



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
REGIONAL SCAFFOLDING & HOISTING CO.
Respondent.

**OSHRC DOCKET
NO. 94-0765**

**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 13, 1995. The decision of the Judge will become a final order of the Commission on October 13, 1995 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 3, 1995 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

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

Date: September 13, 1995

DOCKET NO. 94-0765

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhause, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Michael Mazzucca, Vice President
Regional Scaffolding & Hoisting
Co., Inc.
3900 Webster Avenue
Bronx, NY 10470

Irving Sommer
Chief Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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United States of America
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 1120 20th Street, N.W., Ninth Floor
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Phone: (202) 606-5405

Fax: (202) 606-5409

SECRETARY OF LABOR,	:
	:
Complainant,	:
	:
v.	:
	:
REGIONAL SCAFFOLDING & HOISTING CO.,	:
	:
Respondent.	:

OSHRC Docket No. 94-765

APPEARANCES:

Patricia M. Rodenhause, Esq.
 Regional Solicitor
 Alan L. Kammerman, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 201 Varick Street
 New York, New York 10014
 For Complainant

Michael Mazzucca
 Regional Scaffolding & Hoisting Co., Inc.
 3900 Webster Avenue
 Bronx, New York 10470
 For Respondent, *pro se*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), to review a citation issued by the Secretary of Labor pursuant to section 9(a) of the Act, and the proposed assessment of penalties therein issued, pursuant to section 10(a) of the Act. Regional Scaffolding and Hoisting Company (“Regional”) filed a timely notice of contest placing all the citation items and penalties in issue. Accordingly, the Commission has

jurisdiction of this proceeding. Regional admits that it is engaged in a business affecting commerce. Therefore, Regional is an employer under section 3(5) of the Act, and the Act applies to its work activities. A hearing was held, at which Regional was represented by Michael Mazzucca, who is one of its owners and its Vice-President of Operations.

BACKGROUND

The Secretary alleged that Regional committed two violations of safety standards for scaffolding based on an inspection of a worksite in White Plains, New York. It is undisputed that two employees of Regional stood on a tubular welded frame scaffold about 15 feet in height while welding plates onto a steel beam that ran in front of the scaffold. The record further shows that Regional had erected the scaffolding and knew that its employees were working there. (Tr. 7, 9, 10, 12, 17, 20, 30, 32, 43, 49-50; exhs. C-1 through C-3). The Secretary alleged one violation of 29 C.F.R. § 1926.451(a)(13), which applies to scaffolds generally, and one violation of 29 C.F.R. § 1926.451(d)(10), a provision applying specifically to tubular welded frame scaffolds.

ALLEGED VIOLATION OF 29 C.F.R. § 1926.451(a)(13)

This standard requires:

§ 1926.451 Scaffolding.

(a) *General requirements.*

....

(13) An access ladder or equivalent safe access shall be provided.

There was a ladder secured to the steel deck above the scaffold positioned about 5 feet to the right of the scaffold. Exhibit C-1 shows this to be a portable, extension-type ladder. The employees, however, did not use this ladder when they descended from the scaffold. Rather, the Secretary's compliance officer, William Donovan, observed the employees climbing down the rungs of the scaffold, which were spaced between 18 and 24 inches apart. (Tr. 9-10, 16, 19).

In its answer Regional raised an affirmative defense that the violation is *de minimis* in nature. A *de minimis* violation is one having no tangible relationship with safety and health. *Concrete Constr. Co.*, 15 BNA OSHC 1614, 1621, 1991-93 CCH OSHD ¶ 29,681, p. 40,245 (No. 89-2019, 1992). The Commission has previously held that a violation of section 1926.451(a)(13) exists where an employee climbs down the rungs of a scaffold if the rungs, as in this case, are not spaced at the

same interval required for ladder rungs. However, those decisions also hold that such violations are *de minimis* because employee safety is not “appreciably diminished” by the difference in spacing between scaffold rungs and the rungs of a ladder. *Charles H. Tompkins*, 6 BNA OSHC 1045, 1047, 1977-78 CCH OSHD ¶ 22,337, pp. 26,918-19 (No. 15428, 1977) and cases cited therein.¹ In accordance with this precedent, I find the violation here *de minimis*.

ALLEGED VIOLATION OF 29 C.F.R. § 1926.451(d)(10)

This standard requires in pertinent part:

§ 1926.451 Scaffolding.

....

(d) *Tubular welded frame scaffolds.*

....

(10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection) and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be minimum of 4 inches in height.

There was a top rail on the sides and rear of the scaffold but no midrails or toeboards. The employees on the scaffold were using hand tools and working with welding rods. Employees of other contractors were in the area around the base of the scaffold. Donovan testified that the employees were exposed to the hazard of a fall due to the absence of proper guardrails and that toeboards were needed to prevent tools or other objects which might be dislodged from falling onto individuals on the ground below. (Tr. 9, 12, 19-20, 22, 37, 41, 53; exh. C-1). Regional’s foreman, Darren Good, testified that the beam on which the employees were doing welding provided sufficient fall protection at the front of the scaffold. (Tr. 51). I find that Good’s testimony is corroborated by exhibit C-1. However, the lack of a proper guardrail around the remainder of the scaffold and the

¹The scaffold rungs in *Tompkins* were spaced 18 to 20 inches apart. The Commission noted that the ladder standards in effect at that time, 29 C.F.R. § 1926.450(a)(3)-(5), require a uniform distance between rungs of 12 inches. The ladder standards have since been amended and now specify that the spacing on rungs of portable ladders may vary from 10 to 14 inches or from 8 to 18 and 6 to 12 inches, depending on the type of portable ladder. 29 C.F.R. § 1926.1053(a)(3)(i) & (a)(3)(iii). There is less divergence between the spacing of the rungs of Regional’s scaffold and the permissible range of spacing for ladder rungs under the current ladder standards than there was between the scaffold rungs and the required ladder spacing in *Tompkins* and similar cases.

complete absence of a toeboard is clear and unrefuted. I find that the Secretary has made a prima facie showing of a violation by a preponderance of the evidence.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission. *Long Mfg. Co., N.C. v. OSHRC*, 554 F.2d 903, 908-09 (8th Cir. 1977). In assessing penalties, the Commission takes into account the employer's size, its good faith, its history of previous violations, and most important, the gravity of the violation. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Here, two employees were exposed to a fall, but there is no direct evidence of how long they were exposed. The employee shown in exhibit C-1 appears to be working fairly close to the edge of the scaffold, and a fall from a height of 15 feet could easily result in serious injury. On balance, I consider the gravity to be moderate. Donovan testified that Regional had previously committed serious violations of the Act, but he also stated that Regional demonstrated good faith by having a written safety program. On balance, I conclude that a penalty of \$700 is appropriate.

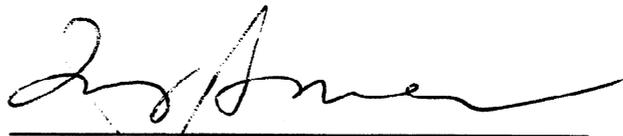
FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specifically and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based on the Findings of Facts, Conclusions of Law, and the entire record, it is hereby ordered:

- 1) Citation no. 1, item 1 is affirmed as a *de minimis* violation.
- 2) Citation no. 1, item 2 is affirmed, and a penalty of \$700 is assessed.



IRVING SOMMER
Chief Judge

DATED:

SEP 12 1995

Washington, D.C.