

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

PICO INDUSTRIES, INC.,

Respondent.

OSHRC DOCKET No. 04-1419

APPEARANCES:

Toye Olarinde, Esq.
Robert S. Wilson, Esq.
U.S. Department of Labor
Arlington, Virginia
For the Complainant.

Lewis Mulitz
President
Pico Industries, Inc.
Baltimore, Maryland
For the Respondent, *pro se*.

BEFORE: Administrative Law Judge William C. Cregar

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”), and has been heard and decided pursuant to Subpart M of the Commission’s Rules of Procedure, 29 U.S.C. § 2200.200 *et seq.*

Pico Industries, Inc. (“Pico”) is a steel erection contractor. On August 11, 2004, a Compliance Officer (“CO”) from the U.S. Occupational Safety and Health Administration (“OSHA”) inspected Pico’s work site, a theater renovation located in Washington, D.C. As a result of the inspection, OSHA issued a citation alleging a serious violation of a construction safety standard, 29 C.F.R. § 1926.760 (a)(1). Pico timely contested the citation, and a hearing was held in Washington, D.C. on December 7, 2004. No affected employees sought party status. For the reasons below, I uphold the citation and the proposed penalty.

Jurisdiction

At all times relevant to this action, Pico, a steel construction contractor, maintained a principal place of business at 611 W. Ostend Street in Baltimore, Maryland and a work site located at 3303 14th Street, N.W., in Washington, D.C. The work at the site involved the renovation of the Tivoli Theater, and Pico was engaged in the erection of fire escapes. The parties have stipulated that Pico was engaged in interstate commerce. I conclude that Pico is an employer within the meaning of section 3(5) of the Act. Accordingly, the Commission has jurisdiction over the parties and the subject matter. (Tr. 5; Exh. G-2).

Statement of Facts

On August 11, 2004, Pico was engaged in the construction of steel fire escape platforms at the above-noted site in Washington, D.C. On that date, OSHA CO Mark Austin drove to the site, parked his car, and walked around the perimeter of the site to see if there were any safety violations. He saw two individuals standing on the platform of a fire escape under construction. He photographed the activity, after which he met with a representative of the general contractor to discuss what he had seen; the two then went to observe the exposed employees and to have them leave the platform. (Tr. 11-15).

The CO's photographs reveal two individuals standing on a rectangular platform three stories above the ground. One side of the platform is attached to the wall of the building, but the other three sides of the platform are open with no guardrails in place. Abutting one side of the platform ("Side 1") is an articulating boom lift, or "cage," occupied by a third employee.¹ The side of the platform opposite the cage ("Side 2") extends over a roof area that is approximately 5 feet below the platform. However, this roof area underlies only a portion of the remaining side of the platform ("Side 3"). Side 3 extends 18 to 24 inches beyond the roof area. Accordingly, there is an unobstructed 27-foot drop to the street from the 18 to 24-inch-long stretch of the edge of Side 3, and overstepping the unguarded edge of that side

¹Only the cage next to Side 1 prevented a fall from that side. *See* G-1, photos 7 and 8.

could have resulted in a 27-foot fall to the street below. (Tr. 13-21; Exh. G-1, photos 1 through 8). Indeed, two of the photographs depict an individual standing on the 2-foot edge of Side 3 with his left foot actually extending over the edge. (Exh. G-1, photos 3 and 4).

The two individuals on the platform are Pico employees Omar Parada and Ambioris Santana. Pico's foreman, Khatchik Galladian, was aware that the two employees were on the platform at the time of the alleged violation, and he admitted to the CO that the employees should have had some type of fall protection. (Tr. 5-6, 29-30).

On June 11, 2004, Monarc Construction, Inc., the general contractor at the Tivoli site, issued an "urgent memorandum" to Pico, citing it for the failure of its employees to use harnesses when they were required to do so. A handwritten reply signed by Mr. Mulitz states: "Our safety expert, Mr. Galladian, is taking all necessary steps for safety now." (Exh. C-4).

On January 27, 2003, a Commission administrative law judge affirmed a citation alleging two serious violations issued to Pico resulting from an OSHA inspection conducted on June 24, 2002. Both violations related to fall protection, and one involved a supervisor of Pico who was working on a platform lacking a guardrail. *Pico Indus., Inc.*, 20 BNA OSHC 1153 (No. 02-1146, 2003).² See also 2003 OSAHRC LEXIS 14.

Discussion

The cited standard, 29 C.F.R. § 1926.760 (a)(1) provides as follows:

Each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

The citation alleges a violation of the above standard, as follows:

Southeast Side of Building - Iron workers were observed at the edge of an open sided floor, 27 feet above the ground below, without the use of guardrails, safety nets, or

²The decision became a final order on February 28, 2003.

personal fall arrest system. The employees were grinding welds on an exterior fire escape landing on the edge of the building's exterior, on or about 8/11/04.

To establish a violation of a standard, the Secretary must show by a preponderance of evidence that: 1) the cited standard applies; 2) the standard was not met; 3) employees had access to the violative condition; and 4) the employer had actual knowledge of the violative condition or, with the exercise of due diligence, could have known of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in part, remanded in part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has demonstrated all four elements in this case, as set out *supra*. First, employees were engaged in steel erection activity (the construction of fire escapes), and they were on a platform with an edge more than 15 feet above a lower level. Second, the platform did not have guardrails, and no safety nets or personal fall arrest systems were in use. Third, Pico's employees were working on the platform. Fourth, Pico's foreman was aware that employees of Respondent were on the platform, and although he initially stated that there was no exposure to falls because of the roof area under the platform, he admitted to the CO, upon viewing the employees on the platform, that the employees should have had some type of fall protection. (Tr. 29). The record therefore shows that Pico had actual knowledge of the violation of the standard. This citation item is accordingly affirmed as a serious violation, as it is apparent that a fall from a height of 27 feet could result in death or serious injury.

Penalty Assessment

The Secretary has proposed a penalty of \$2,000.00 for this citation item. In assessing penalties, the Commission must give due consideration to four criteria, that is, the gravity of the violation and the employer's size, history and good faith. *See* 29 U.S.C. § 666(j). The gravity of the violation, usually the most significant factor, is determined by 1) the severity of the injury that could result from the hazard, and 2) the probability that injury or illness could occur. As noted above, the violation is properly classified as serious, as a fall from 27 feet to the street could result in death or serious injury. Probability is determined by a number

of factors, including employee proximity to the hazard. In this case, two Pico employees were exposed to the hazard of falling from the edge of the platform, and two photographs show one of the employees actually extending one foot over the edge of the platform. The Secretary presented evidence that the gravity-based penalty in the amount of \$5,000.00 was reduced to \$2,000.00 due to the small size of the company. However, no adjustment was made for history because Pico had received a citation alleging two serious violations within the previous three years. In addition, no adjustment was made for good faith in light of the gravity of the violation. (Tr. 35-37). I also note, as to good faith, that the previous citation alleged violations of fall protection standards and that the memo Monarc issued to Pico, two months before the subject inspection, was for employees not wearing fall protection. I concur with the Secretary that a penalty in the amount of \$2,000.00 is warranted under the circumstances of this case. A penalty of \$2,000.00 is accordingly assessed.

ORDER

1. Item 1 of Serious Citation 1 is **AFFIRMED**, and a penalty of \$2,000.00 is assessed.

/s/

William C. Cregar
Judge, OSHRC

Dated: February 17, 2005
Washington, D.C.