United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1244 North Speed Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. BAST HATFIELD, INC., Respondent.	OSHRC DOCKET NO. 98-0098

APPEARANCES:

For the Complainant:
Esther D. Curtwright, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York

For the Respondent:
Harold D. Gordon, Esq., Gordon, Siegel, Mastro, Mullaney, Gordon & Galvin, Schenectady, New York

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act"). Respondent, Bast Hatfield, Inc. (Bast), at all times relevant to this action maintained a place of business at 73 Midline Road, Ballston Lake, New York, where it was engaged in construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 17, 18)..

On September 9, 1997 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Bast's Ballston Lake work site. As a result of that inspection, Bast was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Bast brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On September 16-18, 1998, a hearing was held in Albany, New York. The parties have submitted briefs on the issues and this matter is ready for disposition.

Fourth Amendment

As a threshold matter Bast maintains that the September 9, 1997 inspection was conducted without a warrant, in violation of its right to be free from unreasonable searches and seizures, and asks that the evidence obtained during that inspection be suppressed. For the reasons set forth below, I find that Bast had no reasonable expectation of privacy in its worksite. Accordingly, Bast's motion to suppress is *denied*.

The construction site which is the subject of the above captioned action is an addition to an existing church, Our Lady of Grace (Tr. 404). The church is located in an area heavily wooded to the rear and to the north and a housing development is located to the south of the church property (Tr. 411, Exh. R-3). A parking lot accessing the rear of the church, where Respondent was engaged in construction, was accessible by way of a drive leading from the roadway in front of the church (Tr. Exh. R-3). Daniel House, Bast's project manager, testified that unauthorized personnel on the site could be injured, subjecting Bast to liability; therefore, access to its construction area was restricted (Tr. 534). A sign, stating: VISITORS MUST REGISTER AT THE JOB TRAILER. THIS IS A HARD HAT AREA, was posted next to Bast's job trailer (Tr. 413, 527). The trailer was located at the side of the driveway leading to the rear parking lot. The church, however, remained in operation during construction (Tr. 530-31) and parishioners attended weekend services. Mark Salisbury, the superintendent on site, testified that it was not unusual for people to park in the parking lot (Tr. 470, 478). Moreover, there is no evidence that parishioners or other church visitors were required to report to Respondent's trailer prior to attending church services or conducting other business with the church.

On September 9, 1998, OSHA Compliance Officer (CO), Paul Wigger, arrived at the Our Lady of Grace Church, drove to the rear of the building and parked (Tr. 206). Wigger then took a series of pictures of a Bast employee standing on a scaffold platform (Tr. 206). Wigger testified that he drove past Bast's job trailer to reach the parking lot, but that he did not see a sign (Tr. 353). The parking lot was not blocked off and, according to Wigger, there were two or three other cars in the parking lot (Tr. 355). When Wigger spoke to Salisbury and House, neither expressed surprise by his presence on the site and neither asked Wigger to secure a warrant (Tr. 315, 457, 479, 521-22).

It is well settled that the Fourth Amendment's protection against unreasonable searches must be premised on a reasonable expectation of privacy. *L.R.. Willson & Sons v. OSHRC (Willson),* 134 F.3d 1235 (4th Cir. 1998). In *Willson,* the Court noted that "a person has no 'reasonable expectation of privacy' when he leaves conditions permitting a curious passerby to invade his 'private space'." The Court cited, with approval, a prior Commission case in which the Commission found that "there is no

constitutional violation when an inspector makes observations from areas on commercial premises that are out of doors and not closed off to the public. . .." *See, Concrete Constr. Co.*, 15 BNA OSHC 1614, 1992 CCH OSHD ¶29,681 (No. 89-2019, 1992). *See also, GEM Industrial, Inc.*, 17 BNA OSHC 1184 (1995), cited by Bast in its closing brief.

It is clear that Bast had no reasonable expectation of privacy at a construction site located on church property when the church remained open to parishioners during construction. Though Bast attempted to restrict access to actual work areas out of concern for liability in the event of a mishap,[1] it made no effort to actually prevent the public from using the Our Lady of Grace drive or parking lot. Indeed, visitors to the worksite frequently parked in the areas where the compliance officer parked before reporting to the worksite trailer (Tr. 469). Bast's signage, indicating that the construction site was a hard hat area, was neither intended, nor could it reasonably have been understood to exclude use of the parking lot. Moreover, there is no evidence that the church had authorized Respondent to restrict access to the parking area. Since the evidence establishes that it was not unusual for the parking lot to be used by the public, as it was by CO Wigger, without objection from anyone at Bast, the motion to suppress is denied.

Alleged Violation of §1910.1200(h)(2)(ii)

Serious citation 1, item 1

The citation alleges:

29 CFR 1910.1200(h)(2)(ii): Employee training did not include the physical and health hazards of the chemicals in the work area: (Construction Reference: 1926.59).[2]

> (a) West side of the Vestibule, an employee dry cutting concrete block was not aware of the health hazards associated with silica.

Facts

On September 9, 1997 CO Wigger observed and photographed Ron Kaneg, a Bast employee standing on a scaffold platform 13 feet above the ground [scaffold No. 1], cutting concrete block with a masonry saw without wearing a respirator, (Tr. 28, 206; Exh. C-3, C-4, C-5). Wigger testified that Kaneg was exposed to a cloud of silica dust while cutting the blocks (Tr. 217). When he asked Kaneg

[1] In *Willson, supra.*, the Court found no legitimate expectation of privacy where the employer had made no efforts to protect its construction site from observation from vantages outside its control; in that case the roof of a nearby hotel. In this case, Bast made no efforts to screen its activities from the housing development to the south.

[2] The cited standard §1910.1200(h)(2)(ii) provides:

Information. Employees shall be informed of. . . . (ii) Any operations in their work area where hazardous chemicals are present; (*emphasis supplied*).

if he was aware of the health hazards associated with silica (Tr. 209), the employee responded "no" (Tr. 210). Wigger then asked Kaneg if he knew that silica could be as dangerous as asbestos; Kaneg again said no (Tr. 211). Wigger testified that Bast supplied him with training documents signed by Ron Kaneg, indicating that he had received training in hazard communication; however, the compliance officer was not sure whether that training included information specific to silica (Tr. 321-24).

Employee Kaneg testified that he had been instructed to cut cement block only in properly ventilated areas, to use water to wet down the block and to use a respirator when cutting (Tr. 61). Although Kaneg was wearing a bandana around his face at the time of the inspection because his respirator had become clogged with dust, (Tr. 40-41) he admitted that he had been warned that silica can cause silicosis and had seen the safety sheet on silica (Tr. 62). The employee also testified that when he was first hired by Respondent he was shown a film which included information relating to chemicals to be found in the work area, including silica dust, and he attended a weekly safety meeting on silica (Tr. 73-74). Moreover, Kaneg identified his signature on a weekly safety meeting sign in sheet dealing with silica dated April 4, 1997 (Tr. 75; Exh. R-1). Kaneg also testified, without contradiction, that he was instructed by Respondent about the hazardous chemicals to be found in his work area, including silica dust, a by-product of concrete cutting and sawing. Complainant, however, argues that the evidence shows that Kaneg was, nonetheless, inadequately trained as to the hazards posed by silica exposure, pointing to gaps in his knowledge, and his failure to use adequate respiratory protection.

It is undisputed by Respondent that silica dust created by cutting concrete blocks presents hazards to employees exposed to that substance (*See* Exh. C-8 and C-9) (Respondent's brief pg. 33). However, Respondent vigorously argues that all of its employees, including the exposed employee herein, Ronald Kaneg, received mandatory safety training which included the hazards of silica dust via video tape and weekly safety meetings. Specifically, Respondent points to exhibits R-1, a sign-in sheet for a weekly safety meeting dated April 4, 1997 at which time hazards of silica dust were discussed. Employee Ronald Kaneg signed the sheet to verify his attendance (*See* also Exh. R-5). Moreover, the material safety data sheet setting forth hazards of silica dust was maintained in Respondent's trailer at the jobsite. Finally, employee Kaneg testified that he received training in the hazards of silica dust by video tape and weekly safety meetings (Tr. 75-76) and was aware that the medical safety data sheet for silica dust was located in the job trailer Tr. 77).

The evidence offered by the Secretary in support of this alleged violation are the statements made by employee Kaneg at the jobsite to the compliance officer that he (Kaneg) was not aware of the hazards of silica dust and he was not aware that silica dust is as hazardous as asbestos. Kaneg contradicted these responses at the hearing and testified that Respondent had informed him of silica dust hazards. Thus, the statements made by Mr. Kaneg as related by the compliance officer, which constitute the only support for the alleged violation, are refuted by the person making the statement. Under these circumstances the statements made by Kaneg and his testimony at the trial are worthy of little, if any, weight.

To establish a violation, the Secretary must convince the trier of fact by a preponderance of the evidence that the violative event or conduct occurred. The Commission has defined this burden as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false" *Ultimate Distrib. Systems, Inc.* 10 OSHD 1569, 1570 (1982). Based upon this record, there is no creditable evidence in support of the alleged violation. The conclusion reached by the compliance officer based upon an employee's statement has been undermined by the same employee at the hearing. Moreover, the sign-in sheet indicating that the employee attended a safety meeting concerning the hazards of silica dust supports the conclusion that the Respondent did inform its employees of the hazards associated with silica dust. Thus, this item must be vacated because of a failure of proof.

Citation 1 Item 2

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds were not fully planked or decked between the front uprights and the guardrail supports:

(a) West side of the Vestibule, an employee was cutting concrete block while standing on a scaffold platform 13' above the ground that measured approx. 28" wide. The scaffold frame measured 60" wide, and 14' long.

Citation 1 Item 3

29 CFR 1926.452(c)(2): Frames and panels were not braced by cross, horizontal, or diagonal braces, or combination thereof, which secure vertical members together laterally:

(a) East and west side of the Vestibule west wall, two separate scaffold systems, each of which had two missing cross braces.

Citation 1 Item 5a

29 CFR 1926.451(b)(4): Scaffold planks that were not cleated, were not extended over their end supports at least 6 inches:

(a) East side of the west Vestibule wall, planking did not extend 6" over the end supports.

Citation 1 Item 5b

29 CFR 1926.51(b)(5)(i): Platforms less than 10 feet were extended greater than 12 inches over their end supports where they were not so designed and installed so that the cantilevered portion of the platform is able to support employees and for materials without tipping, or has guardrails which block employee access to the cantilevered end:

(a) East side of the west Vestibule wall, planking that extended greater than l2" over the end supports.

Citation 2 Item 1[3]

29 CFR 1926.451(e)(1): Employees working on scaffold platforms more than 2 feet above or below a point of access were not provided with portable ladders, hook-on ladders, attachable ladders, stair towers, stairway-type ladders, ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, or personnel hoist:

(a) East side of the west wall in the Vestibule, an employee climbed the scaffold frame to gain access and egress to a platform 13' above a concrete floor.

Citation 2 Item 2 (Repeat)

CFR 1926.451(g)(1): Each employee on a scaffold more than 10 feet (3.1m) above a lower level was not protected from falling to that lower level by either a guardrail system or a personal fall arrest system:

(a) West side of the Vestibule, an employee was cutting concrete block while standing on a scaffold platform 13' above the ground without any fall protection.

The Bast Hatfield Inc. was previously cited for a violation of this Occupational Safety and Health Standard or in equivalent standard, 1926.451(d)(10), which was contained in OSHA Inspection Number 122248990, Citation Number 1, Item Number 2, issued on 5/19/95, also Bast Hatfield Inc. was cited for violation of this Occupational Safety and Health Standard or its equivalent standard, 1926.451(y)(11) which was contained in OSHA Inspection Number 122245798, Citation Number 1, Item Number 4, issued on 3/9/95.

[3] Complainant's motion to amend this item to a "serious" violation was granted.

The facts underlying the aforesaid violations are not disputed by Respondent. Thus, Respondent agrees that the violative conditions observed by the compliance officer as described above existed at Respondent's worksite, (Respondent's brief p. 13). Upon his arrival at the worksite, the compliance officer parked his vehicle facing the work area and observed three scaffolds being used by Respondent's employees. These scaffolds were designated as scaffolds 1, 2 and 3 at the hearing. According to the compliance officer, the scaffolds were approximately 13 feet high (Tr. 206) and were composed of two six-foot sections (Tr. 215). The compliance officer observed employee Ronald Kaneg standing at the 13 foot level of scaffold 1 without full planking (Citation 1, item 2). With respect to Citation 1, item 3, the compliance officer observed missing cross braces on scaffolds 1 and 2. With respect to Citation 1, items 5(a) and 5(b), the compliance officer measured the 5 or 6 planks at the top level of scaffold No. 2 and found one plank extended less than six inches over its support (Tr. 248-49) and another plank extended 2 feet six inches over its end support (Tr. 214, 247-49). The compliance officer also testified that the scaffold did not have guard rails which would have prevented an employee from stepping on the cantilevered portion of the plank (Tr. 250) (Citation 2, item 2). Moreover, employee Kaneg conceded that the aforesaid planks were not guarded or cleated to keep them from sliding back and forth on the scaffold frame (Tr. 67-68, 103). Finally, the compliance officer observed that the scaffold upon which employee Kaneg was working did not have an access ladder (Tr. 254) (Citation 2, item 1).

After talking with employees Kaneg and Bourdeau, compliance officer Wigger went to the construction trailer and introduced himself to superintendent Salisbury. Mr. Salisbury was the job supervisor and Mr. Bourdeau was designated as a labor foreman and the competent person for purposes of scaffold erection (Tr. 31, 214, 230, 231, 405). It appears, however, for this job, Mr. Bourdeau had no supervisory authority and Mr. Kaneg was designated as "lead man" (Tr. 431-435, 475) without supervisory authority (Tr. 433). Mr. Salisbury telephoned Respondent's safety coordinator, Daniel House, to come to the jobsite. Upon Mr. House's arrival, compliance officer Wigger walked him through the jobsite. Mr. House testified as follows:

> When I was called to the site that morning, and [10] when I had my meeting with Mr. Wigger, and he brought me around and, and showed me what violations had occurred, I was, I was outraged, and I couldn't believe that I had seen and I, and I couldn't, for the life of me, understand how this could possibly happen (Tr. 519).

Based upon this record, there is sufficient evidence to support the conclusion that the violative conditions alleged above existed at Respondent's worksite.

As its defense to the aforesaid violations, Respondent asserts that the Secretary failed to establish that it (Respondent) knew or with the exercise of reasonable diligence, could have known of the violation. Closely related to the employee knowledge issue, Respondent argues as a second defense that the violations were the result of unpredictable and unpreventable employee misconduct. In essence, Respondent argues that it was "unrealistic" to provide on site supervision for the work being performed because the employees were experienced and well qualified; therefore, the violations could not be anticipated nor prevented.

In order to establish that Respondent failed to comply with the aforesaid standards, the Secretary must prove that (1) the standards apply (2) the employer failed to comply with the terms of the standards (3) employees had access to the cited conditions and (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative conditions, *Astra Pharmaceutical Products, Inc.* 1981 CCH OSHC ¶25,578, aff'd 681 F.2d 69 (1st Cir 1982); *Secretary of Labor v. Gary Concrete Products,* 15 BNA OSHC 1051, 1052, 1991 OSHD ¶29,344 (1991) *Carlisle Equip. Co., v. Secretary of Labor* 24 F.3d 790 (1994). Respondent acknowledges that the Secretary has met her burden for the first three elements (Respondent's brief pg. 25). Respondent insists, however, as stated above, that Complainant failed to establish that it knew, or with the exercise of reasonable diligence, could have known of the violative conditions. Respondent argues that the violations occurred "over a short period of time through the renegade actions of principally one employee" *ibid*.

The record reveals that four of Respondent's employees were at the jobsite at the time compliance officer Wigger arrived to conduct his inspection. After reviewing the work to be performed that day with the work crew, Superintendent Mark Salisbury walked across the parking lot to the job trailer. Once inside the trailer, Salisbury could not see the work activities of the other employees, Lynn Bourdeau, Ronald Kaneg and Roger Caldwell. Although Mr. Bourdeau had been designated as a laborer foreman with supervisory authority at other jobsites; Respondent asserts that he had no supervisory authority at this site. Ronald Kaneg was performing as a mason and had been designated as "lead man" on the day of the inspection. However, Kaneg had no supervisory authority. Ronald Caldwell likewise was a laborer with no supervisory authority. Thus, the only person at the site having supervisory authority was Mark Salisbury.

Mr. Kaneg was assigned the task of completing the erection of a concrete block wall. He performed this task from while standing on a scaffold (scaffold 2) which had been placed at the interior of the enclosure being constructed. Another scaffold had been placed at another location in the inclosure (scaffold 3) and employee Caldwell was working from that scaffold. Upon completion of the

wall, Mr. Kaneg went to the job trailer to receive further instructions from superintendent Salisbury. Salisbury told Kaneg to cut a "rake" at the top of the wall; that is, to cut the concrete blocks at an angle to receive the roof supports. In order to accomplish this task, it was necessary to cut the concrete blocks with a power saw on both sides of the wall. Kaneg could cut one side of the block while standing on scaffold 2; however, it was necessary to construct another scaffold to cut the blocks on the opposite side. Kaneg asked Lynn Bourdeau, who had been designated ass the competent man for scaffold erections, to erect a scaffold on the other side of the wall opposite scaffold 2. Bourdeau had partially completed the scaffold when he left the jobsite to obtain coffee for the work crew. CO Wigger arrived at the site in his automobile in time to observe Kaneg cross over the wall from scaffold 2 to scaffold 1 and continue cutting the masonry. Bourdeau returned with the coffee and Wigger discussed the violations observed with the crew.

On these facts Respondent argues that Complainant has failed to carry its burden of proof that Respondent knew, or with the exercise of reasonable diligence, could have known of the violations. First, Respondent notes that it is not necessary to have one on one supervision at a construction site. Respondent cites *Brennan v. OSHRC* 502 F.2d 946, 949 (3rd cir. 1974) for the proposition that "[w]hile close supervision may be required in some cases to avoid accidents, it is unrealistic to expect an experienced and well-qualified [worker] to be under constant scrutiny," *see also Secretary of Labor v. St. Orge Logging* and *B&B Lumber Co.* 7 OSHC BNA 1169. 1170 (1970). Respondent argues that it was perfectly proper for superintendent Salisbury to instruct his highly trained and experienced work crew at the beginning of the day and leave the worksite confident that the work assignments would be accomplished in a safe manner. Furthermore, since none of the employees engaged at the worksite were designated as supervisors by Respondent, the knowledge possessed by those employees regarding unsafe conditions at the site cannot be imputed to Respondent.

In order to prevail with this theory, Respondent must establish that the non-supervised employees were well trained and qualified to perform their work without supervision. Thus, Respondent must establish that its safety training program was sufficient for that purpose. *See New York State Electric and Gas Corporation v. Secretary of Labor* 1995-1997 CCH OSHD 31,099 (1996). In the aforesaid matter, the court of appeals for the Second Circuit, the circuit in which this matter arose, discussed in detail the burden placed upon the Secretary to establish employer knowledge of the violative conditions even where Respondent, as in this case, raises employee misconduct as an affirmative defense. That affirmative defense places the employer's safety program in issue and the respondent bears the burden of establishing the adequacy of its safety program. The complexities of

this shifting burden are described in minute detail by the court in *New York State*, *supra*, and the principles enunciated therein must be applied here if it is established that Respondent's employees were unsupervised at the time the violations were observed by the compliance officer.

The record in this matter contains conflicting evidence regarding the roles performed and the authority exercised, if any, by the various actors involved herein. It is clear that titles have little meaning to Respondent. Thus, foreman (Bourdeau) and lead man (Kaneg), in Respondent's view, do not connote the typical authority and supervisory role usually associated with those terms. The testimony of the employees involved is contradictory on this point and, based upon the demeanor of the witnesses, Bourdeau and Kaneg, is entitled to little, if any, weight. Thus, it cannot be established on this record whether Respondent intended any employee, other than Mark Salisbury, to be vested with supervisory authority at the worksite.

The ramifications of the aforesaid conclusions may be avoided, however, by the fact that employee Bourdeau was the designated "competent person" on site for purposes of scaffold erection (Tr. 213, 405). Even if Bourdeau was specifically told that he had no supervisory authority, his status as a competent person for scaffold erection required that he possess a certain level of expertise in scaffold erection and the identification of existing and predictable hazards. The term competent person for purposes of scaffold erection is defined as 29 C.F.R. 1926.450(b) as follows:

> *Competent person* means 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.

Thus, Bourdeau, as the competent person on site for scaffold erection, was required to identify hazards relating to scaffolds and had authority to correct or eliminate those hazards. Since Bourdeau created the hazards associated with scaffolds 1 and 2 during their erection and dismantling, he was, or should have been, aware of their existence as well as the fact that employee Kaneg was working from scaffold 2 and intended to perform work while standing on platform 1. Mr. Bourdeau's knowledge, in his position as competent person, is imputed to his employer *Ormet Corp* 14 BNA OSHC 2134, 2138-39, 1991-93 CCH OSHD ¶29,254 (1991) *Merritt Electric Co., Inc.* 1981 CCH OSHD ¶25,556 *Access Equipment Systems, Inc.* 1991-1993 CCH OSHD ¶29,993. Therefor, Complainant has met her burden establishing that Respondent had actual or constructive knowledge of the violation.

Notwithstanding the foregoing, Respondent urges that the violation be dismissed because of unpreventable employee misconduct. The burden to establish the affirmative defense of unpreventable employee misconduct falls upon Respondent. In order to establish the defense, the employer must

show that (1) it had established work rules designed to prevent the violation; (2) had adequately communicated those work rules to its employees (including supervisors); (3) had taken steps to discover violations of those work rules, and (4) effectively enforced those work rules when they were violated.

With respect to the first element, Respondent established that its safety manual includes an entire section devoted to the proper erection of scaffolding (Exh. R-4); that regular weekly safety meetings were conducted (Exh. R-5); and that its written safety program provided for progressive disciplinary procedures including a written warning for a first offense, suspension for the remainder of the work day on the second, and discharge for a third violation (Exh. R-2). Bast failed to establish, however, that the relevant rules on scaffolding were ever communicated during the weekly safety meetings. The only safety topic documented and offered into evidence concerned the health hazards associated with silica. The testimony, moreover, demonstrates that Respondent failed to implement its written disciplinary program, resulting in ineffective enforcement. The only disciplinary actions of which any of the Bast employees were aware, came about as a direct result of a prior OSHA inspection when two workers were discharged for riding in a manbasket without fall protection. Bast introduced no evidence that it had ever taken any disciplinary action where an OSHA inspection was not involved.. There was no evidence that any written warnings had ever been issued, or that any employees had ever been suspended prior to the OSHA inspection which is the subject of this action. Moreover, Foreman Salisbury testified that he had given only verbal warnings. The Commission has found that a program consisting only of pre-inspection verbal warnings is insufficient as effective enforcement. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910.

In addition, the Commission has found that misconduct by supervisory personnel constitutes strong evidence that safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991), and that the involvement of a number of employees in the misconduct suggests ineffective enforcement. *Gem Industrial, Inc.*, 17 BNA OSHC 1861, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). Because three separate employees, one of them the competent person for scaffold erection, were found violating, or observing violations of scaffolding violations, the employee misconduct defense has not been established.

Finally, Respondent asserts that its employees were in the process of erecting or dismantling the scaffold at the time the compliance officer arrived at the scene. thus, dispensation from the requirements of the cited standards is applicable under the circumstances. Respondent points to (a) 29 CFR 1926.451(b)(ii) which provides that full planking is not required when employees are erecting or

dismantling a scaffold, (b) 29 CFR 1926.451(e)(9) which provides that a safe means of access is determined by the employer when employees are erecting or dismantling the scaffold and (c) 29 CFR 1926.451(g)(2) which provides that its employer, through a competent person, shall determine the feasibility and safety of providing fall protection for employees erecting or dismantling scaffolds. It is clear that the regulations cited above do not contemplate employees performing work while the scaffold is being erected or dismantled. The record clearly establishes that employee Kaneg was performing construction work while standing on the partially erected scaffold number 1 and the partially dismantled scaffold number 2. These work activities were observed or should have been anticipated by the competent person on the site, Mr. Bourdeau. Moreover, there is no evidence that Mr. Bourdeau instructed Mr. Kaneg to remain off the scaffold until it was fully erected. Accordingly, Respondent has failed to present sufficient evidence to support the dismissal of the citations. Moreover, since all of the violations exposed employees to falls and/or tripping hazards on scaffolds as high as 13 feet from the ground, it is concluded that said falls could result in serious injury or death. Accordingly, the violations are affirmed as serious violations.

With respect to the serious violations set forth above, the record supports a finding that the violations presented a moderate to low gravity factor. In view of the fact that Respondent has a complete written safety program and is of a moderate size in its industry, a penalty in the amount of $1,000.00 is assessed for each violation for a total penalty of four thousand dollars.

With respect to Repeat Citation 2, item 2, Respondent stipulates to the facts underlying this violation (Tr. 54-56), and that a substantially similar violation, previously cited, has become a final order of the Commission (Tr. 256-58). A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). A repeat violation has been established. Based upon the probability of a serious injury and the repeated classification of this item, the proposed penalty in the amount of $5,600.00 is assessed for the violation.

Citation 1, item 4, as amended (Tr. 7)

29 CFR 1926.1053(b)(1): The side rails of through or sidestep fixed ladders did not extend 42 inches (1.1m) above the top of the access level or landing platform served by the ladder:

(a) Rear wall of the existing building, a stepladder used to gain access to a scaffold platform did not extend 42" above the platform.

The cited standard provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

CO Wigger testified that during his inspection employee Caldwell told him that he used a six foot stepladder to access scaffold No. 3 (Tr. 232-33). At hearing, Caldwell admitted using the stepladder (Tr. 175, 187) The ladder did not extend the required three feet above the platform being accessed, but was 6 to 12 inches lower than the scaffold platform (Tr. 186, 233). Caldwell testified that the ladder was set up approximately a foot away from the wall in the back of the scaffold facing the side of the platform (Tr. 189) and he used the scaffold frame as a grabrail (Tr. 190). The compliance officer testified that an employee dismounting from the top of the ladder would have to reach 3-1/2 to 4 feet for an upright on the scaffolding to use as a grabrail (Tr. 235-244, 339). Wigger also stated that an employee could lose his balance and fall from the top of the ladder six and one half feet to a concrete floor (Tr. 239, 245). It is undisputed that the cited scaffold was not fully erected at the time of the cited violation (Tr. 186-187, 448). The evidence establishes that the ladder used for accessing the cited scaffold was neither three feet above the landing surface, nor was it secured to the scaffold. The record thus establishes a violation, regardless of the availability of the scaffold frame for a grab rail.

Bast argues that where a scaffold is not fully erected, ladder access need not be provided, citing *Baker Concrete Construction Co.*, 17 BNA OSHC 1236, 1995 CCH OSHC ¶30,768 (No. 93-606, 1995). In *Baker* the Commission considered a single issue, *i.e.*,whether employers are on fair notice that ladders must be provided intermittently, whenever feasible, during the process of scaffold assembly or disassembly. *Baker* is inapposite where, as here, a ladder has actually been provided. In that instance, as stated at §1926.451(e)(2)[4], ladder usage regulations found at subpart X are specifically applicable.

For the foregoing reasons the violation is affirmed.

[4] (2) Portable, hook-on, and attachable ladders (Additional requirements for the proper construction and use of portable ladders are contained in subpart X of this part -- Stairways and Ladders):

Penalty

A penalty of $1,600.00 was proposed for this item. Compliance Officer Wigger stated that the probability of an accident occurring was small (Tr. 246). However, a fall would likely result in broken bones. He assessed the probable severity of an accident as medium (Tr. 245) and a 20% reduction for size (Tr. 246). Taking into account the relevant factors, the proposed penalty is appropriate and is assessed for the violation.

Citation 3, item 1 alleges:

29 CFR 1926.350(j) Section 3.2.4.3 American National Standards Institute Z49.11967 as adopted by 29 CFR 1926.350(j): Oxygen cylinder(s) in storage were not separated from fuel gas cylinders, reserve stocks of carbides, or highly combustible materials (especially oil or grease) by a minimum distance of 20 feet or by a noncombustible barrier at least five feet high having a fire resistance rating of at least ½ hour:

(a) North end of the Vestibule area, 1 oxygen and 1 acetylene cylinder were stored together.

Facts

CO Wigger testified that he observed an oxygen and acetylene tank stored side by side in the north side of the vestibule (Tr. 259; Exh. C-15) and the tanks were not in use. The tanks were secured to the metal studs with rope, caps in place, and no torches or hoses were located nearby (Tr. 261, 350). Respondent argues that the gas cylinders were not "in storage" because the tanks had been used to cut a one foot steel beam at approximately 8:00 to 8:30 that morning (Tr. 426-27), and were to be used later to cut a second beam approximately 12 feet away (Tr. 452-53). Mark Salisbury testified that the tanks are regularly separated when in storage; one was stored near scaffold No. 3, the other at the temporary entrance wall (Tr. 426).

The Commission most recently discussed the definition of the term "in storage" in *Andrew Catapano Enterprises Inc.*, 17 BNA OSHC 1776 (Nos. 90-0050, 90-0189, 90-0190, 90-0191, 90-0192, 90-0193, 90-0771, 90-0772, 91-0026, 1996). In *Catapano,* the Commission noted that whether a cylinder was in storage must be determined from looking at the evidence as a whole, taking into consideration the length of time the cylinders were not in use, as well as whether the cylinders were to be used intermittently or were available for immediate use. Salisbury testified, without contradiction, that the cylinders had been in use approximately an hour before the OSHA inspection, and were needed to cut a second beam. Based upon the evidence as a whole, it is concluded that the tanks were not in storage within the meaning of the standard. Accordingly, this item is vacated.

Findings of Fact

Findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.

2. Respondent, at all times material to this proceeding was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of Respondent and the subject matter of this proceeding.

ORDER

1. Serious citation 1, item 1, alleging violation of §1910.1200(h)(2)(ii) is VACATED.

2. Serious citation 1, item 2, alleging violation of §1926.451(b)(1) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

3. Serious citation 1, item 3, alleging violation of §1926.452(c)(2) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

4. Serious citation 1, item 4, as amended, alleging violation of §1926.1053(b)(1) is AFFIRMED, and a penalty of $1,600.00 is ASSESSED.

5. Serious citation 1, items 5a and 5b, alleging violations of §1926.451(b)(4) and (b)(5)(i) are AFFIRMED, and a combined penalty of $1,000.00 is ASSESSED.

6. Serious citation 2 item 1, as amended, alleging violation of §1926.451(e)(1) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

7. Repeat citation 2, item 2, alleging violation of §1926.451(g)(1) is AFFIRMED, and a penalty of $5,600.00 is ASSESSED.

8. Other citation 3, item 1 alleging a violation of 29 CFR 1926.350(i) is VACATED.

Robert A. Yetman
Judge, OSHRC

Dated: