Secretary of Labor,
Complainant,

v.

Bredshall Plastering, Inc.,
Respondent.

OSHRC Docket No. **00-1590**

EZ

APPEARANCES

Paul Spanos, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Mr. Brad Bredshall, President
Bredshall Plastering, Inc.
Wilmington, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Bredshall Plastering, Inc. (BPI), a small plastering contractor working on the exterior of an addition to the historical society office in Wilmington, Ohio, was inspected on July 25-26, 2000, by Occupational Safety and Health Administration (OSHA). As a result of this inspection, on August 10, 2000, BPI was issued a serious citation alleging a violation of 29 C. F. R. § 1926.300(b)(4)(ii) for failing to guard the saw blade on a Craftsman table saw used to cut insulation material, and a repeat citation alleging a violation of 29 C. F. R. § 1926.451(g)(1) for failing to protect an employee working on a frame scaffold from a fall hazard of 16 feet, 10 inches, by standard guardrails or personal fall arrest systems. The serious citation proposes a penalty of $2,000; the repeat citation proposes a penalty of $2,000. BPI timely contested the citations.

This case was designated for E-Z trial procedures under 29 C. F. R. § 2200.200, *et seq.* The hearing was held on January 26, 2001, in Dayton, Ohio. The parties stipulated jurisdiction and coverage. BPI is represented *pro se* by its president Brad Bredshall.

BPI denies that it violated the standards and asserts an infeasibility defense as to guarding the saw blade and a greater hazard defense as to the lack of a guardrail on the scaffold.

For the following reasons, BPI's infeasibility and greater hazard defenses are rejected and the two violations are affirmed for a total penalty of $2,500.

Background

BPI, a small company with an office in Wilmington, Ohio, is engaged in the business of interior plastering, exterior stucco, and exterior insulation finish system (EIFS) in Ohio. It has been in business for approximately six years and employs 10 - 12 employees.

In July 2000, BPI was the EIFS subcontractor working on an addition to the historical society office in Wilmington. BPI began work on the project about four days before the inspection and had four employees on the jobsite (Tr. 80-81). The work involved fastening polystyrene insulation board to the wall, attaching fiberglass mesh to the board, and then applying the finish (similar to stucco). To perform this work, BPI had erected tubular frame scaffolding, three frames high, around the exterior of the addition (Exh. C-2, Tr. 38).

On July 25, 2000, at approximately 3:30 p. m., OSHA Compliance Officer (CO) Stephen Medlock was driving from an inspection and observed an employee on a scaffold applying the EIFS to a wall without fall protection and without a guardrail behind him. Medlock stopped his car and initiated an inspection pursuant to an OSHA local emphasis program on fall protection (Tr. 14). There were two BPI employees on site: Guy Adams, the foreman, was on the scaffold; and Ryan Warrior, a laborer, was on the ground (Exh. C-2, Tr. 16). Adams was working on the scaffold at 16 feet, 10 inches, with no guardrail or personal fall arrest protection (Tr. 37). Although the rest of the scaffolding had guardrails, there was no guardrail behind Adams where he was working facing the building (Tr. 44). Adams told Medlock that he did not remove the guardrail (Tr. 47).

Additionally, CO Medlock observed a Craftsman table saw on the ground without a guard covering the saw blade. Foreman Adams told him that he had used the saw earlier in the day to cut four pieces of insulation board. Adams demonstrated how he used the saw. His hands were only 11 inches away from the blade that was set on a 45 degree angle (Tr. 29). Adams, who owned the saw, stated that he never used a guard on the saw blade. Medlock did not observe the saw in operation.

CO Medlock concluded his inspection the next day. Based on his investigation, the citations were issued on August 10, 2000.

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of a standard.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Knowledge of the violative conditions on site is imputed to BPI by its foreman Adams. "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). Adams had been a foreman for BPI since its inception and Bredshall agreed that Adams was the foreman on the project. Adams was operating the table saw without a guard and Bredshall was aware of this. Adams was standing on the scaffold without a guardrail or fall protection. His knowledge is imputed to BPI. "(W)hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

ALLEGED VIOLATIONS

Citation 1, Item 1 – Alleged serious violation of § 1926.300(b)(4)(ii)

Section 1926.300(b)(4)(ii) provides:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The point of operation is the "area on a machine where work is actually performed upon the material being processed." § 1926.300(b)(4)(i). The citation alleges that BPI failed to guard the point of operation on a Craftsman table saw that was used to cut insulation board. The point of operation on this saw is the rotating 10-inch saw blade that cuts the insulation board.

It is undisputed that the saw blade was not guarded (Exh. C-1). The table saw had a guard that came with it, but Bredshall and Adams both admitted to CO Medlock that the saw was always used without the guard to cut insulation (Tr. 27, 31). Adams was the only employee who used the saw. On the day of the inspection, the unguarded table saw was used by foreman Adams to cut a total of four sheets (each two feet wide by four feet long) of insulation board, two that were 1 inch thick and two sheets that were 1½ inches thick (Tr. 21). Adams' demonstration for CO Medlock of how he used the saw to cut the insulation showed that his hands were only 11 inches away from the saw blade during cutting.

The Secretary has the burden of proving that employees had access to a hazard by showing that it is "reasonably predictable" that employees will be, are, or have been in the "zone of danger" created by a noncomplying condition. *Kokosing Construction Co., Inc.,* 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996). The inquiry is not whether the exposure is theoretically possible but "whether employee entry into the danger zone is reasonably predictable." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Here, the zone of danger is the area around the unguarded saw blade. An employee's hands 11 inches away from a rotating saw blade are within the zone of danger. It is reasonably predictable than an employee's hands could come in contact with the blade as a result of operational necessity, accident, inadvertence or carelessness.

The table saw was owned by Adams and used by Adams to cut insulation board for the benefit of his employer, BPI. It is BPI's obligation to protect its employees and guard the saw blade. The Review Commission has upheld sanctions against employers for hazards created by employee-owned devices. "An employer is responsible for ensuring the safety of equipment it owns and provides to its employees. An employer is equally responsible for ensuring the safety of equipment over which it has control, but not ownership, that is used by its employees." *Chicago and North Western Transportation Co.,* 5 BNA OSHC 1121, 1122-1123 (No. 13071, 1977). *See also Camden Drilling*

Co., 6 BNA OSHC 1560, 1561 (No. 14306, 1978). BPI should have had Adams install a guard or should have installed a guard itself.

The record establishes that the standard applies to the work performed by BPI; BPI did not comply with the terms of the standard in that the saw blade was not guarded; employees had access to the hazards of an unguarded blade; and BPI had knowledge that the saw was used without a guard. Without guard protection on the table saw, an employee was exposed to serious physical harm - amputation of fingers or other parts of the hand. Under § 17(k) of the Occupational Safety and Health Act (Act), a violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U. S. C. § 666(k).

Accordingly, the violation of § 1926.300(b)(4)(ii) is affirmed as serious.

Infeasibility Defense

BPI alleges that it is infeasible to use a guard on the table saw because the blade has to be set on a 30-45 degree angle and insulation board that is over two inches thick binds up in the angled blade, damaging the board.

To establish the affirmative defense of infeasibility, an employer has the burden of proving that (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (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) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection. *Beaver Plant Operations, Inc.*, 18 BNA OSHC 1972, 1977 (No. 97-0152, 1999).

BPI failed to show that a guard would have been technologically or economically infeasible to install. CO Medlock testified that he has seen larger, adjustable guards and box type guards for saw blades set on an angle (Tr. 26, 71). BPI did not show that it even attempted to use any type of guarding method.

BPI failed to show that it would have been precluded from performing its work of cutting insulation with a guard. BPI asserts that binding occurs on insulation board over two inches thick. Bredshall stated that the binding problem was alleviated by cutting the insulation board half way through on one side and then flipping it to the other side and running it through the saw again

(Tr. 83). He did not attempt to attach any guard while using this method. Moreover, BPI does not cut insulation board over two inches thick all the time. On the day of the inspection, the insulation board cut by foreman Adams was all less than two inches thick.

BPI failed to show that there was no feasible alternative means of protection. The employer "must show that it has explored all possible alternate forms of protection." *State Sheet Metal* Co., 16 BNA OSHC 1155, 1161 (No. 90-1620, 1993). Indeed, an employer is expected "to exercise some creativity in seeking to achieve compliance." *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995). The standards recognize various other guarding methods such as barrier guards, two-hand tripping devices, and electronic safety devices. *See* 29 C. F. R. § 1926.300(b)(3). Supplemental protection, such as special handtools for placing and removing material, can also be used. *See* 29 C. F. R. § 1926.300(b)(4)(iii). BPI has not presented any alternative means of protection and has not shown whether or not they could be used.

Therefore, BPI has failed to establish its infeasibility affirmative defense.

Citation 2, Item 1 – Alleged repeat violation of § 1926.451(g)(1)

Section 1926.451(g)(1) provides:

> 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. Paragraphs (g)(1) (i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

The citation alleges that BPI failed to have a standard guardrail on its scaffold on which an employee was working and was exposed to a fall hazard in excess of 16 feet.

There is no dispute that there was no guardrail on the part of the scaffold where Adams was working on the day of the inspection (Exh. C-2). The scaffolding belongs to BPI (Tr. 80). According to Bredshall, all of the guardrails were up when the scaffold was erected about five days before the inspection (Tr. 84). Bredshall stated that he was working on the scaffold the night before the inspection and the guardrail was still up (Tr. 87). Bredshall did not know why the guardrail was down on the afternoon of the inspection (Tr. 88). Adams told CO Medlock that he did not remove the guardrail (Tr. 47).

Adams was facing the building, applying the finish, and standing on planking that was 19 inches wide on the scaffold (Exh. R-1). Behind him there was no guardrail. Although there was cross bracing, it was only 19 inches from its highest point and nine inches at its lowest point above the work platform. He was standing 16 feet, 10 inches above the ground.

The fall standard applies to the work performed by BPI; BPI did not comply with the terms of the standard in that the scaffold did not have a guardrail; an employee was exposed to a fall hazard of over 16 feet; and knowledge of the missing guardrail is imputed to BPI through its foreman Adams.

The violation of § 1926.451(g)(1) is affirmed.

Repeat Classification

Under the Commission's long stated test, a repeat violation under § 17(a) of the Act occurs if the Secretary shows "a Commission final order against the same employer for a substantially similar violation." *Potlatch Corporation,* 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity "by showing that the prior and present violations are for failure to comply with the same standard, at which point the burden shifts to the employer to rebut that showing." *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

The repeat classification is based on a citation[1] issued to BPI on February 24, 1999, for violation of § 1926.451(g)(1) for lack of guardrails on scaffolding approximately 13 feet above the ground (Tr. 61). Although the citation was contested, it was informally resolved by settlement agreement with a reduction in penalty. That citation became a final order. This prior citation was for violation of the same standard under similar conditions as the instant case. BPI does not dispute the similarity of the violations.

Thus, the violation of § 1926.451(g)(1) is affirmed as repeat.

Greater Hazard Defense

BPI asserts that there is a greater hazard to an employee by having the guardrail up when placing material on the platform than by removing the guardrail.

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[1]BPI received another citation for violation of § 1926.451(g)(1) in November 1998 which also became a final order on an informal settlement. The November 1998 citation was not used as the basis for this repeat classification because OSHA could not locate the file.

In establishing the affirmative defense of greater hazard, "an employer must prove that: (1) the hazards created by complying with the standard are greater than those of noncompliance, (2) other methods of protecting employees from the hazards are not available, and (3) a variance is not available or application for a variance is inappropriate." *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1225 (No. 88-821, 1991).

BPI has not presented any evidence that using a guardrail was a greater hazard than not using it. The only material placed on the scaffold was a bucket of finish (Exh. C-2). There was no evidence to show that it was necessary to remove the guardrail in order to place the bucket on the scaffold. In fact, Bredshall testified that he did not know why the guardrail was down and merely speculated as to why it was down (Tr. 87-88).

BPI has not presented any evidence that other methods of protecting employees from the fall hazard were not available. If the guardrail had to be taken down, the employer could have utilized personal fall protection for the employee on the scaffold. Adams was not wearing any personal fall protection.

BPI has not presented any evidence of the unavailability of or inappropriateness of a variance.

Thus, BPI has failed to prove its greater hazard defense to excuse its noncompliance with § 1926.451(g)(1).

PENALTY ASSESSMENT

Section 17 (j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1777 (No. 88-237, 1994).

BPI is a very small company that employed 10-12 employees at the time of the inspection. There were only four employees working on the Wilmington project. Based on the very small size, a reduction in the penalty is appropriate.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration

of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). Here, only one employee was exposed to the saw and only one was on the unguarded scaffold. The extent of the exposure time for the saw was very short. Only one small section of the scaffold was unguarded and only on the day of inspection. The likelihood of an accident was low. Based on the low gravity, there should be a slight reduction in the penalty.

BPI exhibited good faith. It was cooperative throughout the inspection and immediately abated both violations. Also, in regard to the saw guarding violation, BPI had a good faith belief that it did not have to comply because of the binding problem when cutting the insulation board. Based on the employer's good faith, reduction in the penalty is appropriate.

BPI has a history of prior OSHA violations for lack of guardrails on a scaffold so no credit will be given for good history.

Based on these factors, a penalty of $1000 is reasonable for Citation 1 and a penalty of $1500 is reasonable for Citation 2. These penalties are sufficient to encourage prospective compliance with the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, alleging violation of § 1926.300(b)(4)(ii), is affirmed as serious and penalty of $1,000 is assessed.
2. Citation 2, Item 1, alleging violation of §1926.451(g)(1), is affirmed as repeat and a penalty of $1,500 is assessed.

/s/
KEN S. WELSCH
Judge

Date: March 7, 2001