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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>SUPERIOR MASONRY BUILDERS, INC.,<br>Respondent. | OSHRC Docket No. 96-1043 |

***DECISION***

Before: RAILTON, Chairman; STEPHENS, Commissioner.

BY THE COMMISSION:

This case arises out of an inspection by a compliance officer of the Occupational Safety and Health Administration ("OSHA") of a scaffold collapse at a worksite in Brookfield, Wisconsin. The scaffold, which was fitted with a canopy-like covering called a winter enclosure, collapsed during a period of high wind while employees of Superior Masonry Builders, Inc. ("Superior") were working on it. As a result of the inspection, OSHA issued two citations to Superior alleging willful and serious violations of scaffolding and training standards. Superior contested the citations, and a hearing was held before Administrative Law Judge Sidney J. Goldstein. In his decision, the judge affirmed the two items in the serious citation, and he affirmed as serious the one item in the willful citation. He assessed a penalty of $7,000 for each violation.

For the reasons that follow, we vacate the willful citation and affirm the two violations in the serious citation, for which we assess a penalty of $7,000 each.

## Background

At the time of the collapse, seven of Superior's employees were working from the scaffold installing brick veneer on the exterior wall of a building under construction. The building was approximately twenty feet high with a flat roof. The tower scaffolds in use, made by Morgen Manufacturing Company ("Morgen"), were comprised of sixteen towers that ran about 112 feet from north to south along the east side of the building. Each of the towers was made up of three nine-foot sections placed on a two-foot base. The towers were 7-1/2 feet apart and were joined by cross-braces or "X-braces," horizontal braces, and stringer braces. In addition, for the first thirteen towers, wall anchors were placed into the wall at about 15 feet vertically and every other tower was connected to a wall anchor with a tie. The last three towers – two of which were to be moved around the corner of the building to another work area – were not connected to the building, but they were still connected to the line of towers by braces. The employees were working from a "carriage," or steel platform covered by wooden planks that were suspended between the towers. The platform was periodically raised as the work progressed.

The winter enclosure, which was also manufactured by Morgen, was designed to allow work to continue in inclement weather. It consists of a large plastic cover draped over a frame attached to the towers. At the time of the accident, the enclosure had just been raised level with or slightly above the roofline at the north end of the scaffold. Apparently, a gust of wind caught the plastic and tore the scaffolds away from the wall, causing each set of towers to pull down the next set. All seven Superior employees on the scaffold fell and were injured.

**Willful Citation 2, Item 1**

The Secretary charges that Superior did not adequately connect the tower scaffolds to the building as required by 29 C.F.R. § 1926.451(a)(15).[1] She alleges that:

> 0. "Stiff Arm Braces" and wall anchors were not provided at each of the sixteen (16) Morg[e]n towers at least at nine (9) foot vertical intervals;
>
> (a) "Stiff Arm Braces" were not installed at the two northernmost wall anchor points permitting the last six (6) Morg[e]n towers to become unstable and initiate a chain reaction which toppled all but two of the remaining ten (10) towers;
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> (b) "Stiff Arm Braces" and wall anchors were not provided at each of the sixteen (16) [Morgen Towers at] least at eighteen (18) foot vertical intervals.

The threshold issue before us on review is whether section 1926.451(a)(15) requires that the scaffold be attached to the wall of the building as the Secretary charges. Superior argues that the language "securely and rigidly braced" in the standard refers to connecting the scaffold members to each other, not to the building wall, and therefore the standard does not apply here. The Secretary argues that her interpretation of "brace" to include attachment to the building is reasonable and consistent with the standard's meaning and purpose, and thus it should be accorded substantial deference. The judge affirmed the citation without addressing the issue of the applicability of the cited standard.

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[1] At the time the citation was issued, the standard provided :

> **§ 1926.451 Scaffolding.**
>
> (a) *General requirements*.
>
> ….
>
> (15) The poles, legs, or uprights of scaffolds shall be plumb, and securely and rigidly braced to prevent swaying and displacement.

In a large-scale revision of the scaffolding standards issued on August 30, 1996, a month after the subject citation was issued to Superior, section 1926.451(a)(15) was deleted. 61 Fed. Reg. 46,026 (August 30, 1996). That section's requirements were moved to new section 1926.451(c)(3) under the new heading of *Criteria for supported scaffolds. Id.* at 46,104.

We first consider the text and structure of the standard at issue. *See, e.g.*, *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993); *see generally Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the meaning of the language is not ambiguous, the inquiry ends there. *See Unarco*, 16 BNA OSHC at 1503, 1993-95 CCH OSHD at p. 41,732. If the meaning is ambiguous, consideration should be given to any contemporaneous legislative history, and then to the Secretary's interpretation so long as it is reasonable.[2] *Id.*, 16 BNA OSHC at 1502, 1993-95 CCH OSHD at 41,732.

At the time of both the accident and the citation, "brace" was defined under the scaffold standard as "[a] tie that holds one scaffold member in a fixed position *with respect to another member*." 29 C.F.R. § 1926.452(b)(3) (July 1996) (emphasis added).[3] Because a scaffold "member" cannot be read to include the adjoining building, "bracing" can occur *only* within the scaffold structure itself. Thus, when the definition is read into the language of the cited standard – "[t]he poles, legs, or uprights of scaffolds shall be plumb, and securely and rigidly braced to prevent swaying and displacement" – we find no basis whatsoever for reading section 1926.451(a)(15) as requiring a scaffold to be attached to the wall of an adjoining building.

A review of other OSHA scaffold requirements in effect at the time the citation was issued demonstrates that when the Secretary wanted to require

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[2]An interpretation is reasonable if it "sensibly conforms to the purpose and wording of the regulation" taking into account "whether the Secretary has consistently applied the interpretation embodied in the citation," "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 157-58 (1991).

[3]The compliance officer who conducted the inspection testified that the Morgen anchors set in the wall could be considered structural members of the scaffold, and thus the violation would be for the failure to connect scaffolding members. The Secretary does not pursue this line of reasoning in her arguments on review, and we do not find it otherwise supported in the record.

attachment to a building or structure, she used express language to do so and did not use the word "brace." For example, section 1926.451(b)(4), dealing with wood pole scaffolds, stated that the scaffold "shall be securely guyed or *tied to the building*." (Emphasis added). The tubular welded frame scaffold standard at section 1926.451(d)(7) stated that "[t]o prevent movement, the scaffold shall be *secured to the building or structure* at intervals not to exceed 30 feet horizontally and 26 feet vertically."[4] (Emphasis added).

By contrast, when a scaffold standard required that scaffold members be "braced," it was always in the context of connecting them to another part of the scaffold, not a separate structure. For example, the wood pole scaffolds standard at section 1926.451(b)(8) referred to "[d]iagonal bracing"; (b)(9) spoke of "[c]ross-bracing"; and (b)(10) concerned "[f]ull diagonal face bracing[.]" The tube and coupler scaffolds provision at section 1926.451(c)(10) required "[c]ross bracing[.]" Section 1926.451(c)(11) referred to "[l]ongitudinal diagonal bracing[.]" The tubular welded frame scaffold provisions at section 1926.451(d)(3) stated that "[s]caffolds shall be properly braced by cross bracing or diagonal braces, or both." The provision for manually propelled mobile scaffolds, which by their very nature would not be secured to a wall, refers in section 1926.453(b)(3) to "[b]racing" as connecting the scaffolding members to each other.

Our reading of section 1926.451(a)(15) is borne out by construction industry safety literature in the record of this case. The American National Standards Institute (ANSI) standard in effect at the time of the accident and the citation, ANSI A10.8-1988 "Safety Requirements for Scaffolding"("ANSI 10.8-1988"), defines "brace" as "[a] device that holds one scaffold member in a fixed position with respect to another member" and "tie" as "[a] device used between

[4]The use of "braced" and "tied" together in some of the scaffolding standards also suggests that the terms were intended to have different meanings. *See, e.g.*, section 1926.451(c)(12) (requiring tube and coupler scaffold to be "tied to and braced against the building").

scaffold component and the building or structure to enhance lateral stability."[5] ANSI A10.8-1988, Section 3. The Scaffolding, Shoring & Forming Institute, Inc. ("SSFI") makes similar distinctions in its "Scaffold Safety Guidelines" for erection and use of scaffolds. Under these guidelines, the paragraph entitled "BRACING" (emphasis in original) states: "Each frame or panel shall be braced by horizontal bracing, cross bracing, diagonal bracing or any combination thereof for securing vertical members together laterally." In contrast, a subsequent paragraph states: "TIE RUNNING SCAFFOLD TO WALL or structure when the height exceeds four (4) times the minimum scaffold base dimension…. Ties must prevent scaffold from tipping into or away from the wall or structure." (Emphasis in original). In the SSFI's "Guide to Scaffolding Erection and Dismantling Procedures," "[c]ross-bracing" is defined as a "[s]ystem of members connecting frames or panels of scaffolding to make a tower structure," and "[t]ies" are defined as "[a] tension compression member used to securely attach scaffold to a structure."

Another industry document in the record, Morgen's "Here's How to Assemble and Use" manual for tower scaffolding, also supports the plain meaning of the cited standard and definition of the term "brace" as not including wall connections. Unlike the citation, Morgen's manual does not refer to the "Morgen stiff arm" as a "brace" or the tower scaffold as needing to be "braced." Rather, the manual refers to how to "tie" the scaffold to the wall with the "stiff arms," which is done by placing the hook at the end of the stiff arm into the hole of the stiff arm anchor. A U-bolt attaches the other end of the adjustable rod-like stiff arm to the

[5]Superior claims that ANSI A10.8-1988 is persuasive in interpreting OSHA's construction standards because they incorporated by reference approximately forty sets of ANSI standards relating to construction, citing 44 Fed. Reg. 8577-79, 8856-57 (1979). We note, however, that OSHA's scaffolding standards did not arise directly from the ANSI standard, but rather they were adopted from the Secretary's own Construction Safety Act standards as established Federal standards under section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(a). When the Secretary adopted the ancestor Construction Safety Act standards, she did so following notice and comment rulemaking. *See* 36 Fed. Reg. 1802, 1833, 1840 (Feb. 2, 1971) (notice of proposed rulemaking); 36 Fed. Reg. 7340, 7373, 7380 (April 17, 1971). *See generally CBI Services, Inc.*, 19 BNA OSHC 1591, 1595-96, 2001 CCH OSHD ¶ 32,473, pp. 50,227-228 (No. 95-0489, 2001).

scaffold tower. Both versions of the manual in evidence require that for scaffolds "[o]ver 20 ft. high each tower must be tied to the wall at intervals not to exceed 18 ft. (9 feet when winter enclosure is being used)." By contrast, the text and diagrams in both versions of the manual refer to "bracing" in terms of attaching scaffold members to each other. Another document in the record, Morgen's Tower Scaffolding Specifications, likewise does not refer to Morgen's "stiff arms" as braces, or attachment to the wall as bracing. The specifications require that the stiff arm be "tied to the wall" every 9 feet when an enclosure is used and every 18 feet when the scaffolding is not enclosed but over 20 feet high. As in the manual, "braces" are mentioned only in the context of connecting parts of the scaffold together. Both the ANSI standard and the Morgen documents represent that the term "brace" as understood by the industry does not include "tying" the scaffold to the building. This reading is consistent with the plain meaning of the standard.[6]

Our finding that the language is unambiguous is not affected by the Secretary's rulemaking activities in 1986 and 1996. She points to a proposed rule she published in 1986 that proposed adding to the definition of "brace" applicable here — "[a] tie that holds one scaffold member in a fixed position with respect to another member" — the language, "[b]race also means a rigid type connection holding a scaffold to a building or structure." 51 Fed. Reg. 42,680, 42,703 (November 25, 1986). According to the Secretary, OSHA considered this change to the definition to be a "reword[ing] for uniformity or clarity," not a "major definitional change." *Id.* at 42,682. She further claims that the publication of the proposed rule provided construction employers with knowledge of her interpretation of the term "brace." When OSHA published the final rule nearly ten years later, one month after the citations were issued in this case, it did so with what it described as "only minor editorial revisions" because no comments were

[6] We also note that the Secretary does not rely on any prior consistent enforcement of the cited standard to support her view. *See* note 2 *supra*.

received. 61 Fed. Reg. 46,025 (August 30, 1996). The definition now states that a brace "means a rigid connection that holds one scaffold member to another member, or to a building or structure." 29 C.F.R. § 1926.450(b)(3).

We reject the Secretary's argument that would require us to retroactively apply a regulation prior to the effective date of the final rulemaking – particularly where it resulted in a significant definitional change to the term "brace" as it is used in the standard. Despite the Secretary's contention to the contrary, we see nothing in this record to suggest that the proposed change was merely a clarification of a definition that already encompassed the Secretary's suggested meaning of the term "brace." Rather, the entire rulemaking activity supports the proposition that it was conducted to substantively change the standard by amending it to require tying to the building.[7]

The way the Secretary describes her rulemaking actions is not dispositive. *See Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (in determining agency's intent in adopting rule, agency's own label indicative but not dispositive). "Proposed regulations are suggestions made for comment; they modify nothing." *LeCroy Research Sys. Corp. v. Commissioner*, 751 F.2d 123, 127 (2d Cir. 1984). *See also Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000) (proposed regulations have no legal effect); *Public Service Co. v. Federal Energy Regulatory Com'n.*, 584 F.2d 1084, 1087 (D.C. Cir. 1978) (notice of proposed rulemaking has no effect on existing regulations; many proposed rules are never adopted or are amended substantially). It was not until ten years later, one month after this citation issued, that the Secretary published her final rule that modified the language in question, thereby changing the definition of "brace." Thus, as the definition of "brace" did not change on the date of publication of the Secretary's

[7]Referring to the dictionary definitions of both terms, the Secretary argues that "OSHA has always recognized that the meaning of 'brace' is synonymous [with] the meaning of 'tie.' " We find no basis for this claim. Her August 1996 change to the definition of "brace" to replace "tie" with "a rigid connection" does not support that assertion. Furthermore, the specific definition given to the term "brace" by the Secretary herself at that time is what is at issue, and we have found that the language is clear, making resort to the dictionary unnecessary.

proposed rulemaking, we cannot find that Superior was provided with notice of her interpretation of the term "brace" at that time.

Because Superior was cited for violating the scaffold standard in effect in July 1996, the term "brace" should be construed by the term's definition then in effect, which did not include "tying" the scaffold to the building as its successor standard does. Thus, we need not address the Secretary's allegations here that Superior violated the standard because it did not tie off to a wall or structure. *See Sweet v. Sheahan, supra.* We find therefore that the Secretary has not proven that the cited standard applies, and we vacate the citation.[8]

**Serious Citation 1, Item 1**

The Secretary charges a serious violation of section 1926.21(b)(2)[9] because "[e]mployees were not instructed on how to assemble a Morg[e]n tower scaffold to assure that the upright members were rightly braced to prevent swaying or displacement when it was enclosed." As the judge noted, this was the first time the Superior employees had used a winter enclosure, and wind gusts of up to 32 miles per hour occurred the morning of the accident. As the Secretary's expert opined and other evidence suggests, use of an enclosure on scaffolding poses particular hazards that can occur during high winds by substantially increasing the load on the scaffold.

The Commission has held that section 1926.21(b)(2) requires an employer to "instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015, 1991-93 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992). *See also El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-95 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106, 1993) (to

[8]In order to prove a violation of a standard, the Secretary must show that the standard applies, the employer violated the terms of the standard, its employees had access to the violative condition, and the employer had actual or constructive knowledge of the violative condition. *See, e.g., Gary Concrete Prods., Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991).

[9]This general construction industry standard provides: "The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to this work environment to control or eliminate any hazards or other exposure to illness or injury." 29 C.F.R. § 1926.21(b)(2).

establish a section 1926.21(b)(2) violation, Secretary must show that cited employer "failed to provide the instruction which a reasonably prudent employer would have given in the same circumstances"). Here, there is abundant evidence in the record that Superior did not instruct its employees in the particular hazards of adding a winter enclosure to the tower scaffolding. Although both the lead laborer who erected the scaffolding and the mason tender who assisted him had many years of construction experience and had been given a copy of Morgen's manual years ago, each man testified that they received no instruction as to the hazards associated with the use of an enclosure. In addition, three masons/bricklayers testified that they had not received any instructions on enclosures. Superior's field superintendent involved in overseeing safety at the site acknowledged that he was not aware of any training on scaffolding enclosures given to the three employees charged with erecting the scaffolding.

Although Superior disputes the point, we find nothing in the record to indicate that Superior lacked fair notice that attaching the Morgen winter enclosure to the scaffolds presented a hazard. Both of the documents Superior received from Morgen and the two industry standards that Superior itself introduced at the hearing make it clear that the use of winter enclosures presented particular hazards. Morgen's "Here's How" Manual, which Superior acknowledges it gave to many of its employees, states that, "[b]ecause the enclosure provides additional wind resistance, each tower must be secured to the wall every 9' vertically, starting at the 9' elevation." In addition, the Tower Scaffolding Specifications Morgen distributes to its customers provide: "Because of the tremendous force which wind can put on any enclosure, the scaffolding must be completely braced according to specifications and tied to the wall with a Morgen stiff arm in the top third of each 9 ft. (2.7 m) insert, starting with the first." Morgen also notes that the enclosure is usually assembled and covered at ground level, thus "eliminat[ing] the dangers of handling canvas and heaters on elevated scaffolding, where a strong gust of wind can be disastrous."

The scaffolding industry documents in the record, on which Superior also relies, make these same points. The SSFI's "Scaffold Safety Guidelines" provide: "WHEN SCAFFOLDS ARE TO BE PARTIALLY OR FULLY ENCLOSED, specific precautions must be taken to assure frequency and adequacy of ties attaching the scaffolding to the building due to increased load conditions resulting from effects of wind and weather." (Emphasis in original). Similarly ANSI

A10.8–1988, section 4.30, provides: "When scaffolds are to be partially or fully enclosed, precautions shall be taken to assure the adequacy of the number, placement, and strength of ties attaching the scaffold to the building because of increased load conditions resulting from the effects of wind and weather. The scaffolding components to which the ties are attached shall be strong enough to sustain, without failure, the additional loads imposed upon them."

Based on the above, we find a violation of section 1926.21(b)(2). *See, e.g., J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2206, 1991-93 CCH OSHD ¶ 29,964, p. 41,025 (No. 87-2059, 1993) (industry practice relevant but not dispositive in determining whether under section 1926.20(b)(1) a reasonable person familiar with the industry would recognize that safety program must address known hazards). *Cf. Farrens Tree Surgeons Inc.*, 15 BNA OSHC 1793, 1794, 1991-93 CCH OSHD ¶ 29,770, p. 40,489 (No. 90-998, 1992) (industry practice relevant but not dispositive to determining whether under section 1910.132(a) a reasonable person familiar with the industry would recognize hazard warranting use of personal protective equipment).

Superior has not taken issue with the "serious" characterization of the violation, which we find is supported by the record. We therefore affirm serious citation 1, item 1. The judge assessed the proposed penalty of $7,000 for this item, and Superior has not challenged the appropriateness of this amount on review. Upon review of the factors set forth in section 17(j) of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 666(j), we find $7,000 to be an appropriate penalty.

**Serious Citation 1, Item 2**

The Secretary charges a serious violation of section 1926.451(a)(3)[10] because "Morg[e]n Tower Scaffolding which was in use [o]n February 7, 1996 [at the inspected site] was not erected under the supervision of a Competent Person." The term "competent person" was not defined in the scaffolding standard that was in effect at the time, but was defined in the general construction standards as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." 29 C.F.R. § 1926.32(f).[11]

Superior designated a lead laborer as its competent person for erecting the scaffolding at issue. The lead laborer testified that approximately 30 years ago he erected some of the first Morgen tower scaffolds used in the Milwaukee area, but he had never worked with an enclosure. In addition, he testified that he read the entire Morgen manual approximately 30 years ago and referred to the manual over the years, but he did not review the manual before erecting the scaffold at issue here. Moreover, he received no safety training from Superior about erecting Morgen tower scaffolding with or without an enclosure. He also stated that there were no warnings on the enclosures themselves. When he erected these towers, he was not aware that Morgen recommends attaching every tower to the wall, tying in every 18 feet if a scaffold is more than 20 feet high, and tying each tower to the wall every 9 feet when a winter enclosure is used. He testified that tying every other tower to the wall has been his practice all his working life.

Under Commission precedent a person is found to be competent when he makes an inspection in a competent manner and makes a reasonable determination that the condition is safe. *C.J. Hughes Constr.*, 17 BNA OSHC 1753, 1757, 1995-97 CCH OSHD ¶ 31,129, p.43, 477 (No. 93-3177, 1996). Superior argues that the lead laborer designated as its competent person was an experienced skilled tradesman who exercised his judgment based on his training and experience. However, experience alone does not qualify the designated employee as a

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[10]The standard provided: "No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons." 29 C.F.R. § 1926.451(a)(3). These requirements have since been moved to section 1926.451(f)(7) (August 1996).

[11] This definition has now been included in the revised scaffolding standards at 29 C.F.R. § 1926.450(b) (August 1996).

"competent person." *See, e.g., E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2050-51, 1993-95 CCH OSHD ¶ 30,580, p.42,341 (No. 92-35, 1994).

We find that the lead laborer was not properly trained and therefore was not a competent person. The evidence shows that he was not instructed about the specific hazards presented by attaching enclosures to scaffolding and thus was not capable of identifying the hazard. *See, e.g., Ed Taylor Constr. Co.*, 15 BNA OSHC 1711, 1717, 1991-93 CCH OSHD ¶ 29,764, 40,481 (No. 88-2463, 1992). His decision to proceed with the erection of the scaffold and enclosure as he did, under the conditions that day, was not reasonable. For these reasons, we conclude that the scaffolding was not erected under the supervision of a competent person.

Based on the above, we find a violation of section 1926.451(a)(3). Superior has not taken issue with the "serious" characterization of the violation, which we find is supported by the record. We therefore affirm serious citation 1, item 2. The judge assessed the proposed penalty of $7,000 for this item, and Superior has not challenged the appropriateness of this amount on review. Upon review of the factors set forth in section 17(j) of the Act, we find $7,000 to be an appropriate penalty.

Accordingly, we vacate item 1 of Citation 2 and affirm items 1 and 2 of Citation 1 as serious, for which we assess a total penalty of $14,000.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

Dated: July 3, 2003

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>SUPERIOR MASONRY BUILDERS, INC.,<br>Respondent. | OSHRC DOCKET NO. 96-1043 |

APPEARANCES:

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Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor against Superior Masonry Builders to affirm two items of a serious citation and one item of a willful citation issued by the Occupational Safety and Health Administration for the alleged violation of safety violations relating to the construction industry. The controversy arose after a compliance officer for the Administration investigated a scaffold collapse at a Respondent's worksite, concluded that the company violated three safety regulations, and recommended that the citations be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with the Commission, hearings were held in Milwaukee, Wisconsin, and Chicago, Illinois.

The two serious items of the citation are shown below:

Citation 1 Item 1 Type of Violation: Serious

The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) Employees were not aware of the mandatory erection stability specifications contained in the Morgen Tower Scaffolding "assemble and use" manual with regard to wall anchorage of tower inserts under Morgen tower scaffold enclosure and also unenclosed conditions.

in violation of the regulation found at 29 CFR §1926.21(b)(2) reading as follows:

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Citation 1 Item 2 Type of Violation: Serious

Scaffolding was not erected under the supervision of a competent person:

(a) Morgen Tower Scaffolding which was in use on February 7, 1996 at 16220 West Bluemound Road Brookfield, Wisconsin at the "Democracy Square" construction site, was not erected per the manufacturer's "assemble & use" specifications in that the required wall anchoring was not provided to ensure stability under scaffold enclosure conditions.

(b) Wall "stiff arm" scaffold anchors were improperly installed with "10d common" double headed "form" nails instead of hardened cut nails as specified in the Morgen Tower Scaffolding manufacturer's "assemble and use" instructions.

(c) Number 6 wire veneer wall ties were substituted and used in place of the Morgen Tower Scaffolding "stiff arm" anchors as specified in the manufacturer's assemble and use instructions.

in violation of the regulation appearing at 29 CFR §1926.451(a)(3), stating:

(3) No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons.

The willful citation reads as follows:

Citation 2 Item 1 Type of Violations: Willful

Upright members of scaffold(s) were not securely and rigidly braced to prevent swaying and displacement:

(a) "Stiff Arm Braces" and wall anchors were not provided at each of the sixteen (16) Morgen towers at nine (9) foot vertical intervals in accordance with the manufacturer's mandatory stability specifications, whenever Morgen Tower Scaffolding is enclosed.

(b) "Stiff Arm Braces" were not installed at the two (2) northernmost wall anchor points permitting the last six (6) Morgen Towers to become unstable and initiate the chain reaction which toppled all but two of the remaining ten (10) towers.

(c) "Stiff Arm Braces: and wall anchors were not provided at each of the sixteen (16) Morgen Towers at eighteen (18) foot vertical intervals in accordance with the manufacturer's mandatory stability specifications, whenever Morgen Tower Scaffolding is erected.

in violation of the regulation appearing at 29 CFR §1926.451(a)(15) as shown below:

(15) The poles, legs, or uprights of scaffolds shall be plumb, and securely and rigidly braced to prevent swaying and displacement.

BACKGROUND

The record contains an accident report from David E. powers, Chief Investigator to Paul E. Bucher, District Attorney, Waukesha, Wisconsin. He reviewed the reports of the Brookfield Police Department and the Occupational Safety and Health Administration and was also familiar with the crash scene because he responded to that location on the day of the event. It was apparent to him that the Respondent did not adhere to certain standards for enclosed scaffolding. There was negligence in erecting the scaffolding, but not criminal in nature.

The crew on the scaffold consisted of five masons and two laborers. Most of these people were experienced in their field, but using an enclosed Morgen Tower Scaffold was a first for them. What was fine for an open scaffold was not adequate for an enclosed one.

It appeared to the investigator that wall anchors were placed in the walls at about 15 feet vertically and for every other tower. The wall anchors were placed the day before the accident so that the cement settled. Seven anchors were placed, but only four were regular Morgen Tower anchors. The three northernmost anchors were fabricated from

wire ties not suitable for anchoring scaffolding. At least some of the Morgen Tower anchors were set with common nails, not the cut nails specified for the anchor.

On the day of the accident, stiff arms were placed between the wall anchors and the towers. Five of the stiff arms were placed, but the northernmost two anchors did not have stiff arms attached. The mason and laborer on that part of the scaffold were aware of this situation and mentioned it to a laborer who indicated that the additional stiff arms were buried in the snow. The mason also conveyed his concern to the superintendent about the windy conditions prevailing, but he did not feel the wind was a problem at that time. None of the masons felt they were in danger on the scaffold. The field superintendent was not aware that standard Morgen Tower wall anchors with cut nails were being used.

The constant wind velocity did not seem to be a factor. Wind gusts up to 32 mph appeared after the north end of the scaffold was raised above the eave line on the north end of the building, thus exposing a small portion of the scaffold to the wind. Apparently, a gust of wind caught the plastic enclosed scaffold; the latter, acting as a sail, pulled the unattached north towers away from the wall. The scaffolding started to domino, pulling each next set of towers down. The wire wall anchors left in the wall seem to be where the stiff arms were not attached. At least one wire wall anchor pulled out of the wall. Some Morgen Tower anchors that were set with common nails, not cut nails, also were pulled out of the wall. The scaffold came down, causing injury to the workers on it.

According to the report the Respondent had the ultimate responsibility to properly train its employees, especially while doing something new, such as an enclosure. The company relied upon experienced employees, but the latter did not take into consideration the difference between open and enclosed scaffolding. These employees had in their possession Morgen Tower manuals, but they either failed to read or to understand them.

On the day of the accident there was new snow on the ground. The pallet with additional stiff arms of the correct size was plowed under and looked for. One mason thought the scaffold was too far from the wall, and a request for additional cross bracing

was carried through. Unfortunately, the scaffolding was raised above the north eave where the wind gust caught it before the stiff arms were found and placed.

There remained the question of the placement of less than adequate wall anchors. Correct anchors set with common nails by the masons appeared to have pulled out. The investigator did not understand the use of the wire anchors when there appeared to be Morgen Tower anchors on the jobsite. Reports allude to normal anchors found in a mason tool box in the rubble. The superintendent stated that not only were correct anchors on site, but also he carried additional ones in his truck. He visited the building site each day.

The chief investigator concluded that negligence was present on the part of numerous individuals but did not rise to criminality. He felt the accident was caused by a combination of lack of specific understanding of a new system and lack of training in that system. Some portions of the negligence were beyond the control of the employer.

SUMMARY OF THE TESTIMONY

In general, testimony at the hearing confirmed much that was contained in the investigative report. Thus, two laborers stated that they had no instructions or safety training with respect to Morgen Towers. They were not aware that these towers were to be tied every nine feet to the wall if an enclosure was utilized. Stiff arms were not supplied when needed. One laborer noticed that masons were inserting ordinary nails and wire ties instead of the recommended material in the Morgen Tower manual. Another laborer, still with the Respondent, heard no complaints and was not aware of a shortage of stiff arms. He regarded the Respondent as a safe employer.

Bricklayers also received no safety training or instructions regarding enclosures during high winds. They were concerned about the lack of stiff arms and made complaints to management representatives. One mason mentioned that the plastic enclosure could act as a sail in the strong wind and pull scaffolding down. Stiff arms helped stability, but a sufficient number was never supplied. In addition, wire ties were substituted for Morgen flat anchors. One mason added that he did not notice any wind problem.

Two mason tenders also testified. One was troubled by the lack of stiff arms. He requested more of them but was informed that none were available because they were buried in the snow. In his opinion stiff arms should have been placed every nine feet.

Another mason tender who was employed by Respondent for about 21 years did not hear any employee complain about the scaffolding. He considered the respondent to be a safe employer. No training was received with respect to Morgen Towers. He was not aware of any shortage of stiff arm braces. Morgen Tower enclosures did not come with installation instructions.

Respondent's field supervisor shared safety responsibility with a foreman and conducted tool box safety sessions weekly. He recalled that one bricklayer was concerned about the high winds but was not aware that employees were substituting Morgen Tower anchors with wire ties and that stiff arms were missing. Admittedly he did not give Morgen Tower training to some employees. However, it was not company practice to substitute wire wall ties for Morgen wall ties. To prevent a recurrence of the mishap stiff arms are used in each tower; they are placed every nine feet when scaffolding enclosures are used.

A former official with the Morgen Tower organization, a twenty-year veteran and active in its instruction work, testified that scaffolding with an enclosure requires double the amount of stiff arms because wind loads are greater with enclosures. There was no competent person on site at the time of the mishap because towers were not tied off with stiff arms. He did not believe that employees were sufficiently trained. Concrete nails should have been used because they are more resistant to pullouts. Thus, scaffolding was not properly braced. He added that warnings and cautions accompany the braces.

The OSHA compliance officer who investigated the collapse of the scaffolding learned that Respondent's employees were not aware of the mandatory erection stability specifications contained in the Morgen Tower assembly and use instructions. Scaffolding was not assembled according to the manufacturer's instructions. Stiff arms and scaffolding anchors were not properly installed with specific nails. It appeared that other than Morgen flat wall ties were used to anchor stiff arms to the walls. Thus, scaffolding was not completely braced to the walls. On the day of the accident there

were wind gusts of up to 49 mph , and employees expressed concern to management representatives.

Upon more detailed examination, the compliance officer agreed that the OSHA standards in issue did not provide that an employer must follow the manfacturere's or ANSI standards. He acknowledged that the Respondent gave skilled tradesmen the "How to Do It Book." He also recalled that twelve of the fourteen citations issued to the Respondent took place prior to 1989.

The compliance officer recommended the "willful" citation because the Respondent's superintendent had an opportunity to check the wall ties and had information concerning the lack of proper safety equipment.

OSHA's Assistant Area director agreed that the Agency never issued a citation for failure to have every Morgen Tower tied to a wall.

Respondent's President testified that a safety policy was instituted when he took control of the company. This included insurance and tool box and safety talks. He also called upon the Mason Contractors Association for help in the safety field. In all cases of new hires employees were given hard hats and a copy of the company safety program. There were also talks on enclosing scaffolding. Respondent's safety consultant agreed that Morgen Tower specifications call for nine-foot vertical intervals, but there is no statement that this was mandatory. In the Milwaukee area towers were tied to every third or fourth tower; but Respondent worked with every other tower, an indication that it was not indifferent to safety. On the day of the accident employees worked with wind pressure which could be three times stronger than the recorded wind speed. In his opinion, the scaffold would have collapsed no matter what measures Respondent could have taken.

Although Respondent's expert believed that the scaffolding was secured to prevent swaying or displacement, he agreed that employees should not work during high winds or storms. The scaffolding was stable and braced adequately for normal conditions, but wind conditions were not normal at the time of the accident. In his opinion the accident was isolated and unpredictable, but he added that the structure would be more stable if all six towers were attached.

The Respondent also called upon the Director of Field Services for Zimmerman Design Group who stated that Respondent was an honest and safe employer.

DISCUSSION

As previously noted, Citation 1, item 1 charges that respondent did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury. The evidence discloses that Respondent did not instruct each employee in the hazards associated with Morgen Tower scaffolding and they were not aware of the Morgan Tower Scaffolding Manual regarding anchorage of tower inserts under enclosed or unenclosed conditions. The testimony confirms the Respondent's failure to instruct the laborers with regard to Morgen Tower scaffolding. Indeed, they were not aware that towers were to be tied every nine feet if an enclosure was utilized.

Bricklayers also testified that they received no training regarding scaffold enclosures, one of whom added that he cautioned management that the plastic enclosure could act as a sail in the strong wind. A mason tender employed by the respondent for 21 years also did not receive any training with regard to Morgen Towers. Finally, Respondent's field supervisor admitted that he did not give Morgen Tower training to some employees.

The regulation requires the employer to instruct each employee in the recognition and avoidance of unsafe conditions. The Respondent failed to comply with this regulation, and therefore Citation 1, item 1, is affirmed.

The regulation at 29 CFR §1926.451(a)(3) provides that no scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons. In item 2 of Citation 1 the Complainant enumerated three instances wherein scaffolding was not erected under the supervision of a competent person. The record confirms that the Respondent did not follow the Morgen Tower manufacturer's assemble and use instructions in three instances: (1) required wall anchoring was not provided to ensure stability under scaffold enclosure conditions; (2) stiff arm scaffold anchors were installed with nails which did not meet specifications in the manufacturer's assemble and use instructions; and (3) number 6 wire veneer wall ties were substituted and used in place of Morgen Tower scaffolding "stiff arm" anchors as specified in the manufacturer's

assemble and use instructions. Thus, no competent person supervised the installation of Morgen Tower equipment to conform with the manufacturer's instructions. Item 2 of Citation 1 is therefore also affirmed.

Citation 2 (designated "Willful") item 1 alleges that upright members of scaffolding were not securely and rigidly braced to prevent swaying and displacement. Three examples were advanced: (1) Stiff Arm Braces and wall anchors were not provided to each of sixteen (16) Morgen Towers at nine (9) foot vertical intervals, according to manufacturer's specifications whenever Morgen Tower Scaffolding is enclosed; (2) Stiff Arm Braces were not installed at two (2) northernmost wall anchor points, permitting the last six (6) Morgen Towers to become unstable and initiating a chain reaction which toppled all but two of the remaining ten (10) towers; and (3) Stiff Arm Braces and wall anchors were not provided at each of the sixteen (16) Morgen Towers at eighteen (18) foot vertical intervals in accordance with manufacturer's stability specifications.

It is not disputed that stiff arm braces were not provided at nine foot intervals when the scaffold was erected. This resulted in a violation of the regulation at 29 CFR §1926.451(a)(15) which provides that poles, legs, or uprights of scaffolds should be plumb and securely and rigidly braced to prevent swaying and displacement.

The Complainant established that scaffolding was not securely and rigidly braced to prevent swaying and displacement. Even after an employee complained concerning swaying and lack of stability, the workers were not provided with the proper protective equipment. The latter was buried in the snow, but no effort was made to retrieve the necessary materials. However, the employees were furnished with substitute equipment, admittedly not intended for use with Morgen Tower scaffolding and not as effective in preventing swaying and movement between towers and walls.

WILLFUL

As indicated, Citation 2, item 1 was classified as "Willful." the Commission has held that a willful violation of the Occupational Safety and Health Act of 1970 is one committed with an "intentional knowing or voluntary disregard to the requirements of the Act or with plain indifference to employee safety." It is differentiated from other types of violations by a "heightened awareness of the illegality of the conduct or conditions - and by a state of mind-conscious disregard or plain indifference."

In this case the compliance officer recommended that the infraction be treated as willful because the superintendent had an opportunity to check the wall ties, and employees complained about the windy conditions with the management representative.

While the Respondent violated the regulation, I do not believe the facts demonstrate the company had a conscious disregard or plain indifference for the safety of its employees. One employee stated that some stiff arm braces were attached to the walls and heard no complaints regarding employee safety. He was unaware of any safety problems and considered the employer to be safety minded. A bricklayer did not notice any problem with regard to the wind. A mason tender also considered the Respondent a safe employer and was never told there was a problem with the scaffolding. The field supervisor was unaware that employees were substituting Morgen Tower anchors with wire ties, and it was not the company's practice of replacing wire wall ties for Morgen wall ties. Immediately after the accident stiff arms were placed every nine instead of eighteen feet when enclosures were in use.

Other factors considered included the fact that Respondent gave skilled tradesmen the "How To Do It" book, and twelve of fourteen previous citations were issued before 1989 when the current president took over the daily operations of the business. Also, the Administration's Assistant Area Director testified that the Agency never issued a citation for failure to have every Morgen Tower tied to a wall.

When the current management took charge of the business the company adopted a safety policy and obtained assistance in this area from its insurance carrier. It started weekly tool box talks, sought help in the safety area from the Mason Contractors Association, and required employees to attend safety meetings with a contractors association. In addition it arranged for special talks regarding enclosing scaffolding.

The Respondent's safety consultant testified that in the Milwaukee area towers were tied every third or fourth post whereas the Respondent installed ties every other tower. He calculated that the wind of approximately 45 mph should be multiplied by three when the employees were working. In his opinion the accident would have occurred because of the very strong wind exposure; it was an isolated unavoidable event.

From the facts in this case, I cannot conclude that the Respondent intended to violate the regulation as shown in Citation 2, item 1. Nor did the Respondent willfully disregard or exhibit plain indifference to the regulation.

While the Respondent's failure to comply with the regulation in Citation 2, item 1 was not willful, it does come under the definition of "serious" as with the two items of Citation 1. Section 17(k) of the Act defines "serious" as follows:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The Respondent was in serious violation of the regulation found at 29 CFR §1926.451(a)(15).

The cases hold that to establish a *prima facie* case of a violation of a standard the Secretary must show (1) that the standard applies to the conditions cited; (2) that the standard was violated; (3) that an employee had access to the hazard; and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative conditions. In this case the Secretary has satisfied each of these requirements. As previously discussed the Respondent failed to instruct some of its employees in the proper erection of Morgen Towers, failed to have a competent person supervise the erection of the scaffolding, and failed to instruct employees how to assemble a Morgen Tower scaffold to assure that upright members were rightly braced to prevent swaying or displacement when enclosed. The responsibility in connection with the three items of the citations belonged to the Respondent, not to the manufacturer of the equipment.

I find that the Respondent failed to comply with the requirements of the standards as found in 29 CFR §1926.21(b)(2); §1926.451(a)(3); and §1926.451(a)(15) as charged in the citations.

Citation 1, item 1 is AFFIRMED with a penalty of $7,000.00.

Citation 1, item 2 is AFFIRMED with a penalty of $7,000.00.

Citation 2, item 1 is AFFIRMED with a penalty of $7,000.00.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: February 8, 1999