



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

SECRETARY OF LABOR, :

Complainant, :

v. :

ISLAND LATHING & PLASTERING, :

INC., :

Respondent. :

OSHRC DOCKET NO. 97-1026

APPEARANCES:

Barnett Silverstein, Esquire
 New York, New York
 For the Complainant.

Angelo J. Genova, Esquire
 Livingston, New Jersey
 For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is 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 construction site in Newark, New Jersey, where Respondent Island Lathing & Plastering (“Island”) was performing plastering work inside the multi-story theater complex being built; as a result, Island was issued a serious citation, a repeat citation and an “other” citation. Island contested the citations, and a hearing was held on February 18 and 19, 1998. Both parties have filed post-hearing briefs.

The OSHA Inspection

Douglas Prince, the OSHA compliance officer (“CO”) who inspected the site, testified that he visited the project on March 24, 1997, pursuant to a complaint about a fall hazard on the roof of the building; he spoke to the general contractor’s project manager, who consented to an inspection of the entire site and to the CO’s request to videotape, after which the two went to the roof. After viewing the roof area, Prince and the project manager descended to the third floor, where they saw

an employee doing overhead work from a scaffold that was adjacent to the edge of the balcony on that floor. Prince observed that the scaffold was the manually-propelled mobile type, that it was about 6 inches from the balcony's edge, and that the employee was about a foot from the balcony's edge; he also observed that the employee had no fall protection, and that a fall from the front of the scaffold would have caused the employee to fall to the theater floor below. Prince considered the employee to be in imminent danger and asked the project manager to get the employee's foreman; Prince then approached the employee, videoing him and asking him to get down from the scaffold, whereupon the employee climbed down an A-frame ladder that was next to the scaffold. (Tr. 21-35; 41-44; 85; 98-103; 107-13; 118-22; 133; 140-41; 194; 198-99; 208; 211-14).

When Cosmo Picca, Island's foreman, arrived at the balcony, he told Prince that the scaffold belonged to Island and that the employee, Loreto Lomonaco, was one of the three Island employees at the site; Prince also learned Lomonaco had been working in the area for about an hour that day, since lunch.¹ Prince advised Picca that Lomonaco was exposed to the hazard of falling from the balcony, a hazard that was exacerbated by the work he was doing and by the fact that the scaffold wheels were not locked in place, and Picca told Prince that he would take the scaffold out of service.² Prince measured the scaffold and found it to be 6 feet long, 28 inches wide and 5 feet high; he also measured the distance from the floor of the theater to the balcony, with an optical measuring device, and found that distance to be 35 feet. The citations in this case were issued on May 16, 1997; citation 1 alleged a serious violation of 29 C.F.R. 1926.452(w)(2), in that the scaffold wheels were not locked, citation 2 alleged a repeat violation of 29 C.F.R. 1926.451(g)(1), in that the employee was not protected from falling from the balcony, and citation 3 alleged an "other" violation of 29 C.F.R. 1926.1053(b)(20), in that the employee, in climbing down the ladder, did so with his back to the ladder.³ (Tr. 24-35; 41-44; 64-66; 69-78; 81-84; 115-27; 136-37; 158; 186-87; 202; 206-08; 211-15).

¹Prince videoed Lomonaco and the scaffold from 2:13 to 2:14 p.m. *See* C-2; R-2.

²Prince said two of the wheels did not have locking devices on them and that while the other two did they were unlocked; he also said Lomonaco's overhead work could have caused the scaffold to move, and that his concentration was on his work and not his feet. (Tr. 42-43; 64-66; 71-78).

³Citation 1 initially alleged violations of 29 C.F.R. §§ 1926.451(f)(4) and 1926.451(w)(2).
(continued...)

The Repeat Citation

Citation 2 alleges a repeat violation of 29 C.F.R. 1926.451(g)(1), which states that:

Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

Paragraphs (g)(1)(i)-(vi) discuss various types of scaffolds, but do not refer to manually-propelled mobile scaffolds; however, paragraph (g)(1)(vii) provides as follows:

For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

Island does not dispute the existence of the cited condition, which is clearly shown by the CO's testimony set out above and by R-2, his video, and C-2, stills from the video. It contends, rather, that it had no knowledge of the condition. Cosmo Picca, Island's foreman at the site, testified that he and the other two employees were doing patching work that day, that he was working on the second floor while Lomonaco and the other employee were working on other floors, and that Lomonaco had been patching in the hallway on the third floor that morning, which to Picca's knowledge was almost a whole day's work; he also testified that he had not told Lomonaco to go to the balcony area, that Lomonaco had no reason to be there, and that he was unaware of Lomonaco being there until the CO sent for him. (Tr. 217-25). However, Picca agreed that the bonding agent application work Lomonaco was doing in the balcony area was something that had to be done. (Tr. 223). Moreover, Picca's testimony that Lomonaco was probably doing this work because he had finished up in the hallway and had "a few minutes" before Island's quitting time at 2:15 p.m. was contrary to the CO's testimony that he learned from Picca and Lomonaco that the work on the scaffold in that same location had been going on for about an hour, since lunch. (Tr. 126; 186-87; 214; 222-23). Finally, I agree with the CO's opinion that Picca should have been aware of the work

³(...continued)

However, the Secretary's complaint amended this citation to allege two grouped instances of 29 C.F.R. 1926.452(w)(2); the complaint also amended the citations to reflect a manually-propelled mobile scaffold rather than a self-propelled mobile scaffold.

on the scaffold in the balcony area due to his supervisory capacity, the length of time that Lomonaco was there, and the fact that the condition was in plain view. (Tr. 31-32; 43-44; 73-74; 118; 123-26; 186-87; 192-93; 214). On the basis of the record, Island was in violation of the cited standard.⁴

Island next contends that the repeated characterization of the violation is inappropriate. Commission precedent is well settled that a violation is properly classified as repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). In support of her citation, the Secretary presented C-1, Island's response to the Secretary's request for admissions, and C-4, a computer printout that CO Prince generated which sets out previous OSHA inspections Island has undergone. In C-1, Island admitted that the attachments to C-1 were true copies of documents relating to citations issued to it on July 3 and September 19, 1996; those documents show that the citations alleged violations of the scaffolding guardrail requirements, that is, 29 C.F.R. 1926.451(d)(10) and 29 C.F.R. 1926.451(c)(13), and that the citations became final orders of the Commission on October 30 and December 23, 1996, respectively. As to C-4, CO Prince testified about how it was generated and what it reflected. (Tr. 50-62; 137-39). Based on his testimony and C-4, five additional citations issued to Island alleged violations of the scaffolding guardrail requirements, and these citations also became final orders before the alleged violation in this case; specifically, the citations date from 1987 to 1991, allege violations of either 29 C.F.R. 1926.451(d)(10) or 29 C.F.R. 1926.451(e)(10), and were all final orders by August 10, 1992.⁵

The thrust of Island's contention is that the subject violation is not substantially similar to the previous violations because the previous violations involved different standards and scaffolds unlike the one in this case. However, CO Prince testified that the scaffolding standard was revised in August of 1996 such that similar requirements for scaffolding were consolidated, renumbered and put in a

⁴Island's assertion that Lomonaco's work in the balcony area was unpreventable employee misconduct is rejected, as there is no evidence in the record demonstrating the elements of this affirmative defense. See *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979).

⁵The CO testified about two 1980 citations, also reflected in C-4, that he considered with the other prior citations noted above; however, the 1980 citations will not be considered by the undersigned because, unlike the others, it is not clear that they relate to Island. (Tr. 59-62; 137-39).

general standard, and that instead of setting out the guardrail requirement for each type of scaffolding, as in the old standard, the guardrail requirement was placed in the general standard. The CO noted that regardless of whether the previous citations involved scaffolds different from the one at the subject site, the citations all involved the same violative condition, that is, the failure to have guardrails on scaffolds where the lower level was more than 10 feet; the CO also noted that while the mobile scaffold Lomonaco was standing on was 5 feet high and would not need guardrails as long as there was no exposure to falls over 10 feet, the scaffold's location next to the edge of the balcony exposed Lomonaco to a 40-foot fall. (Tr. 44; 50-56; 62-63; 67-68; 112-14; 158-63; 189-91).

In view of the foregoing, the citation was properly characterized as repeated. The cited standard requires, for all scaffolds not otherwise specified where a fall to lower level would be greater than 10 feet, "the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section." The previously-cited standards, that is, 29 C.F.R. §§ 1926.451(c)(13), (d)(10) and (e)(10), which apply, respectively, to tube and coupler scaffolds, tubular welded frame scaffolds, and manually-propelled mobile scaffolds, require guardrails on "all open sides and ends on all scaffolds more than 10 feet above the ground or floor." Based on the record, I conclude that the facts in this case meet the test noted *supra* in *Potlatch*; specifically, the standards and the violative conditions relating to the prior and the subject citations are substantially similar. Island's assertions to the contrary are unpersuasive, especially in light of the Commission's finding in *Potlatch* that differences in the function and location of similar equipment, where the cited hazard is the same, will not militate against a repeated characterization.⁶ *Id.* at 1063, 1065. Also unpersuasive is Island's assertion that the older prior citations are too remote in time; as noted in *Potlatch*, "one prior violation may support a finding of repeated," and "the length of time between the two violations is relevant only to the 'good faith' criterion for penalty assessment." *Id.* at 1064. This citation is accordingly affirmed as a repeated violation.

Island's final contention is that the \$50,000.00 penalty proposed for this citation is excessive and that OSHA's failure to accord it reductions for size, history and good faith was improper. CO Prince testified the penalty was based on the repeated classification and that no reductions for size,

⁶Island's assertions are also unconvincing due to its 1989 and 1991 violations of 29 C.F.R. 1926.451(e)(10), which applies to the same type of scaffold at issue here. (Tr. 52-54; C-4).

history or good faith were given due to the circumstances. In particular, the CO noted that the gravity of the violation was high because the employee was working under conditions which made a fall from the balcony likely and because, had it occurred, the 40-foot fall would almost certainly have resulted in death. The CO also noted the number of prior violations for the same type of condition, and said that one of the reasons for the high penalty was to deter the recurrence of such conditions in the future; as he put it, “[s]omeone’s got to get the message.” (Tr. 63-71; 142-56; 172-76).

Based on the foregoing, I conclude that the proposed penalty is appropriate. In so concluding, I have considered Island’s evidence as to its size (about 60 employees), its financial situation, and its efforts with respect to safety after the subject inspection. (Tr. 226-36; 241-42). However, as discussed on the record, OSHA’s decision to not give Island a penalty reduction for size was due not to the number of employees but on the other circumstances of this case, and, in particular, the number of previous violations. (Tr. 234-39). Moreover, in my opinion, the record as a whole provides no basis for a penalty reduction. The proposed penalty of \$50,000.00 is therefore assessed.

The Serious Citation

Citation 1 alleges two violative instances of 29 C.F.R. 1926.452(w)(2), which provides that:

Scaffold casters and wheels shall be locked with positive wheel and/or wheel and swivel locks, or equivalent means, to prevent movement of the scaffold while the scaffold is used in a stationary manner.

The CO’s testimony, together with R-2 and C-2, his video and the stills from the video, demonstrates that the mobile scaffold Loreto Lomonaco was using was in violation of the cited standard; two of its wheels did not have locks, and the other two had locks but the locks were not engaged. The record also demonstrates that the condition represented a serious, high-gravity hazard; the scaffold could have moved and caused Lomonaco to fall, especially in light of the overhead work he was doing, the scaffold was adjacent to the edge of the balcony, and the 40-foot fall from the front of the scaffold to the theater floor below would likely have resulted in Lomonaco’s death. (Tr. 41-43; 71-78; 126-27; 133-36; 180-86; 205-06). Island presented no evidence to rebut that of the Secretary, and this citation is accordingly affirmed as a serious violation.

The Secretary has grouped the foregoing instances and proposed a total penalty of \$5,000.00 for this citation. The CO testified that no reductions were applied to this amount, due to the high gravity of the condition and the fact that Island was previously cited for similar violations; in this

regard, the CO testified, and C-4 shows, that Island was cited pursuant to similar standards in 1989 and 1992, and that the violations became final orders of the Commission. (Tr. 74-81). Based on the record, the proposed penalty is appropriate and it is therefore assessed.

The “Other” Citation

“Other” citation 3 alleges a violation of 29 C.F.R. 1926.1053(b)(20), which states as follows:
When ascending or descending a ladder, the user shall face the ladder.

The evidence in the record plainly establishes, and Island does not dispute, that Loreto Lomonaco descended the ladder on the balcony with his back to the ladder; the record further establishes that any fall Lomonaco might have had in descending the ladder would have been just a few feet to floor of the balcony, and that an injury from such a fall, *i.e.*, a sprained ankle, would have been minor. (Tr. 42; 81-85; C-2; R-2). This citation is accordingly affirmed as an “other” violation. No penalty was proposed for this citation, and none is assessed.

Conclusions of Law

1. Respondent, Island Lathing & Plastering, 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. Respondent was in serious violation of 29 C.F.R. 1926.452(w)(2), repeat violation of 29 C.F.R. 1926.451(g)(1), and “other” violation of 29 C.F.R. 1926.1053(b)(20).

Order

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

1. Citations 1, 2 and 3 are affirmed. Penalties of \$50,000.00 and \$5,000.00 are assessed for citations 1 and 2, respectively, and no penalty is assessed for citation 3.

Irving Sommer
Chief Judge

Date: