scaffold (no Brickfield employees were working from it at the time of the inspection). The alleged violation is based on the CO's testimony that the 4 x 4-inch board continued beyond the west scaffold and served as part of the foundation for the south scaffold.²

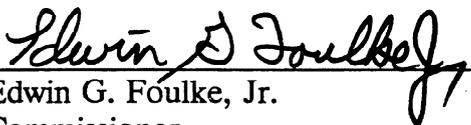
However, Ex. C-4 shows that that board went no further than the inside front corner of the west scaffold. It did not extend to the south scaffold, which began to the right of the red tapes that are visible in Exs. C-4 and C-2. Thus, we reject the judge's reliance on credibility findings, because the photographic evidence conclusively supports Brickfield's position. *E.g., Beta Constr. Co.*, 16 BNA OSHC 1435, 1442-43, 1993 CCH OSHD ¶ 30,239, pp. 41,649-50 (No. 91-102, 1993) (Commission will disregard judge's credibility findings, even those based on witnesses' demeanor, if inconsistent with record), *petition for review filed*, No.

²At the hearing, the judge saw copies of Exs. C-3 and C-4 on which the CO identified the anchorage in question by drawing a triangle in red ink. Those copies did not become part of the official record, but the Secretary forwarded his copies to us upon request, and they contain such markings. Those copies are a part of the record now as "Recovered Exhibits C-3 and C-4." They further clarify what is apparent from the rest of the record--that the CO's basis for the alleged violation was her belief that the 4 x 4-inch board extended to the south scaffold.

93-1817 (D. C. Cir. Dec. 3, 1993); *Asplundh Tree Expert Co.*, 7 BNA OSHC 2074, 2078-79, 1980 CCH OSHD ¶ 24,147, pp. 29,346-47 (No. 16162, 1979).

Accordingly, we vacate citation no. 1, item 2. The judge's rulings on the other contested citation items are final orders of the Commission.


Stuart E. Weisberg
Chairman


Edwin G. Foulke, Jr.
Commissioner


Velma Montoya
Commissioner

Dated: February 24, 1995



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SECRETARY OF LABOR,
 :
 :
 Complainant,
 :
 :
 v. :
 :
 BRICKFIELD BUILDERS, INC., :
 :
 Respondent. :
 :

Docket No. 93-2801

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 24, 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.
 Ray H. Darling, Jr.
 Executive Secretary

February 24, 1995
 Date

Docket No. 93-2801

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,

v.

BRICKFIELD BUILDERS, INC.
Respondent.

OSHRC DOCKET
NO. 93-2801

**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 May 26, 1994. The decision of the Judge will become a final order of the Commission on June 24, 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 June 15, 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.
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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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 26, 1994

DOCKET NO. 93-2801

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 93-2801-S
	:	
BRICKFIELD BUILDERS, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

James E. Culp, Esquire
Dallas, Texas
For the Complainant.

Jimmy W. Ezzell
Howard Hosek
Houston, Texas
For the Respondent, *pro se*.

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 July 27, 1993, the Occupational Safety and Health Administration ("OSHA") inspected a construction site in Galena Park, Texas, where various contractors were engaged in a school addition project; Respondent, the masonry contractor, had erected three-tiered scaffolding along the south and west walls of the addition in order to brick the exterior. As a result of the inspection, the company was issued a serious, repeat and "other" citation. The company contested the citations, and a hearing was held on February 1, 1994, in Houston, Texas.

Serious Citation 1 - Item 1 - 29 C.F.R. 1926.25(a)

Colleen Roulston is the OSHA compliance officer (“CO”) who inspected the site. She testified she observed a pile of debris consisting of broken bricks and boards in front of and underneath the scaffolding along the south wall of the addition, as shown in C-1, when she arrived at the site that morning, and that the pile was still there when she inspected Brickfield’s work area that afternoon. She saw an employee walk through the pile at that time to get to the scaffolding, and Leroy Mitsche, the company’s jobsite foreman, told her the individual was a Brickfield employee; C-2, a more distant view, shows workers on the scaffolding along the south wall. Roulston noted it is the nature of the business to have debris but that this pile was large and presented a serious hazard; employees would have had to go through it to access the scaffolding and the bricks shown in C-1 and could have tripped and fallen, it could have compounded injuries if a worker had fallen from the scaffold, and there was a board with a nail protruding from it, depicted at the far right of C-1, which could have injured anyone stepping or falling on it. (Tr. 12-19; 22-26; 41; 44; 47-51).

The subject standard provides as follows:

During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Respondent concedes the debris was a hazard, and does not seriously contend employees were not exposed to it; although Jimmy Ezzell, Brickfield’s vice president, testified employees could have gone around the debris he admitted workers were not trained in this regard and presented nothing to refute the CO’s testimony. (Tr. 23; 26; 29-31; 39; 50-51; 144-45). Ezzell further testified it would have been more hazardous for employees to clean up the debris with workers overhead and that it was impractical to stop work to clean up in the middle of the day. (Tr. 24-29; 189-90). However, the CO testified that employees on the scaffold could have worked in a different area while the debris was removed, and Ezzell admitted this could have been done. (Tr. 42; 143-44). Based on the record, Respondent was in serious violation of the standard.

Turning to the assessment of an appropriate penalty, I note Respondent had about eighty employees at the time of the inspection but less than thirty-five at the time of the hearing. (Tr. 7). I note also the CO considered the gravity of the condition low, and that the company had only seven employees at the site. (Tr. 19-20; 23-24). After considering these factors, and the company's history and good faith, a penalty of \$300.00 is assessed for this item.

Serious Citation 1 - Item 2 - 29 C.F.R. 1926.451(d)(4)

Colleen Roulston testified the footage or anchorage supporting the scaffolding at the building's southwest corner was unstable and inadequate to support the load; the outside leg of the end frame on the west side scaffolding was supported by boards that were stacked haphazardly, and while no one was working on the west side that day the board below the top board on which the west side end frame sat ran north and south and also supported the south side end frame. C-3 and C-4 depict the condition, which Roulston described as a serious hazard because of the possibility the anchorage could slip or shift, causing the scaffolding on both walls, and consequently employees, to fall. She noted that C-5, an excerpt from Safway scaffolding erection instructions, showed the proper way to support a scaffold in this situation. She also noted there were not only employees but also bricks and mortar tubs on the scaffold, which contributed to the hazard. (Tr. 59-77; 81-83; 97).

The subject standard provides as follows:

Scaffold legs shall be set on adjustable bases or plain bases placed on mud sills or other foundations adequate to support the maximum rated load.

Respondent contends there was no violation based on Jimmy Ezzell's testimony that the photos show the scaffolding was not connected. (Tr. 79-83; 147-50). I find, however, that no such conclusion can be drawn from C-4-5; while they clearly show the subject anchorage they do not show the connecting area described by the CO. The CO, the only witness who was at the site that day, was emphatic that the west and south end frames were supported by the same anchorage. Ezzell, on the other hand, testified that he was at the site the next morning and that the end frames were not connected. (Tr. 151; 156-57). I observed the demeanor of both witnesses and found the CO's testimony both convincing and

exhibiting a clearer and more forthright recollection of the actual factual situation; moreover, Respondent could have presented the testimony of Leroy Mitsche, the jobsite foreman, but did not do so. For these reasons I credit the CO's testimony over that of Respondent's vice president, and the company's contention is therefore rejected.

Respondent next contends the anchorage was adequate to support the load; in this regard, Ezzell testified that in his opinion, the anchorage shown in C-3-4 was more stable than that depicted in C-5. (Tr. 67-73; 151-55; 190). Respondent's contention is rejected, as a comparison of C-5 with C-3-4, together with the CO's testimony, convinces the undersigned the cited anchorage was unstable and in violation of the standard; this item is therefore affirmed as a serious violation. As to an appropriate penalty, the CO considered the condition of medium gravity. (Tr. 63). Based on this factor, and those set out *supra*, a penalty of \$900.00 is assessed.

Serious Citation 1 - Item 3 - 29 C.F.R. 1926.451(d)(7)

Colleen Roulston testified she and Leroy Mitsche looked at the entire 98 feet of scaffolding along the south wall, and that it was not tied to the structure at any point. She noted the standard requires scaffolding to be tied off every 30 feet to prevent movement, which can cause scaffolding to collapse. She further noted her conclusion that there was no reason the scaffolding could not be tied off, although Mitsche told her he knew of no way to do it, and OSHA's position that tie-backs must be used on scaffolding until it is taken down; in this regard, Roulston pointed out that bricks could have been left out at the points where tie-backs were required on the subject addition and then put in place with a lift after the scaffolding was taken down. (Tr. 84-90).

The subject standard provides as follows:

To prevent movement, the scaffold shall be secured to the building or structure at intervals not to exceed 30 feet horizontally and 26 feet vertically.

Respondent does not dispute the hazard of unsecured scaffolding, but contends the scaffolding at the site was secured; in this regard, Jimmy Ezzell testified that when he went to the site the next morning the scaffolding was tied off with wire every 24 feet at the second and third levels and that it had to have been tied off the day before as the wall had already

been built. (Tr. 157-65; 190-91). However, the CO was emphatic that she inspected the entire wall and that the scaffolding was not tied off at any point, and based on my credibility determinations in the preceding discussion her testimony is credited over that of Ezzell. This item is accordingly affirmed as a serious violation. Turning to an appropriate penalty for this item, the CO considered the condition to be of low gravity. (Tr. 86). On the basis of this factor and the others set out above, a penalty of \$300.00 is assessed.

Repeat Citation 2 - 29 C.F.R. 1926.451(a)(13)

Colleen Roulston testified there was no access ladder to the south wall scaffolding, and that Leroy Mitsche confirmed this was the case when she asked him; there was an access ladder to the west wall scaffolding, but since the west and south scaffolding had no connecting planking workers getting up on the south scaffolding would have had to climb up its frame or cross bracing. Roulston noted the citation was issued as a repeat because the company had been cited in 1990 pursuant to the same standard; C-6 shows the previous citation, and C-7-8 show its disposition. (Tr. 92-103).

The subject standard provides as follows:

An access ladder or equivalent safe access shall be provided.

Respondent does not dispute an access ladder was required, but contends that there was one. Specifically, Jimmy Ezzell testified he ordered several access ladders for the job and that when he got to the site the next morning there was an access ladder at the east end of the south wall scaffolding; he noted the access ladder for the west wall scaffolding was shown in C-4, that the access ladder he saw on the south wall was to the right of the scene depicted in C-2, and that he was unaware of any company jobs not having access ladders since the 1990 citation. (Tr. 166-69; 191-92).

Although Ezzell's testimony has been considered, that of the CO is credited over his in light of my credibility findings, *supra*; this citation item is therefore affirmed as a repeat violation. In regard to an appropriate penalty, the CO considered this violation of low gravity. (Tr. 96). Based on this factor and the others set out above, as well as the fact that this is a repeat citation, a penalty of \$600.00 is assessed.

Repeat Citation 2 - Item 2 - 1926.451(d)(3)

Colleen Roulston testified there were at least three sections of the south side scaffolding that were not fully braced, shown by the circled areas on C-9-11; she noted the standard requires cross bracing on the front and back of all sections of tubular welded frame scaffolding to make it square and secure, that inadequate bracing can cause a scaffold to shift and even collapse, and that bracing is especially important on end frames. Roulston agreed bracing must be taken off to move objects like the mortar tub in C-11 on and off scaffolds, but disagreed such was the case at the time of her inspection; she observed the worker in C-10 going from section to section to put on the missing bracing after her arrival to the area and no items were being put on or taken off the scaffold then. Roulston said this item was issued as a repeat citation due to a 1990 violation of the same standard, as established by C-6-8. (Tr. 104-25).

The subject standard provides, in pertinent part, as follows:

Scaffolds shall be properly braced by cross bracing or diagonal braces, or both, for securing vertical members together laterally, and the cross braces shall be of such length as will automatically square and aline vertical members so that the erected scaffold is always plumb, square, and rigid.

Respondent contends, based on the testimony of Jimmy Ezzell, that the missing bracing was due to items being put on and taken off the scaffold. (Tr. 169-75; 192-93). However, he admitted he had no personal knowledge of what occurred as he was not there that day, and that any bracing removed should have been replaced. (Tr. 170-71; 174). The CO testified, as noted above, that she saw the worker in C-10 going from section to section to put on bracing after her arrival, when no items were being put on or taken off the scaffold. As Ezzell was not there his opinion about what happened can only be viewed as speculation, and Respondent did not present the testimony of Leroy Mitsche, the jobsite foreman. This item is therefore affirmed as a repeat violation, and a penalty of \$600.00 is assessed; this penalty is based on the factors set out in the preceding discussion, and the fact the CO considered the violation of low gravity. (Tr. 111).

“Other” Citation 3 - Item 1 - 29 C.F.R. 1926.150(a)(1)

Colleen Roulston testified that all of the fire extinguishers at the site had been put in the school cafeteria, apparently by the general contractor, and that there were no water hoses available; extinguishers are to be kept every 100 feet on construction jobs, and employees would have had to travel several hundred feet to get to one. Roulston said there were combustibles such as wood at the site, but that the condition was cited as “other” because a fire was not likely; she also said that Leroy Mitsche was unable to produce an extinguisher. (Tr. 128-30; 133).

The subject standard provides as follows:

The employer shall be responsible for the development of a fire protection program to be followed throughout all phases of the construction and demolition work, and he shall provide for the firefighting equipment as specified in this subpart. As fire hazards occur, there shall be no delay in providing the necessary equipment.¹

Respondent contends that it was the general contractor’s responsibility to provide fire extinguishers for the building. (Tr. 130-33; 178-79; 193). However, Commission precedent is well settled that each employer is responsible for the safety of its own employees, notwithstanding another’s contractual obligation to provide the necessary protection. *See, e.g., Anning-Johnson Co.*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976). The CO’s testimony shows Brickfield employees were exposed to the risk of fire, although the risk was low, and Respondent did not rebut her testimony. The CO’s testimony also shows that all employers present at the site, including the general contractor, were cited for this condition. (Tr. 132-35).

Respondent further contends, based on the testimony of Jimmy Ezzell, that it had fire extinguishers on the Lull forklift and Bobcat swinger it had at the site. (Tr. 132-33; 176-77). However, Ezzell admitted the equipment would not always have been within 100 feet of the addition. (Tr. 176-77). Moreover, Ezzell’s testimony is undercut by that of the CO that

¹29 C.F.R. 1926.150(c)(1)(i) provides, in pertinent part, that “[t]ravel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.”

Leroy Mitsche, the jobsite foreman, was unable to produce an extinguisher. This item is affirmed as a nonserious violation. No penalty is assessed.

Conclusions of Law

1. Respondent, Brickfield Builders, 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. On July 27, 1993, Respondent was in serious violation of 29 C.F.R. §§ 1926.25(a), 1926.451(d)(4) and 1926.451(d)(7).

3. On July 27, 1993, Respondent was in repeat violation of 29 C.F.R. §§ 1926.451(a)(13) and 1926.451(d)(3).

4. On July 27, 1993, Respondent was in "other" violation of 29 C.F.R. § 1926.150(a)(1).

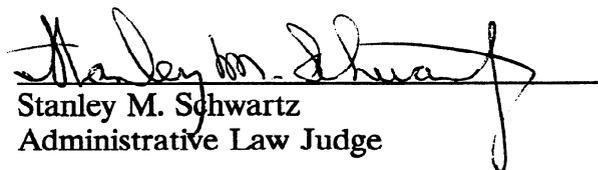
Order

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

1. Items 1, 2 and 3 of serious citation number 1 are AFFIRMED, and penalties of \$300.00, \$900.00 and \$300.00, respectively, are assessed.

2. Items 1 and 2 of repeat citation number 2 are AFFIRMED, and a penalty of \$600.00 is assessed for each item.

3. Item 1 of "other" citation number 3 is AFFIRMED, and no penalty is assessed.


Stanley M. Schwartz
Administrative Law Judge

Date: MAY 19 1994