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. THE PIKE COMPANY, INC., Respondent.	OSHRC DOCKET No. 98-0657

APPEARANCES:

For the Complainant:
Mychelle Morgan, Esquire, U.S. Department of Labor, Office of the Solicitor, New York, New York

For the Respondent:
Michael E. O'Neill, Esquire, Rochester, New York

Before: Administrative Law Judge Ann Z. Cook

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 Pike Company, Inc. ("Pike") was the general contractor on the construction of a new prison wing at the Greene Correctional Facility at Cocksackie, New York. Following an inspection by compliance officer ("CO") Richard Homenick on January 28, 1998, the Occupational Safety and Health Administration ("OSHA") issued Pike one serious, one repeat and one "other" citation alleging four violations of OSHA regulations. Pike timely contested the citations, and the case was heard on December 22 and 23, 1999, in Albany, New York. Both parties filed post-hearing briefs. Pike does not contest that it is an employer engaged in a business affecting interstate commerce and that it is subject to the requirements of the Act. (Answer ¶ 1).

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (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 (*i.e.*, 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).

ALLEGED SERIOUS VIOLATION OF 29 CFR 1926.501(b)(1)

Citation 1, Item 1 alleges:

> At the job site - second floor: employees working near the very edge of a floor opening measuring 11 feet in width and 20 feet in length with a fall potential of 13 feet and 4 inches to the ground level. Employees were cutting 2x4' lumber and had their backs to the opening which had no guard rails.

Section 1926.501(b)(1) provides:

> (A) *Unprotected sides and edges.* Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

CO Homenick, with 18 years experience at OSHA, primarily in construction, and 10 years in the construction industry as a laborer and foreman, testified credibly and knowledgeably about his observations at the work site. He testified he observed and photographed three men working on the second floor within 6 feet of the edge of a walking/working surface. One of his photos shows three men standing around a worktable. One man's back is about 2 feet from the edge, which dropped off 13 feet, 4 inches to the concrete floor below. There was no guardrail along the edge, but a cable was on the ground that Pike tightened to provide a guardrail after the CO pointed out the problem. Rebar about 24 inches high stood at intervals along the edge, offering no fall protection, but posing a possible stumbling hazard. The men told Homenick that they were Pike employees and had been working there for about one hour. Homenick testified that the men working near the unprotected edge were very visible and that Pike foremen and superintendents were working elsewhere within sight on the second floor. He further testified that in place of guardrails, Pike could have used other

fall protection, such as body harnesses. (Tr.18-24, 26-30; CX-2-3). Homenick's testimony, along with his photos, establish all of the above-noted elements of the Secretary's burden of proof.

Infeasibility

Pike raises the affirmative defense of infeasibility of compliance, arguing that it was impossible to construct the wooden forms needed to pour concrete around a column with a fall protection system in place. To establish this defense, an employer must show (1) that the means of compliance prescribed by the applicable standard would have been infeasible, in that (a) its implementation would have been technologically or economically infeasible, or (b) necessary work operations would have been technologically or economically infeasible after its implementation, and (2) that there would have been no feasible alternative means of protection. *VIP Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

The testimony of George Budine, the project superintendent, and Thomas Scheg, the carpentry foreman, establishes that a guardrail had once been in place and that one end of the guardrail cable had been attached to a steel column. The column was to be encased in concrete and the concrete forms could not be placed around the column without detaching the guardrail cable from the column. (Tr. 136, 168). Pike contends that when Homenick observed them, the three Pike employees were "in the process of getting ready to build base shoes or possibly planning this act." (R. Brief p. 7; Tr. 169). However, the record indicates that the men were reading plans and/or sawing 2x4's and that their activity did not require working near the edge or removal of the guardrail. (Tr. 159-60; CX-2). Pike has therefore not demonstrated infeasibility of compliance.

Based on the foregoing, the evidence establishes the alleged violation. The evidence also establishes that the violation was serious, in that if one of the three exposed employees had fallen over the edge to the concrete floor below, he could have been seriously injured or killed. (Tr. 20).

Penalty

The Secretary has proposed a penalty of $2,125.00 for this item. In determining appropriate penalties for violations, due consideration is to be given to the gravity of the violation as well as the employer's size, history and good faith. The gravity of the violation is generally "the primary element in the penalty assessment." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Given the few employees exposed to the fall hazard and the brevity of the exposure (one hour at

most), I agree with the CO's assessment of the gravity as low. (Tr. 62). Pike has over 250 employees and has been cited for a serious violation within the last three years, making a reduction for either size or history inappropriate, and the proposed penalty already reflects credit for good faith. However, the proposed penalty is too high, in my opinion, due to the low gravity of the violation. Consequently, I conclude that a penalty of $1,750.00 is appropriate.

ALLEGED SERIOUS REPEATED VIOLATIONS OF 29 CFR 1926.451(e)(1) and (g)(1)

Items 1 and 2 of Citation 2 are considered together because they involve the same fact situation and related hazards.

Citation 2, Item 1 alleges:

> (a) At the job site - second floor: Employees climbed the tubular steel frame scaffold by using the scaffold frame. The fall potential was 20 feet to the concrete ground below.

Section 1926.451(e)(1) provides, in pertinent part:

> (e) *Access.* This paragraph applies to scaffold access for all employees....
> (1) When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as means of access.

Citation 2, Item 2 alleges:

> (a) At the job site - cell area: An employee was in the process of pouring concrete from a pail into a concrete form. The employee was working on an outrigger 20 feet above the ground level with no fall protection provided.

Section 1926.451(g)(1) provides, in pertinent part:

> (g) *Fall protection*. (1) 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.

CO Homenick testified that upon arriving on the second floor of the work site, he noticed a man on a scaffold in the process of pouring concrete into a form around a column. The man stood facing the building on an outrigger platform about two planks wide and 14 feet long. The outrigger extended from the main scaffolding that ran around the perimeter of the building. The front of the outrigger was a few feet from the building and 5 or 6 feet above a concrete floor from which the

concrete was being hoisted up to the worker. On the other sides (behind the worker and at both ends of the outrigger) the drop was about 20 feet. The worker was 2 to 3 feet from one end of the platform and 11 to 12 feet from the other end. The outrigger had no guardrails. Homenick took two photographs of the man at work on the outrigger. (Tr. 13-14, 34-35, 70, 73, 78; CX-4-5).

As he approached, Homenick noticed there was no access ladder and called up to the man, "I don't see any ladder for you." The man replied "No," and started to move toward the edge of the scaffolding as if to climb down. Homenick told him to wait for a ladder before coming down. George Budine, Pike's project supervisor, then instructed another man to get a ladder, saying "I don't understand how this could have happened." Without a ladder or other visible means of accessing the outrigger platform, Homenick surmised the man climbed 5 feet up the outside of the scaffolding from the floor below. Pike contends planks were to have connected the building to the scaffolding, allowing access to the floor below by walkways, ladders and stairways built into the scaffolding. However, there is no evidence planks were used for this purpose on the day at issue, and Pike concedes planks were often stolen or appropriated for other work. (Tr. 34-35, 71, 151-53, 161-62).

The man on the platform identified himself to Homenick as a Pike employee and said that he had been working there for an hour. Homenick testified that he noticed the employee on the outrigger as soon as he arrived on the second floor and that he was sure anyone else walking by would have noticed the employee and the problem. Had the man lost his balance and fallen while on the platform or climbing the scaffolding, he could have fallen as far as 20 feet and sustained serious injuries or even death. (Tr. 35-36, 39-40, 49).

Section 1926.451(e)(1) applies when scaffold platforms are more than 2 feet above or below a point of access. The standard applies here because the distance from the floor below (the point of access) to the platform was 5 feet. The uncontroverted evidence establishes Pike's noncompliance with the standard as well as the exposure of its employee to the fall hazard. It is not necessary, as Pike suggests, that there be eyewitness testimony of the employee climbing up the scaffolding to reach the platform when there was no other reasonable means of access and both employer and employee acknowledged the absence of a ladder. Because the hazard was in plain view, Pike with reasonable diligence could have discovered it. The record establishes a violation of §1926.451(e)(1), and the violation was serious because a fall could have resulted in serious injury or death.

The record also establishes a serious violation of § 1926.451(g)(1), which requires fall protection on scaffolds more than 10 feet above a lower level. As discussed above, the drop from the outrigger platform was 20 feet on three sides, there were no guardrails on the platform, and no other fall protection was in use. The employee was in plain view of several supervisors working on the second floor, and if he had fallen off the platform the result could have been serious injury or death.

Unpreventable Employee Misconduct

Pike raises the affirmative defense of unpreventable employee misconduct with respect to both violations. This defense requires the employer to prove: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations were discovered. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F.3d 401 (6th Cir. 1977).

The evidence falls far short of showing unpreventable employee misconduct. The testimony of Pike's safety director and its on-site carpentry foreman demonstrates that Pike gave each new employee a copy of the company safety rules and a job site safety handbook, that the handouts contained fall protection rules, and that weekly on-site safety meetings were held. Their testimony also demonstrates that Pike had a disciplinary program of verbal warnings followed by written warnings and possible termination. (Tr. 104-10, 170-72; RX-1-2, 7). Regardless, Pike presented no evidence that fall protection rules were discussed in safety meetings or otherwise effectively communicated to employees, or that the rules were actually enforced by periodic inspections or other means. The instant violations took place in plain view, lasted up to one hour, and were undetected even though several supervisors were on the same floor. There is no evidence that Pike effectively communicated or enforced its pertinent safety rules at the work site. Pike has therefore not established that the violation was the result of unpreventable employee misconduct.

Classification and Penalties

The Secretary maintains that both violations were repeated and proposes a penalty of $5,000.00 for each item. A violation is repeated if, at the time it occurred, 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). CO Homenick testified that on July 23, 1997, Pike was cited

for serious violations of both §§ 1926.451(e)(1) and (g), that he had been the inspecting official, and that the citation had been resolved by an informal settlement agreement that became a final order on September 2, 1997. Homenick further testified that the 1997 violations were very similar to those in this case. (Tr. 43-44, 54-55, 67-68; CX-6). Pike has not challenged the repeated classification, and, based on the record, the violations are affirmed as repeated.

The proposed penalty for item 1 was calculated by doubling the $2,500.00 gravity-based penalty and giving no credit for size, history or good faith. Since only one employee was at risk, and the risk existed only when he ascended or descended the scaffolding, I find the gravity of the violation to be low. With no other mitigating considerations, I conclude that a penalty of $3,000.00 is appropriate for this violation.

The proposed penalty for item 2 was calculated in the same manner as the penalty for item 1. In my view, however, the gravity of this violation is greater because the employee's exposure was longer and it was more likely that he could have fallen while concentrating on his cement-pouring work. I conclude that a penalty of $4,000 is appropriate for this violation.

ALLEGED "OTHER" VIOLATION OF 29 CFR 1926.404(b)(1)(i)

Citation 3, Item 1 alleges:

> Employer did not use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:
>
> (A) At the job site - second floor: An employee was using a Hilti Screw gun and a Milwaukee saw to cut 2x4' lumber.

Section 1926.404(b)(1)(i) provides:

> *(b) Branch circuits*-(1)-*Ground-fault protection*-(i) *General*. The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

CO Homenick testified that he observed a man who identified himself as a Pike employee using two power tools that were plugged into an electrical outlet. Homenick inserted a ground fault circuit tester into the outlet, and, when nothing tripped, he determined that the outlet had no ground

fault circuit interrupter. The employee told him that he had been using the tools intermittently for approximately two weeks. Homenick testified that without ground fault protection there was a danger of minor burns. However, he also testified that the tools the employee was using were in good condition and that the possibility of a short was decreased by the fact that one of the tools had a ground pin and the other was double insulated. Homenick noted that it was difficult to detect ground fault violations because they were not always visually apparent and required testing. The other outlet that he tested had proper ground fault protection. (Tr. 57-60, 83).

Pike argues that it was entitled to rely on the prime electrical contractor, R.G. Gray Company, to have properly performed its work, because Gray was not its subcontractor and the violative condition was not visually detectable. Although not articulated as such, I construe Pike's argument to be an assertion of the multi-employer work site defense. (R. Brief pp. 23-24; Tr. 154-55). To meet this affirmative defense, the employer must show that it did not create or control the violative condition and that it either (1) took realistic alternative measures to protect its employees or (2) did not know and could not reasonably have known that the condition was hazardous. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (Nos. 3694 & 4409, 1976); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976).

While it is true that Pike did not create or control the cited condition, its responsibility for its employees' safety required more than simply depending on another contractor to do its job correctly. Had Pike taken any steps to ascertain that the grounding had been done in accordance with the standard, it might prevail. However, Pike has not shown that it took any steps to assure that Gray had properly completed its work, such as checking with Gray or doing its own testing. To the contrary, Pike merely assumed that the appropriate ground fault protection was in place and that its employees were protected. The record does not show that Pike's reliance on Gray was reasonable or that in the exercise of reasonable diligence Pike could not have known of the violative condition. *See, e.g., Centrex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2128-29 (No. 92-0851, 1994)*; Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993); *Blount Int'l, Ltd.*, 15 BNA OSHC 1897, 1900 (No. 89-1394, 1992).

The Secretary has established the alleged violation. The violation is properly characterized as "other" because the probability of an accident was low and any resulting injury would not have been severe. This citation item is therefore affirmed. No penalty was proposed and none is assessed.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to section 10(c) of the Act.

2. Pike was in serious violation of 29 CFR § 1926.501(b)(1), and a penalty of $1,750.00 is appropriate.

3. Pike was in serious, repeated violation of 29 CFR § 1926.451(e)(1), and a penalty of $3,000.00 is appropriate.

4. Pike was in serious, repeated violation of 29 CFR § 1926.451(g)(1), and a penalty of $4,000.00 is appropriate.

5. Pike was in "other" violation of 29 CFR § 1926.404(b)(1)(I), and no penalty is appropriate.

ORDER

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

1. Item 1 of Citation 1 is affirmed, and a penalty of $1,750.00 is assessed.

2. Item 1 of Citation 2 is affirmed, and a penalty of $3,000.00 is assessed.

3. Item 2 of Citation 2 is affirmed, and a penalty of $4,000.00 is assessed.

2. Item 1 of Citation 3 is affirmed, and no penalty is assessed.

Ann Z. Cook
Judge, OSHRC

Dated:

Washington, D.C.