



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,  
Complainant,  
v.  
ANDRON CONSTRUCTION  
CORPORATION,  
Respondent,

OSHRC DOCKET NO. 06-1386

Appearances:

Marc G. Sheris, Esquire  
U.S. Department of Labor  
New York, New York  
For the Complainant.

Harold J. Gabriel, Esquire  
New York, New York  
For the Respondent.

Before: Irving Sommer  
Chief Judge

**DECISION AND ORDER**

This proceeding 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 *et seq.* (“the Act”). In April 2006, the Occupational Safety and Health Administration (“OSHA”) inspected a construction site where Respondent, Andron Construction Corporation (“Respondent” or “Andron”), was working as construction manager. As a result of the inspection, on July 18, 2006, OSHA issued to Andron a Citation and Notification of Penalty alleging a serious violation of 29 C.F.R. 1926.501(c). Andron filed a timely notice of contest, bringing this matter before the Commission, and this case was designated for the Commission’s simplified proceedings pursuant to 29 C.F.R. 2200.203(a). The hearing in this case was held on January 17, 2007, in New York, New York. Both parties have filed post-hearing briefs.

**The OSHA Inspection**

OSHA went to the site on April 25, 2006,<sup>1</sup> after receiving a complaint about conditions at the project; the condition relating to this case was an Andron employee who was struck on the head by a concrete block falling from a building on April 6.<sup>2</sup> The construction project was an addition and renovations to a school building located in Rye, New York. The school district had hired a general contractor, who in turn had contracted with various subcontractors. The school district had also hired Andron to manage the project, which involved overseeing the project, ensuring the work done was satisfactory, and coordinating the work of the contractors. (Tr. 39-41).

Robert Paradiso, the OSHA compliance officer (“CO”) who conducted the inspection, met with Carlo Cervini, Andron’s project engineer, and Christopher Perreten, Andron’s project superintendent; the CO also met with David Augenbraun, Andron’s senior project manager. The representatives took the CO to the area where the accident occurred, which was on the ground level near the entrance of the building, and they told him that Mr. Cervini and Mr. Perreten were at that location at about 3:20 p.m. on April 6 when a concrete block fell from the second level and struck Mr. Cervini on the head.<sup>3</sup> The representatives also took the CO up to the second level, which was 26 feet above the ground. The CO spoke to two employees of D.A. Williams (“Williams”), the masonry contractor. Duane Williams, Williams’ president, told the CO that two pallets of concrete blocks were landed on the second level early in the morning on April 6, that the pallet closest to the edge (“the front pallet”) was 3 to 4 feet away from the floor’s edge, and that the other pallet (“the back pallet”) was behind the front pallet; Mr. Williams also said the accident occurred when Joseph Hickey, a mason tender with Williams, had removed blocks from the back pallet in order to take them over to the stairway area. Mr. Hickey, on the other hand, told the CO that the front pallet, which was landed last, was landed on the back pallet and that doing so damaged the front pallet; Mr. Hickey further stated that the pallet was left that way all day and that the stress on the pallet had caused it to give way and the block to fall. The CO received photos from Andron taken the morning

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<sup>1</sup>Hereinafter, all dates will refer to the year 2006 unless otherwise indicated.

<sup>2</sup>OSHA did not receive the complaint until April 25. (Tr. 43).

<sup>3</sup>Mr. Cervini was wearing a hard hat, and, although he was knocked unconscious and was injured, resulting in his hospitalization, his injuries were much less severe than they would have been otherwise. (Tr. 66, 109-11; S-7).

of April 7, and the CO also took photos at the site.<sup>4</sup> As a result of the inspection, the CO determined Andron had violated the cited standard because the concrete blocks had been too close to the edge of the building and no precautions had been taken to protect employees. (Tr. 37-61).

### **The Cited Standard**

The cited standard, 29 C.F.R. 1926.501(c), provides as follows:

*Protection from falling objects.* When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:

- (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or,
- (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or,
- (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

### **The Secretary's Burden of Proof**

To prove a violation of a specific OSHA standard, the Secretary must demonstrate that: (1) the standard applied to the cited condition, (2) the terms of the standard were not met, (3) employees had access to or were exposed to the violative condition, and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

### **Discussion**

The Secretary's position, based on what the CO concluded from his inspection, is that the front pallet of blocks was too close to the edge of the building, resulting in a block falling off the edge. Respondent's position is that the front pallet of blocks was 6 feet from the edge of the building and that Mr. Hickey caused the block that hit Mr. Cervini to fall from the edge. To resolve the issue of how far the front pallet of blocks was from the edge, the relevant testimony follows.

### **Testimony of Joseph Hickey**

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<sup>4</sup>The photos that Andron provided the CO are S-1 through S-5; S-6 is the CO's photo. (Tr. 49, 51-53, 70).

Mr. Hickey has worked as a mason laborer for over 26 years; he worked at the subject site for Williams for two days as a mason tender, which involved supplying the masons with concrete blocks and other materials. He testified that on April 6, he was initially working with the masons on the first level as they built the stairway on that level. He further testified that, by around 2:15 p.m. that day, the masons were up to the stairway on the second level and he was supplying blocks to them on that level. Mr. Hickey explained that the blocks he was providing the masons on the second level were landed there by Williams at about 8:00 a.m. that day and that those were the only blocks landed on that level that day.<sup>5</sup> He also explained how the blocks were landed. A Williams operator used an all-terrain forklift to lift the blocks up one cube at a time; this was done by the forks going into the pallet on which the cube sat and the forklift lifting and then landing the pallet on the second level.<sup>6</sup> Mr. Hickey said that when he went up to the second level, he saw that the back pallet was about 6 feet from the edge, which was an appropriate distance; he also saw that the front pallet had caught on the back pallet when it was landed, tilting the front pallet at an angle and causing the back of the pallet and the blocks on the pallet to come apart, resulting in the front cube of blocks being about a foot from the edge.<sup>7</sup> Mr. Hickey did not see the accident, as he was about 15 feet away, but he heard something fall; he ran to the edge and shouted “look out!” but it was too late. Mr. Hickey spoke to the police officer who arrived at the scene, and then he went home. (Tr. 6-15, 25-32).

Mr. Hickey testified that when he returned to the site the next morning it was very different; scaffolds that had been unsafe had been removed, the concrete blocks on the second level had been moved, and the safety cables at the edge of the second level, which had been dropped down for landing the blocks and then left down, were back in place. Mr. Hickey went to his union hall and came back with a field representative, and, after a discussion about conditions at the site with his

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<sup>5</sup>Mr. Hickey indicated he had noticed the blocks being put up on the second level from where he was working on the first level. (Tr. 20, 31-32).

<sup>6</sup>Mr. Hickey said that the cubes lifted up to the second level were 8 blocks high and 16 blocks per level; he also said the blocks were 8 inches high, resulting in the height of the cubes, together with the 4-inch pallet, being about 5 feet 8 inches. (Tr. 33).

<sup>7</sup>Mr. Hickey assumed the front pallet came apart due to the force of the material on it; he said if the front pallet had not come apart the cube would have been around 2 feet from the edge. He also assumed the front pallet had remained in the same condition all day. (Tr. 8-9, 14, 33-34).

boss, Mr. Hickey decided that he no longer wanted to work at the site and he left. As to the blocks on the second level, Mr. Hickey discussed S-3, a photo Andron took of the second level on April 7 showing a cube on a pallet in the middle of the photo. He said the cube in S-3 was in the same location where the back cube had been the day before and that it was approximately 6 feet from the edge. He also said it was not the same cube, as the pallets used on April 6 were longer and protruded beyond the blocks; in addition, the front pallet of blocks was gone, and the blocks shown to the left of the cube in S-3 were not there the day before. Mr. Hickey assumed that the two empty pallets shown in S-3 by the ladder were the ones that had held the blocks the day before. (Tr. 11-18).

#### Testimony of Christopher Perreten

Mr. Perreten testified that he has been with Andron for 30 years and that he had been the project superintendent at the subject site since the job began in June 2005. He identified R-5 as the plan for the second level of the project; the area where the subject pallets were landed is highlighted in yellow, and the area where the stairway was being built is highlighted in pink. He also identified R-6 as a blowup of the highlighted areas in R-5 and R-7 as a drawing showing the two pallets on the second level.<sup>8</sup> Mr. Perreten said the two cubes of blocks at issue were 8 feet back to back, that the closest cube was 6 feet from the edge of the building, and that workers were unloading the blocks and taking them to the stairway area. He also said he was up on the second level on April 6 when the pallets were landed, that this took place between 10 and 11 a.m., and that he had not seen a broken pallet on that level; he also had not seen any blocks within 6 feet of the edge, and if he had he would have told the masonry contractor to move them. Mr. Perreten explained that the back pallet was landed first and was pushed 6 feet from the edge with the forklift; the front pallet was then landed in front of the back pallet and was also pushed 6 feet from the edge with the forklift. He further explained that this same operation had been ongoing for a couple of days before the accident, that he had personally seen it, and that Mr. Williams himself had been landing the pallets and making sure they were pushed in. Mr. Perreten said the blocks were not being stored on the second level; rather, the second level was a loading and staging area. (Tr. 94-101, 105, 116-21, 131-32).

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<sup>8</sup>Mr. Perreten indicated he had drawn on R-6 where the two cubes were. (Tr. 98).

Mr. Perreten further testified that just before the accident on April 6, he had been attending to a matter in the back of the building; Mr. Cervini joined him, telling him he had noticed a sagging cable in the front of the building and asking if he wanted to see it. Mr. Perreten agreed, and they walked through the building and out the entrance; as they were looking up at the cable, the block fell and hit Mr. Cervini. Mr. Perreten looked up again and saw Mr. Hickey at the edge of the building, looking down; Mr. Hickey then walked away. Mr. Perreten ran to Andron's job site trailer and told Lou Espino, another Andron superintendent, to go meet the ambulance, and he then called 911. A police officer arrived shortly, as did the ambulance, and Mr. Cervini was taken to the hospital. The next morning, when Mr. Perreten arrived at the site and was preparing to investigate the accident, he saw Mr. Hickey and told him he needed to talk to him and get a statement from him; Mr. Hickey became very defensive, saying he hadn't done anything wrong, and Mr. Perreten repeated that he just needed to talk to him. Less than an hour later, a union delegate arrived and said that Mr. Hickey had been removed from the job and that a replacement would be sent. According to Mr. Perreten, Mr. Hickey was a disgruntled employee who had told him he did not like the fact that Mr. Williams, the owner of Williams, was working on the site and keeping an eye on his employees. (Tr. 108-14).

After Mr. Perreten and Mr. Espino had investigated the accident and taken photos of the building, Mr. Perreten prepared S-7, Andron's report of the accident; S-7 states that a laborer who was unloading blocks hit one block with another and that the "[b]lock that was hit rolled off pile of block and edge of building." Mr. Perreten said he had obtained this information from another laborer, because Mr. Hickey was gone by that time, and that since then he had come to believe that the block was actually thrown off the building. Mr. Perreten noted that he had conducted experiments on the ground with blocks on pallets placed at an angle and that the farthest they would roll was 3 feet. He also noted that there was rebar set in concrete every 2 feet along the edge in question, and it was his opinion that the rebar would have prevented a concrete block from rolling off the edge. He admitted, however, that S-6, the photo the CO took of the landing area on April 25, showed a gap between two of the rebar that would have been about 4 feet. He also admitted that S-3, Andron's photo taken on April 7, did not show the condition of the second level on April 6; rather, it showed that one of the cubes of blocks had been unloaded and moved to the left of the cube in the middle of the photo. (Tr.102-07, 117-19, 124-29).

Based on the above, it is apparent that Mr. Hickey's testimony differs significantly from that of Mr. Perreten and that a credibility determination as to these two witnesses is necessary. In this regard, I note that R-12 (the OSHA-1B, the CO's worksheet setting out what he learned from his inspection) states on page 2 as follows:

An employee of the masonry company was bringing blocks from a pallet to masons. He told CSHO that he was taking the blocks from a pallet that was behind another pallet that was a foot or so from the edge of the building. He said the pallet that was near the edge of the building was damaged where it was adjacent to the other pallet when it was landed. He said as he was unloading the block from the pallet further from the edge, some block (3 or 4) fell from the pallet that was closer to the edge and one of those fell off the building and struck the other employee.

The foregoing information, which Mr. Hickey provided the CO at the time of the inspection, is essentially the same as Mr. Hickey's testimony at the hearing. (Tr. 8-14). On the other hand, S-7, the report Mr. Perreten prepared and signed on April 7 that contains the information set out *supra*, is inconsistent with his hearing testimony. Mr. Perreten stated he had changed his opinion about what had happened after writing S-7, but he admitted he had not filed an amended report. (Tr. 129).

R-12 also states on page 2 that "[t]he block was landed in that location first thing in the morning and was left there all day." The CO testified Mr. Williams told him the blocks were landed early in the morning on April 6, and Mr. Hickey testified the blocks were landed at about 8 a.m. that morning. (Tr. 20, 31-32, 46). Mr. Perreten, however, testified the blocks were landed on the second level between 10 and 11 a.m. on April 6 and that he had been on that level at the time. (Tr. 99-100). In addition, while Mr. Perreten testified the front pallet was 6 feet from the edge, the CO testified that Mr. Williams, the individual who was landing the blocks, told him the front pallet was 3 to 4 feet from the edge. (Tr. 46, 55, 98-100). Mr. Perreten's testimony about the distance of the front pallet from the edge is thus contrary to the statements of both Mr. Hickey and Mr. Williams.

The foregoing supports a conclusion that Mr. Perreten's testimony about the distance of the front pallet to the edge of the second level was not reliable. However, there is a further reason to find Mr. Perreten's testimony unconvincing. He testified, in essence, that it was his belief that Mr. Hickey deliberately threw the concrete block off the edge. (Tr. 107, 114). Mr. Hickey's own testimony bolsters that of Mr. Perreten that Mr. Hickey was standing near the edge of the second floor and looking down right after the block struck Mr. Cervini. (Tr. 14, 111). Mr. Hickey explained that he

ran over to the edge to shout out a warning about the falling block but that it was too late. (Tr. 14). I observed Mr. Hickey's demeanor as he testified, and I found him to be a sincere and convincing witness. Moreover, I find it difficult to believe that a mason laborer with 26 years of experience would intentionally throw a concrete block off the edge of a building.<sup>9</sup> I also note that despite Mr. Perreten's testimony about his having formed a different opinion about the accident after he prepared S-7, there is no evidence that he shared this opinion with the CO on April 25, the date of the inspection, which was almost three weeks after the accident. In view of the record, and based on my having observed the demeanor of these two witnesses, Mr. Hickey's testimony is credited over that of Mr. Perreten to the extent there are differences in their testimony.

There is one more issue to resolve with respect to the distance between the front pallet and the edge of the second level. As noted *supra*, Mr. Williams told the CO the front pallet was 3 to 4 feet from the edge; Mr. Hickey, on the other hand, told the CO, and also testified at the hearing, that the front cube was about a foot from the edge. (Tr. 8-14, 46, 55). There is no evidence in the record that Mr. Williams had been on the second level such that he would have known exactly how far the front pallet was from the edge, although he had to have known it was too close to the edge. And, as Mr. Hickey testified, if the pallet had not come apart, the front cube would have been about 2 feet from the edge, which is only a 1-foot difference from what Mr. Williams stated. (Tr. 14). In any case, I credit the testimony of Mr. Hickey, as I have found him to be a reliable witness; he was also on the second level and observed the condition of the pallets. I find, accordingly, that the pallet was landed as Mr. Hickey described it; that is, the front pallet caught on the back pallet as it was landed, such that the front pallet was tilted at an angle and the cube was about 2 feet from the edge. I further find that at some point during the day the back of the front pallet came apart, resulting in the cube coming apart and being about a foot from the edge. As Mr. Hickey was in the process of removing blocks from the back pallet and taking them to the masons working in the stairway area, the front pallet must have become further unbalanced, causing one of the blocks from the front cube to fall off the

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<sup>9</sup>According to the record, the concrete blocks were 8 inches high and 16 inches long, and they weighed about 35 pounds each. (Tr. 33, 76, 106-07).



edge of the floor.<sup>10</sup> On the basis of these findings, it is my conclusion that the front cube was about 2 feet from the edge of the second level earlier in the day and then, after the pallet came apart, about 1 foot from the edge. Consequently, the Secretary has proved the first element of her case; that is, she has shown employees were exposed to falling objects and that the cited standard thus applied.

The Secretary has also proved the terms of the standard were not met. The record establishes that employees were exposed to the hazard of falling concrete blocks and that none of the means set out in the standard were used to abate the hazard. Mr. Hickey and the CO both testified that there was nothing in place to prevent blocks from falling from the edge. (Tr. 10, 34, 60-62). As noted above, Mr. Perreten testified that the rebar, set at 2-foot intervals along the edge of the floor, would have prevented blocks from falling. (Tr. 106-07). However, the accident belies this argument, and Mr. Perreten admitted that S-6, the CO's April 25 photo of the rebar in the loading area, showed a 4-foot gap between two of the rebar.<sup>11</sup> (Tr. 126-27). Mr. Perreten's testimony is rejected.

The Secretary has further proved employee exposure to the hazard; the hazardous condition was located up above the entrance to the building, which employees used to access the building, and Mr. Cervini, an Andron employee, was struck on the head by a block falling from the second level as he and Mr. Perreten stood near the entrance. And, finally, the Secretary has proved Andron could have known of the hazardous condition with the exercise of reasonable diligence.<sup>12</sup> The record shows the pallets were landed on the second level early in the morning on April 6 and that they remained in the condition Mr. Hickey described until the time of the accident at around 3:20 p.m. (Tr. 9, 20, 31-34, 46-48, R-12). The record also shows Mr. Perreten's job involved overseeing the day-to-day

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<sup>10</sup>The record shows Mr. Hickey was removing blocks from the cube and putting them in a wheelbarrow to take them to the stairway area; to reach the stairway area, shown in pink on R-5, he did not go towards the edge of the second level. (Tr. 21-24, 98-99, 130).

<sup>11</sup>This gap between the rebar was evidently the same the day of the accident. S-2, one of Andron's photos taken on April 7, shows there were only three pieces of rebar between the two posts in the loading area. Two of the rebar appear bent, which, based on the record, was so that Williams could land the pallets, and there is a large gap between the two pieces of bent rebar. In S-6, the rebar appear to have been straightened. (Tr. 35-36).

<sup>12</sup>I do not find Andron had actual knowledge of the condition, because I am not persuaded that Mr. Perreten was in fact up on the second level that morning, as he testified.

activities at the site and that he and Mr. Cervini were walking the site just prior to the accident; in fact, according to Mr. Perreten, he and Mr. Cervini were going to look at a sagging cable Mr. Cervini had seen in the landing area.<sup>13</sup> (Tr. 64-65, 96, 108-09). Additionally, the record shows that Andron's job site trailer, although not appearing in the photo, was just to the left of the area depicted in S-2. (Tr. 64-65). Based on the record, Andron should have been aware of the violative condition, which was clearly visible from the ground. *See, e.g.*, S-1 and S-2. The alleged violation is accordingly affirmed, and it is properly classified as serious in light of the serious injury that occurred. As noted above, Mr. Cervini's injuries would have been much more severe but for his hard hat; as the CO put it, Mr. Cervini could have been killed. (Tr. 66, 109-11; S-7).

The Secretary has proposed a penalty of \$875.00 for this citation item. The CO testified that the gravity-based penalty for this item was \$2,500.00 and that three adjustments were made to the penalty; a 40 percent adjustment was made for the employer's size, a 10 percent adjustment was made for history, and a 15 percent adjustment was made for the employer's good faith, resulting in an adjusted proposed penalty of \$850.00.<sup>14</sup> (Tr. 69-70). I find the proposed penalty appropriate, and a penalty of \$850.00 for this citation item is accordingly assessed.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is ordered that:

1. Item 1 of Citation 1, alleging a serious violation of 29 C.F.R. 1926.501(c), is AFFIRMED, and a penalty of \$850.00 is assessed.

/s/ \_\_\_\_\_  
Irving Sommer  
Chief Judge

Dated: March 15, 2007  
Washington, D.C.

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<sup>13</sup>Mr. Perreten admitted that S-9, his resume, states he is responsible for the safety of Andron workers and subcontractors. His testimony also establishes that he had the authority to have subcontractors correct unsafe conditions at the job site. (Tr. 123-24, 131-32).

<sup>14</sup>The CO noted that Andron had 100 employees at the time of the inspection. He also noted that the cited hazard had been abated in that when he went up to the second level on April 25, the concrete blocks he saw were at least 10 feet from the edge of the building. (Tr. 63, 70).