
SECRETARY OF LABOR,

Complainant,

v.

G. PORTER AND COMPANY,

Respondent.

OSHRC Docket No. 99-0686

ORDER

This matter is before the Commission on a Direction for Review entered by Commissioner Gary L. Visscher on March 31, 2000. The parties have now filed a Stipulation and Settlement Agreement.

Having reviewed the record, and based upon the representations appearing in the Stipulation and Settlement Agreement, we conclude that this case raises no matters warranting further review by the Commission. Accordingly, the Stipulation and Settlement Agreement is approved.

We incorporate the terms of the Stipulation and Settlement Agreement into this Order and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Stipulation and Settlement Agreement. This is the final order of the Commission.

Date: October 20, 2000

/Signed/

Thomasina V. Rogers
Chairman

/Signed/

Gary L. Visscher
Commissioner

/Signed/

Stuart E. Weisberg
Commissioner

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

SECRETARY OF LABOR,

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v.

G. PORTER & COMPANY,

Respondent.

OSHRC DOCKET NO. 99-0686

Appearances:

Helen J. Schuitmaker, Esquire
Chicago, Illinois
For the Complainant.

Peter Cucuz
St. Charles, Illinois
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This is a proceeding pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”) to review a citation and notification of penalty issued by the Secretary of Labor (“the Secretary”) pursuant to section 10(a) of the Act.

On February 4, 1999, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a construction site where employees of Respondent, G. Porter & Company (“Porter”), were engaged in masonry work. As a result of the inspection, OSHA issued Porter a serious citation alleging a violation of 29 C.F.R. § 1926.451(g)(4)(i). Respondent timely contested the citation, the case was designated for E-Z Trial pursuant to Commission Rule 203, and the hearing in this matter was held in Chicago, Illinois, on December 14, 1999. Neither of the parties has submitted a post-hearing brief.

The OSHA Inspection

Anthony Smith, the OSHA compliance officer (“CO”) who conducted the inspection, testified that

he went to the site pursuant to a complaint that employees were working on an unsafe scaffold. When he arrived, he saw a building under construction with scaffolding along the south and east sides. The scaffolding on the south side was three tiers high, four employees were working on top of the second tier, and while the scaffolding had both front and back cross bracing it did not have guardrails as required to prevent falls off the ends and front; the scaffolding also had clear plastic tarp over part of it, but the section where the employees were working was not covered. The CO drew R-1, a sketch of the building, and then met with Tim Glen, the general contractor's superintendent, who told him the scaffolding was that of Porter, the masonry subcontractor; the CO next met with James Reitmayer, Porter's foreman, and he went inside the building with Glen and Reitmayer, who, after observing the scaffolding from a second floor window, agreed with the CO and told him they would put up guardrails.¹ CO Smith stated that the employees had been exposed to falls of 18 to 20 feet, which could have caused serious injury or death. (Tr. 5-24).

Discussion

The cited standard provides as follows:

Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews.

The Secretary's evidence, as set out above, establishes a *prima facie* violation of the cited standard. In defense of this item, Porter presented the testimony of James Reitmayer, its job site foreman, and Thomas Gradowski, the sub-foreman at the site. Taken together, their testimony was that Porter's safety policy was to put up guardrails before employees got up on scaffolding and to remove them only during dismantling or when materials were placed on or taken off the scaffolding platform; their further testimony was that the masons were just completing their brick work in the cited area when the CO was there, that Gradowski was touching up the finished brick work, and that cleanup and dismantling work was also taking place. Reitmayer identified C-1-2 as photos he took on February 5, 1999, showing the scaffolding and Porter's loading equipment, and he stated that the two employees in C-2 were located where the CO had seen the employees the day before and that the section to the right of the employees in C-2 was the "loading port." He also stated, as did Gradowski, that the two employees in C-2 were dismantling the scaffolding, as evidenced by the

¹The CO tried to video his observations but, due to the very cold weather that day, his video equipment would not operate. (Tr. 16).

stacked planks to their left and by the fact that the plastic had been removed.² Reitmayer and Gradowski said that the only unguarded area on the scaffolding had been the loading port shown in C-2, that that guardrail had been taken down so material could be removed during dismantling, and that neither Gradowski nor the other masons had been exposed to a fall hazard because they worked next to the building and the scaffolding platform was 7.5-feet deep. (Tr. 33-87).

Based on the record, Porter has failed to rebut the Secretary's evidence. First, although Reitmayer and Gradowski indicated that only the "loading port" was unguarded, the CO indicated that none of the scaffolding in the area in which he saw employees working had guardrails, including the ends. (Tr. 7-9; 31; 41; 49-52; 59; 77-78; 82-83). Second, the CO said the scaffolding was not being dismantled when he saw it, and while Reitmayer said the scaffolding was "history" an hour after the CO left, he and Gradowski described C-2, which was taken the next day, as showing the dismantling of that same scaffolding.³ (Tr. 9; 52-59; 86-87). Third, Reitmayer's testimony that he agreed with the CO at the time of the inspection because he did not know until later that the wall was finished was not persuasive, since he could simply have gone outside to look at the wall. (Tr. 63-67). In view of the evidence as a whole, the testimony of Reitmayer and Gradowski is not credited to the extent it conflicts with that of CO Smith. I find as fact that employees were performing masonry duties at the time of the inspection and that the scaffolding did not have guardrails as required.

I also find that employees were exposed to the cited hazard. Reitmayer and Gradowski testified that the masons worked near the wall and not near the sides of the scaffolding platform, where bricks and other work materials were placed. (Tr. 38-40; 67-70; 79-82). However, it is clear that the masons would have been exposed to the unguarded sides of the scaffolding, both to get materials during bricklaying and to place leftover materials near the sides so they could be removed prior to dismantling. (Tr. 39-40; 80-82). Further, Gradowski testified that he was working near one of the ends of the scaffolding, which, as the CO indicated, were also unguarded. (Tr. 7-9; 31; 79). Finally, I have considered and rejected Porter's suggestion that the cross bracing and plastic tarp served as fall protection. (Tr. 21; 63-64). As noted above, Reitmayer agreed at the time of the inspection that guardrails should have been up, and the CO testified that due to the height of the cross

²Reitmayer testified that the plastic served to protect the masonry from the cold. (Tr. 42).

³C-2 clearly shows that the subject scaffolding was still intact, although some planking and cross bracing had been removed.

bracing and the size of the openings on the scaffolding, employees were exposed to falls from the sides; the CO also testified that there was no plastic over the specific area where he saw the employees working and that the plastic in any case would not have afforded fall protection. (Tr. 9-11; 17; 23-24; 29-33). This citation item is affirmed as a serious violation.

The Secretary has proposed a penalty of \$1,500.00, which, as the CO indicated, took into account the gravity of the violation as well as the company's size, history and good faith. (Tr. 12-13). I conclude that the proposed penalty is appropriate, and it is accordingly assessed.

Conclusions of Law

1. Respondent, G. Porter & Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1926.451(g)(4)(i).

Order

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

1. Item of Citation 1 is AFFIRMED, and a penalty of \$1,500.00 is assessed.

/s/

Irving Sommer
Chief Judge

Date: 28 FEB 2000