

SECRETARY OF LABOR,

Complainant,

v.

TEXAS A.C.A., INC., and its successors

Respondent.

OSHRC DOCKET NO. 98-1567

APPEARANCES:

For the Complainant:

Madeleine T. Le, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

Robert E. Rader, Jr., Esq., Rader, Campbell, Fisher & Pyke, P.C., Dallas, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

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, Texas A.C.A., Inc. (A.C.A.), at all times relevant to this action maintained a place of business at 1661 West Airport Freeway, Euless, Texas, where it was engaged in stucco and lathing of new construction. The Commission has held that construction is in a class of activity which as a whole affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company*, 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Respondent is, therefore, an employer engaged in a business affecting commerce, and is subject to the requirements of the Act.

On July 28, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of A.C.A.'s Euless work site. As a result of that inspection, A.C.A. was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest A.C.A. brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On February 19, 1999, a hearing was held in Dallas, Texas. At the hearing the Secretary withdrew items 1(b) and 9(b) of “serious” citation 1 (Tr. 5). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

Alleged Violations of §1926.451(a)(6) and (c)(3)

At the hearing, the Secretary requested that citation 1, items 1a and 5 be grouped for purposes of proposing a penalty.

Citation 1a alleges:

29 CFR 1926.451(a)(6):

The scaffold at this site was not constructed in accordance with its design. Diagonal bracing was not used to square the scaffold sections and cross bracing was absent on many sections, exposing the scaffold to becoming unstable and collapsing.

Citation 1, item 5 alleges:

29 CFR 1926.451(c)(3):

Scaffold legs were not plumb, square, and rigid. Some legs appeared to be bent and scaffold frames were not squared so as to maintain structural integrity. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

Compliance Officer (CO) Michael Rivera testified that he conducted the July 28th inspection of A.C.A.’s work site (Tr. 9). Rivera testified that as he drove by A.C.A.’s work site at 1661 West Airport Freeway he observed workers performing exterior finish work from scaffolding around the south and northwest sides of the building under construction (Tr. 9, 13, 17; Exh. C-2). Rivera testified that he videotaped the workers as he approached the site (Tr. 13; Exh. C-1). Upon his arrival, he was met by Tom Ahern, A.C.A.’s foreman, and that Ahern admitted that the workmen on the scaffolding were A.C.A. employees (Tr. 11). On cross-examination, Rivera admitted that other subcontractors were on the site, and that when he arrived at the site, all the A.C.A. employees were grouped at the northwest end of the building (Tr. 65-66; Exh. C-2).

Rivera testified that on the northwest side of the building there was no cross-bracing on the interior side of the scaffolding next to the building (Tr. 18, 20-21; Exh. C-1, C-2). A.C.A. employees were observed working on the cited portion of the scaffolding (Tr. 21-22). In addition, Rivera stated, an end frame on a south facing L of the scaffold was out of square with

the rest of the scaffold (Tr. 25; Exh. C-1). Though no employees were working on that portion of the scaffold, Rivera stated that the members of the south facing L supported the planking running along the northwest of the building, where A.C.A. employees were observed (Tr. 26).

Alleged Violation of §1926.451(b)(1)

Citation 1, item 2 alleges:

29 CFR 1926.451(b)(1):

Scaffolds used at this site were not fully planked between the front uprights and the guardrail supports on all working levels. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera testified that the scaffold was not fully decked between the guardrail supports on the exterior of the scaffolding to the interior uprights next to the building (Tr. 28-29; Exh. C-1). An A.C.A. employee was videotaped working in the unplanked area (Tr. 29-31; Exh. C-1).

Alleged Violation of §1926.451(b)(7)

Citation 1, item 3 alleges:

29 CFR 1926.451(b)(7):

Scaffolds used at this site had planks which were supported by other scaffold planks and not resting on scaffold bearers. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera testified that the scaffold planks running along the northwest side of the building, where the A.C.A. employees were working, did not rest on a separate bearing scaffold member, but overlapped, and were supported solely by the planks of a scaffold running along the adjoining south facing L (Tr. 33-36; Exh. C-3).

Alleged Violation of §1926.451(c)(2) and (c)(2)(ii)

Citation 1, item 4a alleges:

29 CFR 1926.451(c)(2):

Base plates were not used on all scaffold legs to support the scaffold structure. This condition would expose the scaffold to becoming unstable and expose employees working on it to falling from the working level.

Citation 1, item 4b alleges:

29 CFR 1926.451(c)(2)(ii):

Unstable objects such as corners of wood pieces were used to support scaffold footings. Scaffold footings were not supported by level, sound, rigid materials capable of supporting the loaded scaffold without settling or displacement. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera testified that he observed at least 2 scaffold legs without baseplates on the south and north side of the scaffolding (Tr. 39-40, 81-82; Exh. C-2). Rivera admitted that there were no employees working in the area of the missing base plates (Tr. 82).

George Adams testified that when he walked the job site on the 27th, he did not notice any missing baseplates. Adams stated that the baseplates were welded on to the bottom of the scaffold leg's screw jack during manufacture, but admitted that the screw jacks could be removed from the scaffold legs (Tr. 133, 38).

In addition, Rivera videotaped two instances where scaffold baseplates were inadequately supported by pieces of wood, and one instance where the scaffold leg had sunk into the ground, which did not provide a rigid footing for the baseplate (Tr. 42-43; Exh. C-1, C-2).

Alleged Violation of §1926.451(e)(1)

Citation 1, item 6 alleges:

29 CFR 1926.451(e)(1):

Scaffolds used at this site were not provided with ladders or other safe means of access. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera testified that there was no visible means of safe access to the scaffolding, and that when he initially arrived on site, he observed an employee climbing down a scaffold end frame (Tr. 46, 48).

At the hearing, George Adams testified that stairs accessing the scaffolding were installed on the southwest and east sides of the building (Tr. 134).

Alleged Violation of §1926.451(f)(3) and (f)(4)

Citation 1, item 7a alleges:

29 CFR 1926.451(f)(3):

Scaffolds were not inspected for visible defects before each work shift. Damaged equipment was used on the scaffold at this site. Employees using this scaffold were potentially exposed to a fall to the concrete below them in the event of scaffold collapse.

Citation 1, item 7b alleges:

29 CFR 1926.451(f)(4):

Damaged scaffold components were not replaced or removed from service. Split scaffold planks and bent cross bracing were observed in use at this site. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera believed that the cited scaffolds had not been inspected, because visible defects had not been corrected prior to A.C.A.'s employees mounting the scaffold (Tr. 51). Rivera testified that split scaffold planks were used as decking (Tr. 53; Exh. C-1). Rivera admitted that he could not say whether the split he observed weakened the planks' strength to less than that required by paragraph sub (a) of §1926.451 (Tr. 80).

Rivera also stated that the bent end frames cited at item 5 should have been replaced (Tr. 54, 81).

Alleged Violation of §1926.451(g)(1)(vii)

Citation 1, item 8 alleges:

29 CFR 1926.451(g)(1)(vii):

Employees working on the scaffold at this site were not protected from falling by the use of a guardrail system or personal fall arrest system. Employees using this scaffold were potentially exposed to a fall to the concrete below them.

Facts

CO Rivera testified that he and another CO, Rick Ranck, took measurements from the working platform to the concrete on the northern end of the scaffolding. The scaffold at that point was 10 feet, 9 inches above the ground (Tr. 57, 59; Exh. C-1). There were no guardrails on the scaffolding in that area, though there was an employee working in that area (Tr. 57, 59; Exh. C-2).

Alleged Violation of §1926.454(a)

Citation 1, item 9a alleges:

29 CFR 1926.454(a):

Each employee working on the scaffold at this site was not trained to recognize the hazards associated with the scaffold. Employees were exposed to numerous fall and scaffold collapse hazards.

Facts

CO Rivera testified that, based on the number of scaffolding violations observed at the site, and the number of employees involved, he believed that the A.C.A. employees involved had not been trained to recognize, or minimize, the hazards associated with scaffolding (Tr. 62).

Analysis

With the exception of items 4a, 7b, and 9a, A.C.A. does not dispute the existence of the cited violations.

Item 4a. Item 4(a) alleges that baseplates were not used on all scaffold legs. CO Rivera admitted that there were no employees working in the area of the missing baseplates. The Secretary has failed to show employee exposure, and the cited item is vacated.

Item 7b. Item 7(b) alleges that split scaffold planks and bent cross bracing were in use on the cited scaffold, in violation of §1926.451(f)(4). The cited standard requires that:

Any part of a scaffold damaged or weakened such that its strength is less than that required by paragraph (a) of this section shall be immediately repaired or replaced, braced to meet those provisions, or removed from service until repaired.

Paragraph (a) requires that each scaffold component be capable of supporting at least 4 times its maximum intended load. The Secretary failed to make any showing on this issue. This item will be vacated.

Item 9(a). Item 9a alleges that employees were not trained to recognize hazards associated with scaffolds. In her brief, the Secretary admits that A.C.A. had an adequate training program, which was communicated to its employees. The cited item will be vacated.

Employee Misconduct

A.C.A. argues that its employees would not have been on the cited scaffolding, were it not for the unpreventable misconduct of its foreman, Tom Ahern, and that the cited items at 1a, 2, 3, 4b, 5, 6, 7a and 8 must be vacated.

George Adams, owner of Texas A.C.A., testified that employees are given safety training when they are first hired; someone goes over A.C.A.'s safety manual (Exh. R-1), and work procedures with them (Tr. 94). On Fridays, payday, the foreman conducts a 10 minute safety talk with the employees, discussing a safety topic out of the manual provided by the Texas Lathers and Plasterers Association (Tr. 95). A.C.A. employees signed off on sheets pertaining to: scaffold safety on April 27, 1998; ladder safety on April 20, 1998; fall protection on April 6, 1998 and December 8, 1997 (Tr. 96; Exh. R-2). A.C.A.'s disciplinary policy consists of repeated verbal warnings, which, if ignored, may result in termination (Tr. 108, 141). Adams testified that his foremen are required to inspect scaffolding his men are going to be working on (Tr. 134), and that he monitors his foreman's performance; he and another superintendent walk the jobs to make sure safety rules are being followed (Tr. 109-10, 139). Adams testified that he never had any indication that his foremen were not following, or enforcing safety rules (Tr. 110).

Adams or another supervisor walked the Euless job approximately 3-4 times a week; the last time Adams had walked the job was on the 27th, the day before the inspection (Tr. 116, 139-40). Adams testified that exterior finish work had been halted on the Euless site at the direction of the project superintendent, who told Adams that the steel and sheetrock work had not yet been completed (Tr. 111). Adams stated that A.C.A.'s stucco and lathing crews do not erect scaffolds; a separate, specially trained crew, is in charge of scaffolding (Tr. 93). Adams testified that because the job was not ready for the exterior finish work, the scaffold crew was sent out to another job on the 28th without completing the scaffolding (Tr. 111-15). Adams did not believe his finish crews would be on the unfinished scaffolding, because there was work to be done on the roof (Tr. 116).

Adams testified that his foreman, Tom Ahern knew better than to have his men on the unfinished scaffolding (Tr. 131). Adams had never known Ahern to let his employees work on unsafe scaffolding prior to this incident (Tr. 132). Adams stated that Ahern's conduct on the 28th was contrary to company rules, and that he was verbally reprimanded for his infraction (Tr. 132).

Tom Ahern, A.C.A.'s foreman, testified that he has 19 years of experience in the stucco siding business, including a year in scaffold construction (Tr. 147, 153). When he was hired by A.C.A. he went through a safety orientation covering scaffold safety, first aid, hazard

communication, and A.C.A.'s rules and regulations (Tr. 151). Ahern testified that he has been at safety meetings addressing scaffold safety since; as part of his training Ahern was provided, and had read the Scaffold User Serving Guide (Tr. 154, 168; Exh. C-4). Ahern conducts weekly safety meetings for his crews, reading the safety topic sheets provided, and discussing its application with the crew (Tr. 150-51). Ahern testified that he was responsible for enforcing A.C.A.'s safety rules, and that he had never taken shortcuts on safety before this incident (Tr. 163). Ahern stated that he has disciplined his crew with verbal reprimands, but that he had to send a man home for a second infraction only once (Tr. 169-70). Finally, Ahern testified that he normally inspected the scaffold his crew was to be working on, on a daily basis (Tr. 154).

On the day of the OSHA inspection, Ahern had four employees working for him, three on the scaffolding with him on the west and northwest corner of the building, and one on the ground (Tr. 157, 159). Ahern knew that his crew was supposed to be working on the roof, but because it was hot, he chose to have the crew work on the scaffold (Tr. 161-62, 166). Ahern knew that the scaffold was incomplete, and that he was working on the scaffold contrary to A.C.A.'s rules (Tr. 162). Ahern believed that there were other trades, possibly painters, working on other areas of the scaffold (Tr. 16).

Discussion

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

In her brief, the Secretary concedes that A.C.A. had established adequate work rules, and that those rules were adequately communicated to A.C.A.'s employees. The Secretary maintains, nonetheless, that A.C.A. did not adequately monitor its supervisory personnel, or enforce its safety program. This judge disagrees.

The Fifth Circuit, where this matter arises, has held that it is unrealistic to expect an employer to constantly supervise an experienced employee, especially where such employee holds a supervisory position himself, and has not before been known to act unsafely. *Horne*

Plumbing and Heating Company v. OSHRC and Dunlap, 528 F2d 564 (5th Cir. 1976). I find that, based on Ahern's unblemished record, A.C.A.'s daily supervision of his work was adequate.

Moreover, the evidence establishes that A.C.A. had a progressive disciplinary program, recognized as adequate by Commission precedent. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (No. 1995). A.C.A.'s program called for increasingly harsh measures for infractions of work rules. An employee ignoring a verbal warning would be sent home; further infractions would result in the employee being fired.

A.C.A. has established its affirmative defense, and the remaining items are vacated.

ORDER

1. Citation 1, item 1a, alleging violation of §1926.451(a)(6) is VACATED.
2. Citation 1, item 2 alleging violation of §1926.451(b)(1) is VACATED.
3. Citation 1, item 3, alleging violation of §1926.451(b)(7) is VACATED.
4. Citation 1, item 4a, alleging violation of §1926.451(c)(2) is VACATED.
5. Citation 1, item 4b, alleging violation of §1926.451(c)(2)(ii) is VACATED.
6. Citation 1, item 5, alleging violation of §1926.451(c)(3) is VACATED.
7. Citation 1, item 6, alleging violation of §1926.451(e)(1) is VACATED.
8. Citation 1, item 7a, alleging violation of §1926.451(f)(3) is VACATED.
9. Citation 1, item 7b, alleging violation of §1926.451(f)(4) is VACATED.
10. Citation 1, item 8, alleging violation of §1926.451(g)(1)(vii) is VACATED.
11. Citation 1, item 9a, alleging violation of §1926.454(a) is VACATED.

Stanley M. Schwartz
Judge, OSHRC

Dated: