UNITED STATES OF AMERICA
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SECRETARY OF LABOR, Complainant, v. PYRAMID MASONRY CONTRACTORS, INC., Respondent.	OSHRC Docket No. 91-0600

DECISION

BEFORE: FOULKE, Chairman, and MONTOYA, Commissioner.

BY THE COMMISSION:

Pyramid Masonry Contractors, Inc. ("Pyramid") was performing construction work at a site in Orlando, Florida when it was inspected by the Occupational Safety and Health Administration ("OSHA") on December 12, 1990. On January 11, 1991, the Secretary of Labor issued a citation alleging that Pyramid had violated the scaffold-guarding standard at 29 C.F.R. § 1926.451(d)(10), which requires the installation of a standard guardrail, including a 6-inch-wide midrail approximately 21 inches high, on the open sides of scaffolds.[1] The

[1]The standard provides:

> **§ 1926.451 Scaffolding**
>
> . . . .
>
> (d) *Tubular welded frame scaffolds.*
>
> . . . .
>
> (10) Guardrails made of lumber, not less than 2 x 4 inches . . . and approximately 42 inches high, with a *midrail* of 1 x 6 inch lumber . . . shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor.

(continued...)

cited scaffold, a 20-inch-wide platform referred to by the parties as an "outrigger" scaffold, was suspended a few feet below the main 5-foot-wide platform of a tubular welded steel frame scaffold. The OSHA compliance officer observed an employee working on the scaffold with a trowel. He was crouched on one knee with his back to the open side of the outrigger scaffold. He was exposed to a fall through a gap (2 feet 5 inches high by 7 feet long) into the interior of the scaffolding to the ground 18 feet below. The main scaffold platform forming the top edge of the gap behind him served as a single guardrail of sorts. There was no other rail narrowing the 29-inch-high gap between the cited scaffold and the main scaffold platform.

The parties submitted the matter on stipulated facts pursuant to Commission Rule 61, 29 C.F.R. § 2200.61, in lieu of a hearing on the merits. Judge Edwin G. Salyers affirmed the violation as serious and repeated, as stipulated by the parties, and assessed the stipulated penalty of $1,200. Pyramid petitioned for review of that decision.

Discussion

Pyramid argues on review that the citation should be vacated because:

(1) the standard does not apply to the cited scaffold,

(2) the cited scaffold is not "open-sided," and/or

(3) a "reasonable person" test applies to the placement of guardrails.

The Secretary maintains the opposite. For the reasons that follow, we find that the cited standard does apply to the open-sided scaffold in this case and that a reasonable person test is inappropriate here. The judge's decision finding a violation of section 1926.451(d)(10) is therefore affirmed.

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[1](...continued)
(Emphasis added). Section 1926.452(b)(21) defines *midrail* as "[a] rail approximately midway between the guardrail and platform, secured to the uprights erected along the exposed sides and ends of platforms."

(1) Does the Standard Apply to the Cited Scaffold?

Pyramid's first contention is that the cited scaffold fits neither the definition of an "outrigger scaffold"[2] nor that of a "tubular welded frame scaffold."[3] Pyramid contends that the scaffold at issue is instead "an outrigger platform that was attached to a tubular welded frame scaffold." The Secretary counters that Pyramid is estopped from denying that the "cited scaffold at issue is a tubular welded steel frame scaffold" because Pyramid stipulated to that fact. Moreover, the Secretary submits that even if the Commission were to let Pyramid avoid its stipulation, nothing in the scaffold guarding standards suggests that an outrigger platform attached to a supporting structure of tubular welded frames is not itself still a "tubular welded frame scaffold" within the meaning of section 1926.451(d). To the contrary, he argues, the diagram that both parties attached to their briefs, as well as the ANSI standard from which it was taken, *see* ANSI A10.8-1988, leaves no doubt that what the parties call an outrigger scaffold is typically supported by "brackets" attached to the main scaffold. "Brackets" are specifically included among the components of a metal tubular frame scaffold. *See* section 1926.451(d)(1).

We find that the plain language and intent of the stipulation prevail. While the parties did not exactly stipulate that "the cited standard applies," what they did comes very close to that. (The stipulation provides: "Pyramid was issued a citation alleging a violation . . . for a scaffold . . . . The cited scaffold at issue is a tubular welded steel frame scaffold . . . .").

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[2]Although the parties consistently refer to the cited scaffold as an "outrigger scaffold," neither contends that it is the kind of "outrigger scaffold" defined at section 1926.452(b)(23): "a scaffold supported by outriggers or thrustouts projecting beyond *the wall or face of the building or structure*, the inboard ends of which are secured inside of such building or structure" (emphasis added). It is, instead, a scaffold supported by outriggers or thrustouts (called brackets) projecting beyond *the face of the main scaffold*, not of the building.

[3]"Tubular welded frame scaffold" is defined at section 1926.452(b)(33) as "a sectional panel or frame metal scaffold substantially built up of prefabricated welded sections which consists of posts and horizontal bearer with intermediate members."

(2) Was The Cited Scaffold Open-sided?

Pyramid's second contention is that even if section 1926.451(d)(10)'s guarding requirements generally do apply to scaffolds like the one in this case, Pyramid was not required to install a midrail to guard this particular scaffold because it had no "open sides and ends" within the meaning of the standard. To this end, Pyramid sets forth a three-pronged argument: (1) the Secretary must prove that the cited scaffold is open-sided and that to do so, the Secretary must prove that a fall hazard is present; (2) any fall hazard present in this case is not materially different from the one that would remain after compliance with the standard; and (3) a fall in this case would have been almost impossible.

Below, the judge rejected Pyramid's contention that the 29-inch gap behind the employee was too small for the scaffold to be considered "open-sided" as contemplated by the standard, citing *Dick Corp.*, 7 BNA OSHC 1951, 1979 CCH OSHD ¶ 24,078 (No. 16193, 1979) and *Western Waterproofing Co.*, 5 BNA OSHC 1897, 1977-78 CCH OSHD ¶ 22,212 (No. 13538, 1977) ("*WWI*"). He also found that the standard presupposes the existence of a hazard in the absence of a standard midrail, citing *Del-Cook Lumber Co.*, 6 BNA OSHC 1362, 1978 CCH OSHD ¶ 22,544 (No. 16093, 1978) and *Thermo Tech, Inc.*, 5 BNA OSHC 2045, 1976-77 CCH OSHD ¶ 20,697 (No. 15381, 1977).

On review, Pyramid acknowledges that, as a general proposition, under *Dick Corp.*, *Del-Cook Lumber*, and *Thermo Tech*, the Secretary need not prove the existence of a hazard where the promulgation of a specifically worded standard presupposes a hazard. The company contends, nevertheless, that the Secretary does have the burden of proving that the sides or ends of the scaffold are "open." Citing *Western Waterproofing Co.*, 7 BNA OSHC 1625, 1627, 1979 CCH OSHD ¶ 23,785, p. 28-861 (No. 1087, 1979) ("*WWII*"), Pyramid draws on the Commission's statement in *WWII* that the sides and ends of a scaffold are open "if the fall hazards addressed by the standard are present." The Secretary also cites *WWII* for this proposition. Unlike Pyramid, which argues that since such hazards are not present, the scaffold is not open-sided, the Secretary argues the opposite, that since the hazards *are* present, the scaffold *is* open-sided. The Secretary submits that a prima facie violation of section 1926.451(d)(10) is established upon proof that guardrails meeting the specifications

of the standard are not provided on the scaffold's open sides, *see Dick Corp.*, 7 BNA OSHC at 1953, 1979 CCH OSHD at p. 29,249, and further argues that he is not required to show that employees could have fallen because the standard assumes the existence of a hazard, citing *Thermo Tech.* The Secretary also relies on *Vecco Concrete Constr., Inc.*, 5 BNA OSHC 1960, 1977-78 CCH OSHD ¶ 22,247 (No. 15579, 1977). In that case, the employer went so far as to produce opinion testimony designed to show that there was no hazard posed by the absence of guardrails on a tower crane platform, but the Commission ruled that the standard (section 1926.500(d)(1)) presupposes the existence of a hazard if its terms are not met.

We conclude that while the Secretary must, as Pyramid argues, initially prove that any scaffold he cites is open-sided to establish a violation of section 1926.451(d)(10), he need not introduce independent case-specific proof that a hazard exists. Section 1926.451(d)(10) presumes the existence of a hazard when its terms are not met. Therefore, the Secretary need only show that the terms of this standard were not met, not that the failure to meet them results in exposure to a hazard. The *WWII* case does not require more in this case. The Commission's statement in that case, that a side is "open" if there is a fall hazard, is a tautology that restates the obvious: since an employee cannot fall off anything but an open side, if there is the possibility of a fall, the side is open. Therefore, in order to make a prima facie showing of a violation of section 1926.451(d)(10), the Secretary must only establish that the cited scaffold has open sides, not that the openings present a fall hazard.[4]

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[4]Our conclusion is not affected by the language in a footnote in *Dick Corp.* that Pyramid brings to our attention. There, the Commission found that the employer was correct that the Secretary has the burden of proving that the sides or ends of the scaffold are "open." However, because the evidence showed that the scaffold was open, the Commission did not address the employer's argument that the judge had erroneously placed the burden on the company to show that the scaffold was not open-sided or open-ended. 7 BNA OSHC at 1955 n. 11, 1979 CCH OSHD at p. 29,250 n. 11. This language does not suggest that the Commission takes a different view of the Secretary's burden of proof when the standard presumes the existence of a hazard. The Commission specifically stated in the *Dick Corp.* decision itself that "[t]he Secretary establishes a prima facie violation of § 1926.451(d)(10) by proving that guardrails *meeting the specifications of that standard* are not provided . . . ." *Id.* at 1953, 1979 CCH OSHD at p. 29,249 (emphasis added). *Accord Vecco Concrete*, 5 BNA OSHC at 1961, 1977-78 CCH OSHD at p. 26,777 (Secretary need only show that employees were exposed to noncomplying conditions). The Commission has continued to adhere to *Vecco Concrete*. *See, e.g., Research Cottrell, Inc.*, 9 BNA OSHC 1489, 1497, 1981 CCH OSHD ¶ 25,284 (No. 11756, 1981).

The second prong of Pyramid's argument that the scaffold was not open-sided focuses on the degree of difference between the 29-inch opening at Pyramid's site and what it claims is the 21-inch opening[5] permitted under the standard. Pyramid asserts that the "real issue" is whether the fall hazard present in this case is "materially different" from the fall hazard addressed by the standard. If not, Pyramid argues, then the scaffold in this case did not have an open side within the meaning of the standard, and there was no violation. The Secretary responds that common sense dictates that a 29-inch gap will invite a wider range of falls and a significantly different hazard than would the 18-inch gap[6] allowed under the standard, thus substantially increasing the risk of falling under the guard. In the Secretary's view, an 11-inch difference, or even an 8-inch difference, in this context is "hardly trifling," and is "not, in terms of the proportions involved, a minor departure."

Although we find that this inquiry might have been relevant in determining the proper characterization or appropriate penalty for a violation, it is irrelevant in determining the presence or absence of a violation. *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶ 29,223 (No. 85-369, 1991) (noting that evidence of "substantial compliance" would not relieve employer of being found in violation, but would only be relevant in recharacterizing violation); *Charles H. Tompkins Co.*, 6 BNA OSHC 1045, 1047, 1977-78 CCH OSHD ¶ 22,337 (No. 15428, 1977) (finding violation to be *de minimis* and reducing penalty).

The third and final prong of Pyramid's argument that the scaffold was not open-sided is Pyramid's attempt to prove that "it is almost impossible for an employee to fall through [the 29-inch] space" in this case. Pyramid introduces in its brief[7] a "quantitative comparison

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[5]*See infra* note 6.

[6]Toeboards aside, the Secretary notes that a 6-inch-wide midrail *centered* at a height of 21 inches would actually narrow the lower gap to 18 inches, creating an 11-inch difference, not an 8-inch difference, between Pyramid's arrangement and a standard guardrail.

[7]At the hearing stage, the Secretary moved to strike the portions of Pyramid's brief below containing this same "quantitative comparison" because the Secretary said it introduced facts not in evidence. The "comparison" was not among the stipulated facts, nor was it attached to the brief in the form of an affidavit or supplemental

(continued...)

between the representative size range of employees and the 29-inch gap." The company sets forth estimates of where the barrier would hit the bodies of hypothetical employees of various heights working in various positions. The Secretary, for his part, does not renew his motion made before the judge to strike those portions of Pyramid's brief containing the "quantitative comparison." Instead, the Secretary seems to work from the premise that even if everything Pyramid alleges in this comparison is true, it does not constitute evidence that there is no hazard. For instance, he argues that even if it is true, as Pyramid asserts, that the 29-inch-high barrier would hit a kneeling employee in the middle of the back, it would not necessarily obstruct the fall of an employee who rests back on his heels or one who bends his back or neck to a crouching or squatting position. The Secretary further criticizes Pyramid for failing to take into account the momentum of a fall from an upright position, citing *Austin Bldg. Co. v. OSHRC*, 647 F.2d 1063, 1067 (10th Cir. 1981) (employer may not rely on the "possibility of a fortunate fall" to excuse its noncompliance).

We agree with the Secretary that Pyramid's so-called "quantitative comparison" has no effect on the outcome of this case. Rule 61, governing cases submitted on stipulated facts, provides in part that "[t]he submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof." There was no hearing at which the validity of this comparison could be tested, nor is it incorporated as part of the stipulation. Nor does the comparison constitute the kind of material of which the Commission may take judicial notice.[8] Finally, even if the Commission were to accept Pyramid's quantitative comparison as fact, there is

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[7](...continued)
stipulation. Pyramid apparently believed that the judge would simply take judicial notice of these observations as common knowledge. The judge, in view of his disposition of the case in the Secretary's favor, deemed the Secretary's motion to strike to be moot.

[8]Commission Rule 71 provides that the Federal Rules of Evidence are applicable to Commission proceedings. Fed. R. Evid. 201 provides in part that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

still no evidence that such a 29-inch space does not constitute a hazard for a kneeling employee.[9]

We therefore conclude that the cited scaffold was open-sided.

(3) Is a "Reasonable Person" Test Appropriate?

Pyramid's final argument promotes the application of a "reasonable person" test to enforcement of the cited standard. Without retracting its acknowledgment of the case law holding that the Secretary is not required to prove the existence of a hazard in cases involving specific standards, Pyramid claims that because the exact height of complying guardrails is not "written in stone," *i.e.*, the standard requires that they be "approximately 42 inches high" and "approximately midway," a reasonable person test applies to guardrail cases. To support this claim, Pyramid relies primarily on an unreviewed judge's decision, *James Luterbach Constr. Co.*, 13 BNA OSHC 1552, 1987 CCH OSHD ¶ 28,080 (No. 87-69, 1987) (digest), and an ANSI standard providing that top rails should be installed no less than 36 inches or more than 45 inches above working surfaces. Pyramid also cites *WWI*, a case in which the Commission summarily affirmed an ALJ's decision which in turn rejected the employer's impossibility argument and pointed out that, at the very least, a 36-inch-high top rail could have been installed. Charging the Secretary with failing to prove that a reasonably prudent person would have known that a midrail was required in this case, Pyramid argues that a prudent person would not have installed one because the 29-inch-high main platform, that was serving as a midrail, adequately protected employees from fall hazards. The Secretary counters that a reasonable person test is appropriate only when necessary to cure notice deficiencies in a standard and that the standard cited here poses no such problem.

Pyramid's argument is without merit. Although the guardrail specifications may not be "written in stone" and have been relaxed on occasion, this is not a reason to interpret

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[9]We agree with Pyramid that the angle from which the photograph was taken does distort the picture, making the opening seem larger than it really is, from the employee's perspective. The judge's finding that the photographed employee's head is "well under the planking in question" is probably not an accurate interpretation of the photograph. Nevertheless, neither the photograph (even properly interpreted), nor the stipulations, nor anything in Pyramid's so-called "quantitative comparison" establishes the absence of a serious fall hazard in this case.

the standard under a reasonable person or industry practice test. The Commission and the courts have resorted to such tests only when the standard in question is so broadly worded or vague that the employer may legitimately claim that it could not know, without reference to industry practice or other reasonable example, how to comply.[10] The standard cited here, which calls for very specific fall-protection measures, poses no such problem.

Order

Accordingly we find that the standard applies to the open-sided scaffold in this case and that the Secretary carried her burden of proof in establishing a violation. We affirm the violation. The parties have stipulated, and we find, that the violation is properly characterized as repeated and that a penalty of $1200 is appropriate.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: November 4, 1993

[10]In *Cape & Vineyard Div. v. OSHRC*, 512 F.2d 1148, 1155 (2d Cir. 1975), the only other case Pyramid cites, the language of the standard was so "broad and obscure" that the court favored a reasonable person/industry practice test to satisfy due process notice requirements. The standard in that case, 29 C.F.R. 1910.132(a), required protective equipment "whenever it is necessary by reason of hazards . . . encountered in a manner capable of causing injury . . . through physical contact." *Id.* at 1152 (quoting the standard).

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-0600
PYRAMID MASONRY CONTRACTORS, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on November 4, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

November 4, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-0600

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
PYRAMID MASONRY CONTRACTORS
Respondent.

OSHRC DOCKET
NO. 91-0600

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on April 9, 1992. The decision of the Judge will become a final order of the Commission on May 11, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before April 29, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: April 9, 1992

DOCKET NO. 91-0600

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SECRETARY OF LABOR,
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PYRAMID MASONRY CONTRACTORS, INC.,
Respondent.

OSHRC Docket No.: 91-600

Appearances:

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For Complainant

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Smoak & Stewart
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

On December 12, 1990, a compliance officer of the Occupational Safety and Health Administration (OSHA), conducted an inspection of respondent's worksite in Orlando, Florida under the provisions of the Occupational Safety and Health Act (29 U.S.C. 651, *et seq.*). As a result of this inspection, respondent was issued a citation which charged respondent with a violation of 29 C.F.R. § 1926.451(d)(10) for its alleged failure to install standard guardrails and toeboards on open sides of a tubular welded frame scaffold more than 10 feet above ground level. The citation was characterized as "repeat" since respondent had been previously charged with a violation of the same standard and this charge had become a final order of the Occupational Safety and Health Review Commission by operation of law on February 27, 1989.

In lieu of a hearing on the merits, the parties have submitted the matter on stipulated facts (Exh. J-19) pursuant to Commission Rule 61 (29 C.F.R. § 2200.61)[1].

For ready reference, the facts are reproduced below and are adopted as the Court's findings of fact:

> 1. Pyramid Masonry Contractors, Inc. ("Pyramid") is a masonry contractor engaged in the erection of masonry wall systems. Pyramid's principal place of business is located in Decatur, Georgia.
>
> 2. On or about December 12, 1990, the date of OSHA's inspection, Pyramid was performing construction work at a jobsite known as the Commerce Center located at 6901 Dr. Phillips Boulevard in Orlando, Florida.
>
> 3. On or about January 11, 1991, Pyramid was issued a citation alleging a violation of 29 C.F.R. § 1926.451(d)(10) for a scaffold located at Building B, east side, based on OSHA's inspection of the workplace on December 12, 1990.
>
> 4. The cited scaffold at issue is a tubular welded steel frame scaffold and is accurately depicted at the time of the inspection in the photograph attached as Exhibit "A". Respondent was aware of the conditions depicted. The scaffold had an outrigger located on the side of the scaffold closest to the wall being erected, which section of outrigger scaffold was approximately 20 inches wide. This outrigger was located approximately eighteen feet above the ground. At or near the time of the inspection, the employee of Pyramid was kneeling on the outrigger planking, engaged in a work activity, at the alleged open side of the planking.
>
> 5. The distance between the outrigger planking on which the employee was working and the full planking above the outrigger platform was approximately 29 inches. The scaffold at issue did not contain a midrail between the outrigger planking and the full planking located above. The midpoint for the cross bracing, on the side of the scaffold closer to the employee which contained the outrigger, was located at or below the level of the outrigger planking. No fall protection was provided to the exposed employee by the cross bracing at that point.

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[1] Rule 61 provides:

> 29 C.F.R. § 2200.61 Submission without hearing.
>
> A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

6. The length of the scaffold to which the outrigger was attached, measured in the direction of the planking from frame to frame was approximately 7 feet. The width of the interior of the scaffold was approximately 5 feet.

7. The exposed employee was not protected by a standard guardrail including top rail, midrail and toeboard. The outrigger platform was placed against the wall of the building under construction. The area beneath the scaffold was not a work area where employees would be present.

8. The potential hazard to which the employee was allegedly exposed was falling under and through the opening below the full planking into the scaffold's structure.

9. In the event an employee were to fall through this opening there would be a substantial probability of the employee's death or serious physical injury.

10. The citation was classified as a repeat violation based on a prior citation issued on or about September 13, 1988, for a violation of 29 C.F.R. § 1926.451(d)(10) for a project located in Orlando, Florida. This citation was settled by stipulation and joint motion executed on or about January 4, 1989, which is attached as Exhibit "B", and was approved by Judge Paul L. Brady on or about January 13, 1989, and become a final Order of the Commission on or about February 27, 1989.

11. If Pyramid violated the cited standard in this case, the citation is properly characterized as a repeat violation, and $1,200.00 is an appropriate penalty for such violation.

12. The proposed abatement date of "January 18, 1991" was not unreasonable.

DISCUSSION

To establish a violation of a cited standard, the Secretary must show:

(1) The cited standard applies to the facts disclosed in the record.

(2) There was a failure to comply with the terms of the standard.

(3) Employees had access to the violative condition.

(4) The cited employer either knew or could have known of the condition with the exercise of reasonable diligence.

Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981).

In her brief, the Secretary methodically relates the stipulated facts to each of the elements of proof. It is undisputed that the cited scaffold is a tubular welded steel frame scaffold and that the outrigger section was located 18 feet above ground level (Stip.#4). On one side of the outrigger was an opening measuring about 29 inches which was not protected by a midrail or cross bracing (Stip. #5). Exhibit "A" attached to the stipulation shows an employee of respondent crouched on the outrigger immediately adjacent to the 29 inch opening and exposed to a potential 18 foot fall. This circumstance, in the event of a fall, posed a "substantial probability of the employee's death or serious injury" (Stip. #9). Respondent was aware of the conditions depicted in Exhibit "A" (Stip. #4).

In its brief, respondent makes two principal arguments:[2]

(1) That the cited standard does not apply to outriggers; and

(2) That the work surface planking located 29 inches above the outrigger floor served as adequate midrail protection.

Respondent's first contention that the cited standard does not apply to the outrigger attached to the tubular scaffold has been considered but is rejected. Both 29 C.F.R. § 1926.451(d)(10) which relates to "tubular welded frame scaffolds" and 29 C.F.R. § 1926.451(g)(5) relative to "outrigger scaffolds" contain the following language which is identical in all respects:

> Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

Both standards require the installation of midrails on "all open sides and ends on all scaffolds more than 10 feet above the ground or floor." Accordingly, the cited standard applies in this case and midrails were required on the open sides of the outrigger.

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[2] In its brief respondent also discusses the question of top rails and toeboards (See respondent's brief pgs. 6-8). Since the Secretary does not contend that these devices were required on the outrigger portion of the scaffold, there is no need to address this question.

Respondent's second contention that the planking located 29 inches above the outrigger platform served as adequate midrail protection is also rejected. Respondent notes that the planking above the outrigger platform was sufficiently wide (5 feet) to prevent employees from falling over this top opening and, therefore, a top railing located at 42 inches above the platform was not required. Respondent also correctly notes that 29 C.F.R. § 1926.452(21) defines the term "midrail" as a "rail approximately midway between the guardrail and platform." Based upon these premises, respondent makes the assumption that the Secretary would require, under the facts of this case, a midrail located 21 inches above the outrigger platform and 8 inches below the planking (*i.e.* midway between the platform and the 42 inch height of a standard top rail). Respondent argues that the 8 inch differential bears no relationship to providing fall protection to employees working on the platform since they would be unlikely to fall through the opening under either scenario.

Respondent bases the foregoing conclusion upon certain quantitative comparisons between a representative size range of employees described in its brief at page 12[3], which respondent maintains would preclude the possibility of a fall through the 29 inch space on the open side of the platform. In essence, respondent argues that the space in question is too small to constitute an "open side" as contemplated by the cited standard since, in respondent's view, it would be impossible or improbable for an employee to fall through this opening. Under this circumstance respondent reasons that its employees were not exposed to a hazard. This Court disagrees with respondent's premise on both the law and the facts.

The Secretary brings this action under section 5(a)(2) of the Act and charges respondent with violation of a specific standard which clearly mandates the use of midrails. In this circumstance, the Secretary is not required to prove the existence of a hazard because the promulgation of the standard presupposes the existence of the hazard. *Del-Cook Lumber Company,* 6 BNA OSHC 1362, 1978 CCH OSHD ¶ 22,544 (No. 16093, 1978).

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[3] The secretary has moved to strike this portion of respondent's brief on the basis that it raises facts not in evidence (J-24). While the Secretary's point is well taken, the Court can take note of circumstances which are a matter of common knowledge and understanding. In view of the disposition reached in this case, the Secretary's motion is moot.

Thermo Tech, Inc., 5 BNA OSHC 2045, 1976-77 CCH OSHD ¶ 20,697 (No. 15381, 1977). Respondent's argument that the side of the scaffold was not "open" was considered and rejected by the Commission under similar facts in *Dick Corporation*, 7 BNA OSHC 1951, 1979 CCH OSHC ¶ 24,078 (No. 16193, 1979). See also *Western Waterproofing Company, Inc.*, 5 BNA OSHC 1897, 1977-78 CCH OSHD ¶ 22,212 (No. 13538, 1977).

Aside from the legal aspects of respondent's defense, respondent's factual conclusions are also flawed. Respondent's speculates "in order to fall under the platform, an employee would have to lie prone on the outrigger and then roll off the platform" (Respondent's brief pg. 12). This assertion ignores the other circumstances which could give rise to a potential fall through this 29 inch opening. The most obvious is presented by considering the circumstances depicted in Exhibit "A" attached to the stipulation of facts. (Exh. J-19). This picture discloses an employee of respondent kneeling or crouched on the outrigger platform whose head is well under the planking in question. In the event of loss of balance, nothing would prevent this employee from falling through the opening. Even if an employee stood erect, the potential exists that he or she could either trip or slip and plunge through the opening. In any event, this Court concludes that the 29 inch opening between the planking and outrigger platform constitutes a fall hazard to employees and respondent's failure to install a midrail at this location violated the cited standard.

Based upon the foregoing, it is hereby ORDERED:

1. Repeat citation No. 1 is affirmed; and
2. The proposed penalty in the amount of $1,200.00 is assessed.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

Date: March 31, 1992