SECRETARY OF LABOR, Complainant, v. DANIEL A. MICKELSEN, an Individual, d/b/a M-L MASONRY, Respondent.	OSHRC DOCKET NO. 96-1788

APPEARANCES:

For the Complainant:
William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington

For the Respondent:
Merrily Munther, Esq., Penland, Munther, & Boardman, Boise, Idaho

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, Daniel A. Mickelsen, an Individual, d/b/a M-L Masonry (M-L), at all times relevant to this action maintained a place of business at 345 West Custer, Pocatello, Idaho, where it was engaged in masonry construction. Respondent admits it is an employer engaged in construction. Because construction is in a class of activity which as a whole affects interstate commerce , M-L is subject to the requirements of the Act. *See, Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983).

On October 23, 1996 the Occupational Safety and Health Administration (OSHA) conducted an inspection of M-L's Pocatello work site. Following that inspection, M-L was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest M-L brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 30, 1997, a hearing was held in Boise, Idaho. The parties have submitted briefs and this matter is ready for disposition.

The Inspection

As a threshold matter, M-L argues that the Secretary failed to abide by its own procedures when it initiated the October 1996 inspection in response to a complaint from a disinterested party.

Facts

On October 15,1996 Michael Pettaway, the area organizer for Sheet Metal Workers Local 60, passed M-L's construction site on his way to his office (Tr. 14). Pettaway noticed masonry workers lowering the platform of a masonry scaffold at the northwest corner of the building under construction (Tr. 15-16). At the hearing, Pettaway testified that he was concerned, because no fall protection was in use on the scaffolding (Tr. 17-18). Pettaway used his video camera to create a tape recording of M-L's operation, which he provided to OSHA (Tr. 18, 42).

On October 23, 1997, in response to Pettaway's complaint, OSHA Compliance Officer (CO) Virgle Howell visited M-L's work site.

As noted by Respondent, The U.S. Department of Labor OSHA Field Inspection Reference Manual (FIRM) distinguishes between "formal" and "nonformal" complaints.

CO Howell testified that when nonformal complaints are received, the employer is generally contacted by phone and fax, informed of the alleged hazards, and asked to notify OSHA of the corrective actions then taken (Tr. 77). Generally nonformal complaints do not result in a site visit, unless the employer fails to respond satisfactorily (Tr. 78).

According to the FIRM, site inspection "shall be" scheduled as a result of all formal complaints. A formal complaint is one:

> . . . alleging an imminent danger or the existence of a violation threatening physical harm, submitted by a current employee, a representative of employees (such as unions, attorneys, elected representatives, and family members), or present employee of another company if that employee is exposed to the hazards of the complained-about workplace. OSHA Instruction CPL 2.103.C.2.c.

Pettaway is neither an employee, nor a representative of M-L's or any other exposed employees (Tr. 34-39, 76); M-L maintains that OSHA should, therefore, have treated Pettaway's complaint as informal. CO Howell testified that the complaint was treated as a formal complaint because OSHA felt that Mr. Pettaway had been trained in, and was aware of safety hazards (Tr. 75-76).

Discussion

The Commission has consistently rejected employers' attempts to hold the Secretary to internal guidelines, stating that OSHA enforcement guidelines are meant to promote efficiency and do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173, fn.24, 1991-93 CCH OSHD ¶29,962 (No. 87-0922, 1993). Thus, OSHA's initiation of a site visit, though it appears to have been contrary to its internal policies, is without legal significance and is not a defense either to the introduction of evidence obtained as a result of the inspection, or to the citation itself. [1]

Alleged Violation of §1926.451(a)(4)

Serious citation 1, item 2 alleges:

29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides of scaffold platforms more than 10 feet above the ground or floor:

(a) North West wall of the construction site: On or about October 15, 1996, and at times prior there to, employees were exposed to an approximate 16 foot fall hazard after removing the guard rails prior to lowering the adjustable work deck for the scaffold that was manufactured by Non-Stop Scaffold.

Facts

During the October 23, 1996 inspection, M-L's foreman, Chris Roidalch, identified the workers in the Pettaway video as M-L employees (Tr. 46). Masons worked on an outrigger which was lower than the scaffold platform and between the scaffold and the building under construction. Employees used the scaffold platform to move between and to operate winches which lowered the scaffold deck (Exh. P-1 through P-5).

According to Howell, Roidalch stated that guardrails were used when the scaffolding was going up, but that it was company policy to remove the guardrails when bringing the scaffolding down (Tr. 48, 120). Roidalch told Howell that the way the scaffold platform is winched down one side at a time causes the guardrails to become detached (Tr. 17, 49, 90). Roidalch explained that M-L was concerned that the loosened guardrails could strike employees on the ground below (Tr. 48). At the hearing, Dan Mickelsen testified that one of his employees was struck by a guardrail that fell and bounced into the employee's shoulder (Tr. 91).

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[1] In its post-hearing brief, M-L suggests that a contrary result is required under **§1903.11 Complaints by employees**, and §1903.12 **Inspection not warranted; informal review**. This judge disagrees. Those sections afford rights only to complaining parties, not to employers.

Howell testified that if both sides of the platform were lowered in unison, the guardrails would remain in place (Tr. 49-50). Roidalch admitted that it would be possible to lower the scaffolding in such a manner that the guardrails would not come loose and fall (Tr. 51, 119). Mickelsen agreed that if there were an operator at each winch, keeping the scaffold deck level as it is lowered, the guardrails would remain in place no matter how fast or slow the deck was lowered (Tr. 107). Mickelsen also agreed that if each side of the platform were winched down no more than three or four inches at a time, the guardrails would probably remain in place (Tr. 105).

Mickelsen argued, however, that the manufacturer did not intend the deck to be lowered so slowly, pointing out that the winch has a higher gear for lowering the deck faster than it is raised (Tr. 106). Non-Stop's vice president, Justin Breithaupt, Jr. testified that the scaffolding deck can generally be lowered with the guardrails in place, although he was familiar with instances where the guardrails had come off during lowering (Tr. 128-30).

Mickelsen also testified that employees were dismantling the scaffold as it was lowered (Tr. 89, 111). Mickelsen stated that as the scaffold deck moved below each nine foot scaffold section, the extensions (9' vertical members) were removed and loaded on to a forklift (Tr. 92-93). Mickelsen also testified that some of the guardrails had to be removed to move the extensions from the scaffold deck to the forklift (Tr. 93). Breithaupt agreed that the guardrails can interfere with the removal of the extensions from the scaffolding (Tr. 126).

Discussion

The cited standard provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor. . ..

It is clear from the record that M-L's employees were exposed to a fall hazard in excess of 10 feet while lowering an unguarded scaffold deck.[2] M-L, however, maintains that: 1) The requirements of §1926.451(a) do not apply to scaffolding which is being dismantled; 2) It is infeasible to maintain guardrails during the dismantling of the scaffold; 3) Any attempt to maintain guardrails during dismantling exposes employees on the ground to a greater hazard from falling guardrails.

Applicability. Respondent argues that the cited standard is inapplicable where scaffolding is being dismantled. In support, M-L cites *National Steel & Shipbuilding Company (National)*, 6 BNA OSHC

[2] This judge agrees that the masons working from the outrigger between the scaffold and the wall under construction do not appear to have been exposed to a fall hazard.

1680, 1978 CCH OSHD ¶22,808 (Nos. 11011 & 11769, 1978) *aff'd.* 607 F.2d 311 (9th Cir. 1979). M-L's reliance on *National* is misplaced.

In *National* the Commission discussed dismantling operations and their effect on the requirements of §1916.41(i)(1), a maritime safety standard governing the guarding of scaffolding, staging, runways, or working platforms supported or suspended more than 5 feet above a solid surface, or any distance above water. In *National* the Commission explained that any exemption from the standard's guardrail requirements arises only when dismantling reaches the point where compliance with the standard becomes impossible. Moreover, the Commission held, there is no exemption from the standard's operation for employees engaged in activities unrelated to dismantling.

The cited construction standard, §1926.451(a)(4), parallels the maritime standard discussed in *National*, and the Commission's holding in that case is applicable here. Here the cited standard is applicable to employees lowering the scaffold platform, an activity only tangentially related to dismantling the scaffold. Though no employees were actually observed dismantling the scaffold, the standard would also be applicable to those employees unless and until the dismantling operation made it impossible, or infeasible to retain the required guardrails.

Infeasibility. To establish the affirmative defense of infeasibility, an employer must show that 1) 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) there would have been no feasible alternative means of protection. *V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1994 CCH OSHD ¶30,485 (No. 91-1167, 1994).

M-L states that it would require three employees occupied solely with winching the work deck in order to ensure that the guardrails are not be pulled from the stanchions while the deck is lowered; M-L states that it would be economically infeasible to assign three of the five workers on this project to that task. The undersigned judge can find no support in the record for this contention. In fact Complainant's Exhibit P-1 and P-2 show that, at times, three employees were engaged in winching.

M-L contends that some guardrails must be removed during dismantling in order to load scaffold extensions onto a forklift. No employees were observed removing or offloading vertical extensions. M-L introduced no evidence describing this procedure, or its relation to lowering the scaffold deck. No witnesses testified that the guardrails had to be removed prior to removal of the extensions.

M-L failed to establish the affirmative defense of infeasibility.

Greater Hazard. In order to establish the greater hazard affirmative defense, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.,* 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

M-L failed to establish a greater hazard defense in that both Mickelsen and Roidalch agreed that it was possible to lower the scaffold platform in a way that would prevent the guardrails from becoming dislodged, thus eliminating the danger to employees on the ground. In addition M-L introduced no evidence establishing either that alternative means of protection were unavailable, or that an application for a variance would have been inappropriate.

M-L failed to establish the greater hazard defense.

Penalty

A penalty of $1,400.00 was proposed for this item.

M-L is a small employer, with approximately 20 employees (Tr. 72). There were five employees at the Pocatello work site (Tr. 72). M-L had been cited for a similar guardrail violation within the prior three years (Tr. 73). The CO testified that no credit was given for good faith (Tr. 74).

Howell testified that an employee falling from the scaffold would probably suffer serious, debilitating injuries, such as broken bones (Tr. 61-62). Howell stated that the probability of a fall was higher because the scaffold decking came out of its brackets as the platform was lowered, causing the employees footing to shift (Tr. 33, 62).

The gravity of this violation is greater because the likelihood of injury was increased by the unstable decking, and because the probable injuries an employee would suffer were severe. The proposed penalty is deemed appropriate and will be assessed.

Alleged Violation of §§1926.21(b)(2) and .451(a)(3)

Serious citation 1, item 1a and 1b were grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident. Those items allege:

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) North West wall of the construction site: On or about October 15, 1996, and at times prior there to, employees were not instructed in the manufacturer's recommended procedure for lowering the adjustable work deck for the scaffold that was manufactured by Non-Stop Scaffold. The employees

were instructed to remove the guard rails which exposed them to an approximate 16 foot fall hazard.

29 CFR 1926.451(a)(3): The employer did not insure that scaffolding was erected, moved, dismantled, or altered under the supervision of competent persons.

(a) A Competent person is one who is knowledgeable in the scaffold standards and who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and has the authorization to and takes prompt corrective measures to eliminate them.

Facts

At the hearing both Roidalch and Mickelsen testified that every employee depicted in Pettaway's video had received training in dismantling scaffolding during safety meetings and on the job (Tr. 93, 98, 117). Among other things, they are instructed not to lower the scaffold deck over 12 to 16 inches at a time (Tr. 96). CO Howell admitted that he did not ask if M-L's employees had been trained in the manufacturer's recommended procedure for lowering the scaffold deck (Tr. 82).

Roidalch testified that he was not present on the worksite on October 15, 1996, and that one Sherrill Rose was acting as foreman on that day (Tr. 67, 118). Roidalch was present, however, at the time of the OSHA inspection. During the inspection he told Howell that he had not reviewed the manufacturer's recommendations for raising and lowering the scaffolding (Tr. 66-67; Exh. R-1).

The Secretary introduced the Assembly and Use Manual from Non-Stop Scaffolding, Inc. That document states at p. 15:

> **Raising the Scaffold**
>
> Once the bricklayers have reached a comfortable working height, their walkboard support can be slid out and their walkboards dropped in place. After that the laborers should raise the scaffold every two courses of block, or every five courses of brick. Start at one end of the scaffold and crank each winch about 10 turns. Repeat this while walking back the other way. That will raise the platform about 16".

In an information sheet provided to Complainant (Tr. 60-61; Exh. P-6), Non-Stop's Justin Breithaupt, Jr., states:

> As per page 15 of our Assembly and Use Manual, start at one end of the scaffold and crank each winch about 10 turns. Continuously check to be sure that the planks maintain their required lap over the center of their supports. Each time this process is completed, the Scaffold will be raised about 8". The bricklayers and laborers can continue to work while the scaffold is being raised. Raising the scaffold in this manner presents no hazard to the bricklayers or laborers. Reverse this procedure to lower the scaffold.. . .

At the hearing, Roidalch stated that the manufacturer's procedures introduced by the Secretary were the procedures he had been instructed in by Dan Mickelsen (Tr. 117). Roidalch testified that Sherrill Rose, the acting foreman on October 15, 1996, had been trained in the same procedures (Tr. 67, 118).

Breithaupt testified that in low gear mode, 10 turns will bring the scaffold deck down approximately 5 inches; in high gear mode the deck will come down about 12 ½ inches (Tr. 123). Breithaupt stated that nothing depicted in the Pettaway video fails to conform to the procedures recommended by Non-Stop Scaffolding (Tr. 125).

Finally, Howell admitted that Mickelsen did recognize the fall hazard associated with the scaffold platform (Tr. 83).

Discussion

1926.451(a)(3) provides:

> No scaffold shall be erected, moved dismantled, or altered except under the supervision of competent persons.

Complainant made no inquiry into the competence of the supervisor directing the October 15, 1996 dismantling process, Sherrill Rose.

The evidence establishes that Respondent followed all available manufacturer's instructions in lowering the work deck on its Non-Stop scaffolding. Nothing in those instructions specifically addresses the problem of guardrails becoming dislodged during lowering. Both Mickelsen and Roidalch were familiar with OSHA regulations, and recognized the fall hazard associated with removing guardrails from the scaffolding, but determined that the danger to unsuspecting workers below from falling guardrails outweighed the danger to workers on the deck who were alert to the fall hazard.

Though Respondent's resolution of the problem did not conform to the strict requirements of the Act, neither does it demonstrate that M-L's supervisory personnel were incompetent.

In the absence of any evidence supporting this item, the cited violation is vacated.

1926.21(b)(2) alleges:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The CO made no effort whatsoever to ascertain whether M-L's employees were instructed in the recognition or avoidance of unsafe conditions or in applicable OSHA regulations, and introduced no

evidence in support of this item. The Secretary relies entirely on M-L's admission that its policy was to remove the guardrails from its scaffolding prior to lowering the work deck.

As in the item above, the mere existence of a violation of the Act is insufficient to show that employees were not trained in conformance with §1926.21(b)(2). This item is vacated.

ORDER

1. Citation 1, items 1a and 1b, alleging violations of §§1926.21(b)(2) and .451(a)(3), respectively, are VACATED.

2. Citation 1, item 2, alleging violation of §1926.451(a)(4) is AFFIRMED, and a penalty of $1,400.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: