



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,
v.
MCDONALD MASONRY
Respondent.

OSHRC DOCKET
NO. 93-3218

**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 August 10, 1994. The decision of the Judge will become a final order of the Commission on September 9, 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 August 30, 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

Date: August 10, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-3218

NOTICE IS GIVEN TO THE FOLLOWING:

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Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
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SECRETARY OF LABOR,

Complainant,

v.

MCDONALD MASONRY,

Respondent.

OSHRC DOCKET NO. 93-3218

APPEARANCES:

Nancy B. Carpentier, Esquire
Dallas, Texas
For the Complainant.

Before: Administrative Law Judge Stanley M. Schwartz

DECISION AND ORDER

This is a proceeding 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”). The Occupational Safety and Health Administration (“OSHA”) inspected a jobsite in De Soto, Texas, where Respondent was engaged in masonry work, on July 28, 1993; as a result, Respondent was issued a serious citation with five items and an “other” citation with one item. The company contested items 1 through 4 of the serious citation.¹

On March 1, 1994, a notice was sent to Billie McDonald, the company’s owner, at Respondent’s address of record, advising that a hearing would be held at 10:00 a.m. on June

¹Since item 5 of the serious citation and item 1 of the “other” citation were not contested, they have become a final order of the Commission by operation of law. (Tr. 6-7).

8, 1994, in Room 7B11 in the Federal Building at 1100 Commerce Street in Dallas, Texas. McDonald signed the certificate of posting regarding the notice, certifying the notice had been posted as required on March 2, 1994, and then returned the certificate to the office of the undersigned judge where it was received on March 11, 1994. On June 7, 1994, my office called McDonald's place of business and left a message on the answering machine about the hearing the next day. However, McDonald did not appear at the hearing, and after waiting until 10:30 a.m. the undersigned concluded the company had decided not to pursue its notice of contest and accordingly began the hearing for the purpose of allowing the Secretary to present his evidence in regard to the contested citation items.² (Tr. 3-8).

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

Gloria Jones, the OSHA compliance officer ("CO") who inspected the site, testified she met first with Mr. Whitaker, the general contractor's superintendent, and then with Mr. Hancock, McDonald's foreman. Pursuant to her inspection, Jones saw broken concrete blocks, wood pieces and other refuse around the legs of the scaffolding on which McDonald's employees were working, as shown in G-1-4. Jones determined the debris was a serious hazard because employees could have tripped and fallen when accessing the scaffolding, resulting in possible head injuries or broken bones, and because workers could have fallen against the scaffolding and caused it to collapse, since the legs were not secure and level as required; McDonald had eight to ten employees working on the scaffolding, and those on the top level, as shown in G-5-6, would have fallen 19 feet had it collapsed. Jones disagreed with the company's statement in its notice of contest that debris was always picked up at the end of the day; she got to the site about 8:10 a.m. and began her inspection shortly thereafter, and Whitaker informed her he had told Hancock to clean up the refuse that morning as well as the day before. (Tr. 6-21; 30-35; 38-40).

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

²As noted at the beginning of the hearing, the Secretary need only present a prima facie case for the undersigned to find violations of the contested items. (Tr. 5).

work areas, passageways, and stairs, in and around buildings or other structures.

Based on the CO's testimony, the Secretary has established a serious violation of the standard. The CO's testimony about the condition and the types of injuries which could have resulted were un rebutted, and her opinion about the scaffold legs is supported by the finding of violations as to items 2 and 4, *infra*. This item is therefore affirmed as a serious violation. In regard to a penalty, the CO considered the company's size, history, and good faith, and the gravity of the violation, in arriving at a proposed penalty of \$1,750.00; she considered the condition of medium gravity but the probability of injury great in case of an accident. (Tr. 16-18). In view of these factors, the proposed penalty is assessed.

Citation 1 - Item 2 - 29 C.F.R. § 1926.451(a)(2)

Gloria Jones testified that some of the scaffold legs were not secure because they were sitting on pieces of wood, as shown in G-2-3, which could have been displaced; a worker could have kicked or tripped on the wood pieces in walking by, as they overlapped the concrete blocks they rested on, which could have caused the wood to move and the scaffold to become dislodged. Jones considered the condition a serious hazard of high gravity due to the debris around the scaffolding and the height at which employees were working, and Hancock agreed with her findings and told her he would keep workers off the scaffolding until he could get all the problems corrected. Jones did not know if additional equipment was delivered later that day, as stated in the notice of contest, but said the scaffolding should not have been used if incomplete and that she disagreed with the company's assertion that the boards were cut for and rigid enough for standard scaffolding. (Tr. 18-24; 29; 36; 40-41).

The subject standard provides as follows:

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.

On the basis of the CO's testimony, the Secretary has demonstrated a serious violation of the standard. This citation item is accordingly affirmed as a serious violation, and the proposed penalty of \$1,250.00 is assessed.

Citation 1 - Item 3 - 29 C.F.R. § 1926.451(a)(13)

Gloria Jones testified there was no access ladder at the site, and that Hancock told her workers used the ends of the scaffold, as depicted in G-5, to climb up it; the condition was a serious fall hazard as the planking overlapped the scaffold ends and employees would have had to pull themselves up over the planking, and there was nothing other than the planking to grab hold of to do so. Jones considered the condition to be of high gravity, and did not know if an access ladder was installed later that day as stated in the company's notice of contest. (Tr. 24-31; 41).

The subject standard provides as follows:

An access ladder or equivalent safe access shall be provided.

In view of the testimony of the CO, a serious violation of the standard has been shown. This item is affirmed as a serious violation, and the proposed penalty of \$1,250.00 is assessed.

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

Gloria Jones testified there were no base plates on any of the scaffold legs at the site, which was a serious hazard because the legs were not balanced and level as required and the scaffolding was subject to movement and collapse; some of the legs were on wood pieces and some were on wood resting on concrete blocks, as shown in G-3-4, and even though there was cement under the dirt on which all the legs sat base plates were still required because the dirt was uneven and could have shifted. Jones said a base plate would have fit over the footing shown on the leg in G-3; she considered the lack of base plates to be of high gravity. (Tr. 31-42).

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.

Based on the CO's testimony, the Secretary has established a serious violation of the standard. This item is accordingly affirmed as a serious violation, and the proposed penalty of \$1,250.00 is assessed.

Conclusions of Law

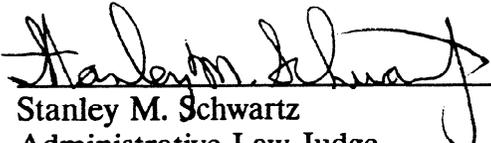
1. Respondent, McDonald Masonry, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.25(a), 1926.451(a)(2), 1926.451(a)(13) and 1926.451(d)(4).

Order

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

1. Items 1 through 4 of serious citation 1 are AFFIRMED as serious violations. A penalty of \$1,750.00 is assessed for item 1, and penalties of \$1,250.00 each are assessed for items 2 through 4.


Stanley M. Schwartz
Administrative Law Judge

Date: **AUG -1 1994**