UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MEGAN CONSTRUCTION COMPANY, Respondent.	DOCKET NO. 97-1361

Appearances : For Complainant: Anthony Stevenson, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, OH.; For Respondent: Lisa M. Bitter, Esq., Cincinnati, OH.
Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, Megan Construction Company, at all times relevant to this action maintained at a job site at Cincinnati Urban League Project, 3458 Reading Road, Evendale, OH., where it was engaged in the business of construction. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

The record reveals that Respondent was one of several prime contractors at the subject job site. Respondent was the contractor in charge of the exterior enclosure which involved masonry and windows, and the interior enclosure which included dry wall and finishes (Tr. 61)[1]. Respondent hired several subcontractors on this job. Blankenship Masonry, Inc. was hired as a subcontractor to perform masonry and brick work (Ex. R-B). On May 1, 1997, OSHA Compliance Officer ("CO") Samuel Merrick conducted an inspection pursuant to a complaint received in his office. As a result of this inspection, on July 21, 1997, Respondent was issued a citation alleging two serious violations with a proposed total penalty in the amount of $4,200.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on March 30, 1998. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

Background

CO Merrick testified that he observed that employees working from scaffolds upon his arrived at the job site between 7:30 A.M. and 7:45 A.M. One employee was on a third level working on a scaffold with no guardrails and others were actively laying brick on the north side. He videotaped this observation (Tr. 11, 50; Exs. C- 1 to 3). At approximately 7:50 A. M., he met with Michael Garrett who was the project manager for Respondent. His duties included overall management of the activities of Respondent's subcontractors including safety and OSHA compliance (Tr. 50, 146-

[1] The term "Tr." refers to the official transcript in the subject matter. The term "Ex." refers to the exhibits which were introduced into evidence during the hearing.

48). Mr. Garrett informed him that in his supervisory role, he was responsible for supervising Blankenship Masonry, Inc. while they were laying the brick. He also met with the primary general for the entire site, Mr. Jack Meyer of d.e. Foxx, and the foreman for Blankenship, Mr. William Baudendistel (Tr. 11-13).

The record reveals that the Respondent's office trailer was some 40 to 50 feet from the cited scaffolding. In the door to the trailer there was a 12 by 12 inch safety glass window with wiring in it. CO Merrick testified that he could observe the cited scaffolding from this window without having to bend or stretch in any manner (Tr. 26-27, 51).

Secretary's Burden of Proof

> The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1, Item 1

29 CRF §1926.20(b)(2) Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

> *a)* The employer failed to make job site inspections, such inspection would have addressed issues of the scaffolding being utilized by employees of the subcontractor such as their erection by a competent person and that they were safe to be utilized.

CO Merrick testified that he asked Mr. Garrett if he had observed the guardrails and the scaffolding that morning. Mr. Garrett told him that he had done inspections (Tr. 14). CO Merrick testified that he issued the instant violation because if Mr. Garrett had made the inspection, the violation should have been corrected before the work began (Tr. 16). He concluded that since there was a violation, Mr. Garrett must not have made an inspection (Tr. 32). He acknowledged that he cited this standard because he saw a violation and it had not been abated. He further acknowledged that the citation did not take into account what Megan's safety program consisted of regarding frequent and regular inspections (Tr. 41). CO Merrick testified that the only documentation Mr. Garrett provided to him validating inspections were written warnings which had been issued to Megan by d.e. Foxx (Tr. 17). He could not recall any documents with regard to weekly inspections or a safety scaffolding checklist (Tr. 32). He further testified that in response to his inquiry regarding a safety program, Mr. Garrett merely pointed to a manual on a shelf. CO Merrick did not retrieve this manual from the shelf because he believed it was company property (Tr. 33).

Mr. Baudendistel, the Blankenship foreman, testified that he did not recall Mr. Garrett performing any inspection of his job site. He testified that he would occasionally see Mr. Garrett walking around the job site. He would see him in passing, headed in and out of the building, or standing in his trailer looking out of the window (Tr. 96-97, 103). He explained that he believed that one would normally be aware of the fact that an inspection of their scaffolding was in progress because the safety person would stand by the scaffold as he observed it (Tr. 98-99). It was his belief that the more effective inspection occurred, when one was aware of the fact that an inspection was

in progress. However, Mr. Baudendistel also acknowledged that he could have been busy working and not seen Mr. Garrett performing inspections (Tr. 98-99). In view of this acknowledgment, the undersigned is unpersuaded that no inspections occurred.

The undersigned finds that in order to determine a violation of the cited standard, the Secretary must inquire into the frequency of the inspections and the competency of the person conducting the inspections.[2] The Secretary has not alleged that Mr. Garrett was not competent to perform such inspections. Respondent's President, Evans Nnamdi Nwankwo, testified that Mr. Garrett, in his position as project manager, was at the project everyday. His duties included safety including daily safety inspections, and he received and responded to any safety complaints directed to subcontractors of Megan (Tr. 146-47, 151-54, 156-57). Mr. Garrett testified that he walked the job site daily to see what was going on and He testified that during his daily walk- through, he kept abreast of safety issues and if he saw a safety infraction he had it corrected. If necessary he had the authority to discipline subcontractors for safety infractions He estimated that he spent 35 to 40 percent of the day in the office trailer coordinating activity. The remainder of his day was spent on the job site (Tr. 187- 89 ; Exh. R-E). He testified at times walked the site more than once a day, and if he saw a violation he would take care of it (Tr. 190). He testified that he spoke to Blankenship's foreman on a daily basis (Tr. 191). He further testified that he kept a daily log which included manpower counts and general activities including observations such as safety problems observed during the day. He explained that he had attempted to locate these records but was not successful. He attributed this to the fact that the Respondent had relocated several times into different trailers while performing two other jobs (Tr. 184-85).

Mr. Garrett further testified that he also conducted a weekly inspection which he had documentation of. He testified that upon his arrival he created several safety documents derived from the forms he used with his former employer. These documents were weekly safety reports and scaffolding inspection forms (Tr. 184-85). He testified that Exh R-G contained the weekly safety reports dated from March 10, (one week after he started working for Respondent), March 17, March 24, March 31, April 14, April 21 and April 28, 1997 (Tr. 197- 201). These documents indicate that on April 28, 1997, a problem was recorded with Blankenship's scaffolding - a couple of scaffold board midrails were missing. He explained that he learned that the midrails had been taken down in order to place materials on the scaffolding. He directed Blankenship to immediately replace the rails (Tr. 201-03). He also had a scaffold safety checklist which focused on the actual scaffold components, erection and usage (Tr. 203; Ex. R-H). He completed this checklist for inspections performed March 24 and 31, and April 8, and 28, 1997. He again documented the issue with the missing guardrails where brick and mortar were being loaded on the April 28, 1997 report.

The undersigned finds that the mere existence of safety violations does not per se establish the failure to have a safety program that provided for frequent and regular inspections. The undersigned also finds that the Respondent presented sufficient evidence to establish that frequent

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[2] Section 1926.32(f) defines a competent person 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. The record contains ample testimony which establishes Mr. Garrett's competency (Tr. 180-83).

and regular inspections of the job site were performed. The contents of the inspection reports corroborate that these inspections were performed frequently and took into consideration the job site, materials and equipment. The undersigned having observed the demeanor of Messrs. Nwankwo and Garrett finds their responses were forthright and finds that their testimony was credible. The violation of §1926.20(b)(2) is Vacated.

Citation 1, Item 2

29 CFR §1926.45(g)(1)(vii) 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.

> a) The employer failed to ensure that scaffolding used on site had complete guardrail system in areas where employees are working. The employer failed to utilize a competent person to erect scaffolding which exposed employees to fall hazards above 13.7 feet.

The record reflects that Respondent stipulated that there was a scaffolding violation, involving Blankenship Masonry, where there were guardrails missing at a point on the scaffolding where it was at a height above 10 feet (Tr. 6). The Secretary argues that as the controlling employer knew or with the exercise of reasonable diligence could have known that employees of its subcontractor were working on scaffolds without proper fall protection. CO Merrick testified that when he arrived at the job site, the exposed employee was on the third buck removing the packing sheets from between bricks and carrying them to the southeast corner to be laid. He testified that he learned that the brick had been set up there the night before (Tr. 21, 39, 46). CO Merrick testified that Mr. Garrett had a direct and clear view of all of the scaffolding from its office trailer (Tr. 25, 49, 51). He believed that all Mr. Garrett had to do was look out of the trailer door window to see the unguarded scaffolding. The Respondent contends that it did not create or control the violative condition, nor with the exercise of reasonable diligence could it have known of the cited condition.(Respondent Post-Hearing Brief, p. 20). Mr. Garrett testified that when he arrived at the job site at approximately 7:30 A.M., no work had started work and the third buck of scaffolding on the east side had not been constructed (Tr. 189). He testified that at the time of his arrival, Blankenship employees were congregating outside the gate until starting time. Upon his arrival at the job site, he went directly to the trailer to take care of paperwork, make phone calls and get the day started (Tr. 189). He testified that he had no idea that any brick was being installed at that time (Tr. 214). The Respondent points out that the compliance officer acknowledged that under the aforementioned scenario, there was no reason to expect Mr. Garrett to look out of the trailer door window in search of a violation (Respondent's Reply Brief, p. 4; Tr. 48).

The Secretary also introduced into evidence four Safety Observation Memoranda which d.e. Foxx had issued to Respondent. These memoranda were issued by Jack Meyer whenever he believed an unsafe condition existed on the job site. The memoranda were dated April 2, 1997 (top rail in mid-rail at window opening on first and second floor used for stacking masonry were not in place); April 3, 1997 (drywallers working on second floor without guardrail or being tied off); April 10, 1997 (men working on scaffold at second floor window without fall protection); April 14, 1997 (no guardrail at ends of working platform on scaffold for brick layer); and April 30, 1997 (masons working on scaffold before guardrail was installed at north elevation). Respondent provided testimony that only the April 2 observation involved Blankenship, and the issue concerned guarding

at a window opening and not scaffolding(Tr. 252). The safety observation of April 3 involved the drywall subcontractor and not Blankenship. Furthermore, Mr. Garrett testified that at the time of this observation, the employees were not required to be tied off because of the height of the scaffolding. He reported this finding back to d.e. Foxx (Tr.206-07, 211). He testified that the April 10 memorandum involved the drywall subcontractor and not Blankenship. He explained that he found that the scaffolding was in place and that there was no fall protection violation (Tr. 208-09). Mr. Garrett testified that he again found no violation in response to the April 14 memorandum (Tr. 210, 214). Mr. Garrett and Mr. Nwankwo both provided undisputed testimony that Respondent was not in receipt of the April 30 memorandum until after the May 1, 1997 inspection (Tr. 144-45, 222-23). Mr. Garrett disagreed with the contents of the memorandum. He testified that he had not observed any scaffolding problems with Blankenship's scaffolding. Furthermore, he believed that because no planking was present on which employees could have been working, construction of the scaffolding was in progress. Therefore, there would have been no guardrail installed at this stage (Tr. 249-50).

There is no dispute that the standard is applicable or that an employee had access to the violative condition. The undersigned finds that the testimony of Messrs. Nwankwo and Garrett and the contract between the two entities (Ex. R-B), establish that Respondent had control over its subcontractors and was responsible for ensuring that safety was enforced. Mr. Garrett's duties included inspections for safety and ensuring that infractions of subcontractors were immediately corrected (Tr. 147-151).

Employer knowledge (constructive) can be established if the Secretary establishes that an employer could have known of the violative condition, if it had exercised reasonable diligence. Review Commission precedent had established that "[r]easonable diligence involves several factors, including an employer's 'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.' *Frank Swidzinski Co., 9 BNA OSHA 1230, 1233 (No. 76-4627, 1981)* . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe.(citations omitted)." *Pride Oil Well Service,* 15 BNA OSHA 1809, 1814 (No. 87-692, 1992). The record establishes that at the time Mr. Garrett was in the trailer he did not know of the violative condition. The record reveals that it occurred subsequent to his entry into the trailer, and thus, he had no actual knowledge of it. However, the record reveals that a part of Mr. Garrett's morning routine upon his arrival at the job site, was to "get [his] game plan for the daily activities"(Tr. 189). The record is void of any evidence of any efforts which Mr. Garrett took to ensure job site safety prior to commencing office type work. In light of the nature of the work occurring outside of the trailer - scaffolding, and the fact that Respondent had been notified by the general contractor of several fall protection issues involving its subcontractors, albeit not always an OSHA violation, the undersigned finds that it was incumbent upon Mr. Garrett to take certain measures prior to going into his trailer to commence office work. Admittedly, it was difficult to view the entire job site from inside the trailer and Respondent's ready access to its subcontractors was prohibitive at that location. However, with the exercise of reasonable diligence preventative measures for the anticipated hazards of the day's work could have been implemented. The undersigned finds that to address these issues after work in the trailer has been completed demonstrates a lack of the exercise of reasonable diligence. The undersigned further finds that in light of the alleged observation made by Mr. Meyer on April 30, Respondent with the

exercise of reasonable diligence would have been made aware of the activity which was to commence on May 1.[3] In view of the work that was being done , Respondent was certainly on notice that some activity was taking place on the north side. This constructive knowledge of the supervisor, Mr. Garrett, is imputable to the Respondent. *Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986); *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). In light of these findings, the undersigned finds that the Secretary had established a prima facie case.

Classification and Penalty

Section 17(k) of the Act, 29 U.S.C.. §666(k) of the Act, provides that a violation is "serious" if there is " a substantial probability that death or serious physical harm could result" from the violation. Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993).

The undersigned finds that a fall from 13.5 feet from a scaffold to the ground level could result in serious physical harm. Thus, the violation was appropriately classified as serious. The gravity of the violation reflected a high severity because of the serious nature of expected injuries. The probability was assessed as greater because on the nation level fall hazards are at a high rate. The gravity based penalty should be adjusted to reflect the respondent's size and history. The Respondent had four employees and no history of violations at the time of the inspection. In view of the serious nature of the violation there has been no adjustment for good faith. Accordingly, a penalty in the amount of $2,100.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

1. Citation 1, Item 1 alleging a violation of §1926.20(b)(2) is Vacated.
2. Citation 1, Item 2 alleging a violation of §1926.451(g)(1)(viii) is Affirmed with a penalty of $2,100.00.

Covette Rooney
Judge, OSHRC

Dated: Washington, D.C.

[3] The undersigned finds that the fact that Mr. Garrett did not observe the alleged April 30 observation does not establish that said condition was not present. The record is void of any evidence as to when Mr. Meyer made his observation and when Mr. Garrett observed the area.