

SECRETARY OF LABOR,
Complainant,
v.
NEW AGE, INC. ,
Respondent.

OSHRC Docket No. 98-0415

DECISION

Before: WEISBERG, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

On November 14, 1997, the Occupational Safety and Health Administration (“OSHA”) inspected a construction worksite in New Braunfels, Texas, where respondent New Age, Inc. was performing masonry work. New Age had “two or three” masons on top of its four-tier scaffolding finishing up work on a wall. In addition, New Age was scheduled to leave the site that day and it had “three or four” employees on the scaffolding preparing to take it down. Instead of guardrails, New Age had strung cables between the uprights of the scaffolding. The general contractor had told New Age’s management that the cables provided adequate guardrails.

As a result of the inspection, OSHA cited New Age for a serious violation of 29 C.F.R. § 1926.451(g)(1)¹ for failing to provide guarding on the scaffold, and proposed a penalty of \$1500. New Age timely contested the citation and proposed penalty.² In his

¹The standard provides, in pertinent part, as follows:

§ 1926.451 General requirements.

. . . .

(g) *Fall protection.* (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. . . .

²New Age had failed to appear at the originally scheduled hearing on September 23, 1998, at which the Secretary presented her *prima facie* case. In a decision dated October 26, 1998, Administrative Law Judge Stanley M. Schwartz affirmed a serious violation and
(continued...)

decision dated February 16, 1999, Administrative Law Judge Schwartz affirmed a violation of the cited standard. He noted the compliance officer's testimony that the cabling was an inadequate substitute for the guardrails required by the standard and that it was missing in some portions of the scaffolding where employees walked. The judge found that the violation was serious because a fall from the scaffold could result in bone fractures, scrapes or lacerations, but he did not assess a penalty. We granted the Secretary's petition for discretionary review on the issue of the judge's failure to assess a penalty.

We conclude that the judge erred in failing to assess a penalty. Assessment of a monetary penalty for a serious violation is mandatory under section 17(b) of the Act, 29 U.S.C. § 666(b). *Ecco High Frequency Electric Corp.*, 11 BNA OSHC 1453, 1454 n.5, 1983-84 CCH OSHD ¶ 26,504, p. 33,715 n.5 (No. 77-1030, 1983). The Commission has the discretion either to remand a case to the judge for the assessment of an appropriate penalty or to determine the penalty. Because we find sufficient evidence of record to determine an appropriate penalty, we will assess the penalty. *See, e.g., Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168, 1993-95 CCH OSHD ¶ 30,041, p. 41,221 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give "due consideration" to four criteria: the size of the employer's business, the gravity of the violation,³ the good faith of the employer, and the prior history

²(...continued)

assessed the proposed penalty of \$1500. New Age filed a petition for discretionary review, which was granted. On December 8, 1998, the Commission remanded the case to the judge for a determination of whether Respondent's failure to appear should be excused and whether the record should be reopened. In his February 16, 1999 decision, the judge determined that respondent's failure to appear at the first hearing was excused and proceeded to address the merits of the citation.

³Gravity, normally the most significant consideration in assessing a penalty, depends on such matters as the number of employees exposed, the duration of the exposure, the
(continued...)

of violations. The record shows that New Age was a small employer and that it had no history of OSHA violations. The gravity of the violation is moderate to high based on the exposure of five to seven New Age employees to the hazard of falling from the four-tier scaffold, which could result in serious bodily injury. Gravity is ameliorated by New Age's partial protection of its employees from the fall hazard by stringing the cable between the uprights of the scaffolding. As to good faith, although New Age did not have guardrails that complied with the standard, it believed that the cabling was adequate to comply with OSHA regulations. Based on these factors, we find that a penalty of \$500 is appropriate.

We therefore affirm the judge's finding of a serious violation of 29 C.F.R. § 1926.451(g)(1) and assess a penalty of \$500.

/s/
 Stuart E. Weisberg
 Chairman

/s/
 Thomasina V. Rogers
 Commissioner

Dated: April 20, 1999

³(...continued)
 precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993).

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1244 North Speed Boulevard, Room 250

Denver, Colorado 80204-3582

Phone: (303) 844-3409

Fax: (303) 844-3759

SECRETARY OF LABOR,

Complainant,

v.

NEW AGE, INC.,

Respondent.

OSHRC DOCKET NO. 98-0415

APPEARANCES:

For the Complainant:

Mary K. Schopmeyer, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:

J.B. Gonzales, Chris Gonzales, I.B. Gonzales, Pro Se, San Antonio, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

The above captioned matter comes up on remand from the Commission.

On September 23, 1998, a hearing was held in San Antonio, Texas. New Age failed to appear; the Secretary set forth her *prima facie* case. This judge's decision was returned to Washington prior to this judge's receipt of Respondent's October 22, 1998 letter objecting to the disposition of the case. The letter was construed as a petition for discretionary review, and the Commission remanded the case for a determination as to whether New Age's failure to appear was excusable under Commission Rule 64(c)⁴. The Commission returned the matter to this judge for a determination of whether the failure to appear should be excused.

⁴ §2200.64 states: *Rescheduling hearing*. The Commissioner or the Judge, upon a showing of good cause, may excuse such failure to appear. In such event, the hearing will be rescheduled as expeditiously as possible from the issuance of the Judge's order.

A hearing was held on January 8, 1999, at which I.B. and J.B. Gonzales testified that a family emergency prevented them from appearing at the September 23, 1998 hearing (Tr. 10, 15). The Gonzales' testified that they attempted to reach the Secretary's counsel, Mary Schopmeyer, calling OSHA's area office and the Houston Office of the Solicitor (Tr. 14). J.B. Gonzales testified that he eventually left a voice mail on Ms. Schopmeyer's voice mail at the Houston number (Tr. 15-16). Mary Schopmeyer stated that she did not receive a voice mail, that her office is in Dallas and that New Age has received several documents with her correct address and phone number (Tr. 16-17).

On the record, this judge found that New Age had made a good faith effort to reach the Solicitor, and that its failure to appear at the September, 1998 hearing was excused (Tr. 19-21). The parties then set forth their evidence on the merits of the case.

Alleged Violation

Citation 1, item 1 alleges:

29 CFR 1926.451(g)(1): Standard guardrails and toeboards were not installed at all open sides and ends on scaffolds more than 10 feet above the ground or floor:

(a) The employer, New Age, Inc., located on 955 N. Walnut did not provide guardrail and toeboards along the open sides of the scaffold erected on the east side of the building. The scaffold sections north of the access ladder and south of the hoisting areas were missing the guardrails and the entire third level was missing the toeboards.

The cited standard provides:

Each employee on a scaffold more than 10 feet (3.1m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1) through (vii) of this section establish the types of fall protection to be afforded.

* * *

(vi) for all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(iv) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

Facts

The evidence establishes that when Compliance Officer (CO) Tony Sanchez arrived at the New Braunfels work site, New Age employees were working on an inadequately guarded four tier scaffold (Tr. 46). J.B. and I.B. Gonzales admitted that New Age was scheduled to leave the site at 4:00 p.m. that afternoon, and that, in order to get a head start on dismantling the scaffolding, their men had begun removing the toeboards⁵ and guardrails, though masons and their tenders still worked on the scaffolding (Tr. 27, 29, 34, 49).

⁵ Though not affecting my decision, I note that toeboard requirements are addressed under §1926.451(h) *et seq.*, and so have not been properly cited here.

New Age argues that in lieu of guardrails, it strung cables between the uprights of the scaffolding (Tr. 58). J.B. Gonzales testified that they had been told by their general contractor that the cable provided adequate guardrails (Tr. 73-74).

CO Sanchez testified that the cabling was an inadequate substitute for standard guardrails in that it was completely missing in some portions of the scaffolding where men were walking, did not consist of a top rail between 38 and 48 inches (J.B. Gonzales estimated the height of the cables at 32-33 inches [Tr. 61]), and a mid-rail, and was capable of more than three or four inches of deflection (Tr. 58-61, 65-66, 74, 77). CO Sanchez stated that, if approved by the manufacturer, a guardrail consisting of two taut cables, set to the heights prescribed for a top and midrail by §1926.451(g)(4) *et seq.* would abate the cited hazard in the future (Tr. 75, 108).

Penalty

The cited violation, which could cause a fall resulting in bone fractures, scrapes and/or lacerations (Tr. 20-23, September 23, 1998 hearing), was properly classified as serious.

New Age has never received an OSHA citation before, though its work sites have been inspected (Tr. 36). New Age acted in good faith in that it provided alternative fall protection to its employees, believing, on the advice of its general contractor, that its cabling was adequate to comply with OSHA regulations. This judge believes that the \$1,500.00 penalty proposed by the Secretary would be better spent in abating the cited hazard, as discussed at the hearing (Tr. 100-101); no penalty, therefore, will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of §1926.451(g)(1) is AFFIRMED, without penalty.

Stanley M. Schwartz
Judge, OSHRC

Dated: