SECRETARY OF LABOR, Complainant, v. TEXAS MASONRY, INC., and its successors, Respondent.	OSHRC DOCKET NO. 00-1301

APPEARANCES:

For the Complainant:
David C. Rivela, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Thomas H. Scott, CSP, John S. Gordon, W.C. Blayney & Associates, Humble, Texas

Before: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

At all times relevant to this action, Respondent, Texas Masonry, Inc., and its successors (Texas Masonry), maintained a place of business at 3020 Hwy 242, The Woodlands, Texas, where it was engaged in construction. The Commission has held that construction is a class of activity which, as a whole, affects interstate commerce. *Clarence M. Jones d/b/a C. Jones Company,* 11 BNA OSHC 1529, 1983 CCH OSHD ¶26,516 (No. 77-3676, 1983). Texas Masonry is, therefore, subject to the requirements of the Act.

On May 10, 2000 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Texas Masonry's work site at The Woodlands. As a result of that inspection, OSHA issued citations to Texas Masonry alleging violations of the Act and setting forth proposed penalties. By filing a timely notice of contest Texas Masonry brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On February 27, 2000 a hearing was held in Houston, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Facts

OSHA Compliance Officer (CO) Harold Dark testified that while he was inspecting a neighboring work site at The Woodlands, he noticed scaffolding that was being used by Texas Masonry (Tr. 54-55). The scaffold was approximately 12 to 14 feet high, consisting of two levels of planking supported by metal bracing and a walkboard located behind the scaffolding (Tr. 60; Exh. C-1). Dark testified that there was an employee stacking bricks on the top level, which appeared to be constructed out of a single plank, and a man on the ground "pitching brick" to the man on the top level (Tr. 9, 12-13, 37, 60-61, 76; Exh. C-1, C-2). Dark stated that as he was conducting the inspection across the street, he could see the men working, and the foreman on the site watching them. Approximately half an hour passed before he could approach them (Tr. 95-96). Before he could move on to Texas Masonry's site, Dark testified, he used up most of his film. The CO was able to take only two pictures, neither of which show the man on the top level or the man tossing bricks; both men were working to the left of the area photographed in Exhibit C-1, according to Dark (Tr. 18, 55).

At least three other employees were present on the work site: a second employee stacking brick on the first level of the scaffold; a man cutting brick; and Mr. Finney, Texas Masonry's foreman (Tr. 13-14; Exh. C-3). CO Dark testified that he observed a number of safety violations in plain view. First, the employee stacking brick on the top level was not using any kind of fall protection (Tr. 41-42). Second, the man pitching brick was not wearing a hard hat (Tr. 17-19, 95). Finally, the employee using a masonry saw was not wearing safety glasses or any other face protection; Dark stated that Finney told him none were available on the site (Tr. 22-23, 25, 68). According to Dark, the cited violations took place in plain sight of the foreman, Mr. Finney (Tr. 26).

Finney, the foreman, told Dark that he was the competent person on the site (Tr. 29). CO Dark stated that he did not believe Finney was competent to erect scaffolding, however, because the scaffold was not constructed in accordance with OSHA regulations (Tr. 29). At the top level, the cited scaffold contained only one or two planks (Tr. 34; Exh. C-1, C-2). There were no guard rails on the scaffold (Tr. 35). No ladder was provided for scaffold access, so that when Finney asked the employee stacking bricks on the top plank to come down, the employee had to climb down the horizontal braces (Tr. 38, 76). There were no toe boards on the scaffold (Tr. 44). Crossbracing was omitted between alternating sets of scaffolding (Tr. 46; Exh. C-1). Dark testified that Finney did not seem to know that the scaffold, as constructed, was hazardous (Tr. 30).

George Finney testified that he has 35 years of experience in construction, that he is familiar with means of constructing scaffolding, and that he has received competent person training in scaffold erection (Tr. 113-14, 133). Finney testified that he did not give the laborers at The

Woodlands site any instruction on building the cited scaffold, although he watched as it was built. Finney stated that he checked the footings to make sure the scaffold was safe (Tr. 119-20). Finney testified that, to his knowledge, there wouldn't have been anyone stacking bricks on the top level of the scaffolding (Tr. 125, 147). Finney maintained that the employees first loaded the bricks onto the lower level, and then placed the bricks up onto the top plank(s) by hand (Tr. 124, 142). Finney admitted that there was no ladder, and that neither guardrails nor toeboards were installed because no one was working above the 10-foot level (Tr. 125-26).

Later, however, Finney contradicted himself, admitting that there had been someone on the upper scaffold planking on May 10 (Tr. 150). Finney further admitted that it was possible that an employee might have gone to the top level to stack bricks because it would have been easier than stacking the bricks once on the first level, and then moving them (Tr. 169).

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1926.100(a): Employees working in areas where there is a possible danger of head injury from impact, or from falling of flying objects, or from electrical shock and burns, were not protected by protective helmets:

a) At 3020 Hwy 242. Employees working below overhead hazards without hard hats.

The cited standard provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling of flying objects, or from electrical shock and burns, shall be protected by protective helmets:

Discussion

CO Dark testified that he observed an employee, who was not wearing a hard hat, standing at the bottom of Texas Masonry's scaffolding, tossing bricks up to a second employee on the top level of the scaffold. In its brief, Respondent admits that employees were working without hard hats, but asserts that Texas Masonry's employees are provided with personal protective equipment and are required to use it. Respondent maintains that the employees had just returned from lunch, and forgotten to put their hats on. Respondent points out that the foreman instructed his men to put on their hats as soon as the CO pointed out the violation.

Under Commission precedent, an employer will not be penalized for an employee's unpreventable failure to follow the employer's safety rules. In order to establish an unpreventable employee misconduct defense, however, the employer must show that it: 1) had established work rules designed to prevent the violation; 2) adequately communicated those work rules to its employees (including supervisors); 3) taken reasonable steps to discover violations of those work

rules; and 4) effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (91-2897, 1995).

Jamie Nobles, owner of Texas Masonry, testified that his employees were leased from Staff Leasing, a company that provides labor, weekly inspections of the job sites, and weekly tool box meetings, including safety training for its laborers (Tr. 200-05). Mr. Nobles could not testify with any specificity as to the content of the laborers' training, and apparently had not made any inquiry into the type of training they received (Tr. 207-08). Nobles merely assumed that the laborers were familiar with safety rules relevant to scaffold erection and use because, "That's their livelihood. That's what they do" (Tr. 208). Though this judge left the record open to give Respondent an opportunity to submit documentation regarding any training its employees might have received (Tr. 205), Respondent failed to provide any evidence from which this judge might determine what, if any, safety training had been provided.

Because nothing in the record establishes that Texas Masonry had a safety rule requiring that its employees wear hard hats, the cited violation is affirmed.

Penalty

A penalty of $1,500.00 was proposed for this item.

The violation was properly classified as serious. Under §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a substantial probability of death or serious physical harm. As CO Dark testified, the exposed employee would have been seriously injured or killed had a brick struck him as it fell from the second level scaffold or from the hands of the employee catching the bricks (Tr. 19-21). The gravity of the violation is low, however. Though one employee was exposed for at least half an hour (Tr. 76), it is unlikely that he would actually be struck by a falling brick. The employee was actually involved in tossing the bricks to the higher level, and would have been aware of a missed toss. Moreover, the second level planking is set back over the fully planked first level. It is most likely that any bricks falling from the top planking would fall straight down, rather than arcing out over the first level platform and striking an employee standing on the ground.

Texas Masonry is a small company, and the proposed penalty reflects a 40% reduction for size (Tr. 27). No credit was afforded for good faith. CO Dark testified that although Mr. Finney told him that regular safety meetings were held, Texas Masonry was unable to produce evidence of a safety program (Tr. 28).

Taking into account the relevant factors this judge finds that a penalty of $1,500.00 is excessive. A penalty of $250.00 is appropriate, and will be assessed.

Serious citation 1, item 2 alleges:

29 CFR 1926.102(a)(1): Eye and face protective equipment was not used when machines or

operations presented potential eye or face injury:

> a) At 3020 Hwy 242. Employees were cutting brick material with a masonry saw without eye protection.

The cited standard provides:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical or radiation agents.

Discussion

CO Dark's testimony regarding an employee's use of a masonry saw without eye protection was uncontradicted. The Material Safety Data Sheet for brick requires that safety glasses and face shields be used when sawing brick (Exh. C-4). Finney told Dark that he had safety glasses in his truck (Tr. 25, 68). That Finney had safety glasses in his truck that *could* have been provided to employees does not satisfy the requirements of the standard. Respondent failed to prove a defense of employee misconduct, for the reasons stated in item 1, above. The violation is affirmed.

Penalty

A penalty of $1,200.00 was proposed for this item.

The cited violation was properly cited as serious. CO Dark stated that if an employee was struck in the eye by a piece of flying debris, he could suffer a partial loss of vision, or even lose an eye (Tr. 23-25). The gravity of the violation is, nonetheless low. As CO Dark testified, employee exposure to flying debris most often results in minor eye irritation or eye damage (Tr. 23-25; Exh. C-4).

Taking into account the relevant factors this judge finds that a penalty of $500.00 is appropriate, and will be assessed.

Serious citation 1, item 3 alleges:

29 CFR 1926.451(a)(6): Scaffolds were not designed by a qualified person and were not constructed and loaded in according with that design:

> a) At 2030 Hwy 242 construction site. Scaffolds were not erected or inspected by a competent person.

The cited standard provides:

> Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design.

Discussion

Though Texas Masonry's foreman, Finney, told Dark he was the competent person on site

for scaffold erection, Dark felt that he could not be "competent" because the scaffold on the work site was deficient (Tr. 29). According to Dark, Finney did not seem to appreciate that the scaffold, as constructed, was hazardous.

First this judge notes that Finney did answer Dark's concems about the construction of the scaffolding at the hearing. According to Finney, no one was supposed to be up on the top level of the scaffolding. The planks on the top of the scaffold were supposed to be used only as a staging area, not as a work platform. This judge left the record open following the hearing, and allowed Texas Masonry to submit a tape demonstrating the manner in which bricks are *supposed* to be loaded. The tape shows how bricks are tossed up to the first level, stacked there, and then loaded onto the second level planks by a worker who moves the bricks by hand, stacking them on the level overhead (Respondent's tape, submitted 4/26/2001). Had standard procedures been followed, there would have been no employees on the second level, and the scaffold, as it was constructed would have been OSHA compliant.

Respondent's foreman, Finney, testified that the bricks were not thrown, but placed by hand on the second scaffold level by an employee standing from the lower planked level, in accordance with his design. However, Finney later admitted that he *had* seen an employee on the top level on the day of the inspection, and that his employees might, without his knowledge, have thrown the bricks up to the second level rather than stacking them on the first level. Because Finney's testimony was internally inconsistent, and because he admitted that his employees could have been involved in the activity CO Dark described, this judge credits Dark's testimony. His testimony establishes that the workmen on the site, perhaps seeking to shortcut the standard loading procedure, threw the bricks directly up to the top staging area from the ground, skipping the intermediate step of stacking the bricks on the first level.

The evidence does not establish that Finney did not know how to properly design a scaffold, or that the cited scaffold was not constructed in accordance with his design. The record does show that the scaffold was not loaded in accordance with the design, as that design was explained by Finney and demonstrated in Texas Masonry's tape. Citation 1, item 3 has been established.

Penalty

A penalty of $1,500.00 was proposed for this item.

Because the loading process went on for at least half an hour while Finney was on the site, this judge concludes that the foreman was aware of the conduct, and yet allowed employees under his supervision to load the cited scaffold in a manner the scaffold was not designed for. The failure to load the scaffold according to its design is the basis for the majority of the other violations for which Texas Masonry has been cited.

The evidence establishes that at least two employees were exposed to the cited hazard for

half an hour. CO Dark testified that a scaffold which is inadequately designed or constructed for its load has a greater chance of failing. Employees on or under a collapsing scaffold could be seriously injured or killed (Tr. 30-31). The gravity of the violation is high. Taking into account the gravity of the violation, as well as the other factors discussed above, this judge finds that the proposed penalty of $1,500.00 is appropriate, and will be assessed.

Serious citation 1, item 4 alleges:

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffold were not fully planked or decked between the front uprights and the guard rail supports.

a) At 3020 Hwy 242. Scaffold platforms at the 7' and the 14' levels were not fully planked.

The cited standard requires:

Each platform on all working levels of scaffolds shall be fully planked or decked between the front uprights and the guardrail supports. . ..

Discussion

It is undisputed that the top level of the scaffold contained only one or two planks. Texas Masonry maintains, however, that level was merely a staging area for materials and was not a walking or working surface.

The evidence establishes that the top level of scaffolding, which was between 12 and 14 feet above the ground and consisted of only two planks was used as a working level. The violation is established in regard to that level.[1]

Penalty

A penalty of $1,500.00 was proposed for this item.

This item was properly characterized as serious. CO Dark testified that the inadequately planked upper level, which was loaded with bricks and also had to support the weight of the man working there, could have collapsed (Tr. 30). Dark maintained that a man falling from that level would likely be struck by the bricks that would come down with the planks and be seriously injured or killed (Tr. 30-31).

One employee was exposed to the cited hazard for at least half an hour, balanced on a narrow, brick laden plank, catching bricks (Tr. 34, 36; Exh. C-2). The gravity of the violation is high.

Taking into account the gravity of the violation, as well as the other factors discussed above, this judge finds that a penalty of $1,500.00 is appropriate, and will be assessed.

Serious citation 1, item 5 alleges**:**

[1] Complainant makes no mention of the allegations regarding the lower, or 7 foot level in its brief, and that issue is deemed abandoned.

29 CFR 1926.451(e)(1): An access ladder or equivalent safe access to scaffold(s) was not provided:

a) At 3020 Hwy 242. Scaffold 14' high did not have a ladder.

The cited standard provides:

> When scaffold platforms are more than 2 feet (0.6m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

Discussion

Texas Masonry admits that it did not provide any ladders to the top staging level, as it did not intend workers to access the planks, or to use them as a work level. Nonetheless, as discussed above, Texas Masonry's foreman, Finney, should have been aware that the workmen were accessing the top planks.

Penalty

A penalty of $2,100.00 was proposed for this item.

According to CO Dark, when the man on the second level was asked to come down, he climbed down the cross braces. Dark testified that because the braces are not horizontal, there is a danger of slipping. Moreover, the braces can come out of their fittings altogether, causing the climber to fall (Tr. 38). Dark stated that he had investigated many such falls, and so believed that the likelihood of an accident occurring was high. Dark believed that such a fall would most probably result in serious injuries short of death (Tr. 38-39).

The CO's testimony establishes that, although the cited violation was serious, its gravity was lower than that of the preceding violation. Taking into account the relevant factors, this judge finds that a penalty of $1,000.00 is appropriate.

Serious citation 1, item 6 alleges:

29 CFR 1926.451(g)(1)(vii): For all scaffolds not otherwise specified in paragraph (g)(1)(i) through (g)(1)(vi) 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.

a) At 3020 Hwy 242. Scaffold 14' high did not have guard rails or a fall arrest system.

The cited standard provides:

> For all scaffolds not otherwise specified. . . 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.

Discussion

Texas Masonry admits that the staging planks were not equipped with guard rails. The record establishes that an employee was working at that level without fall protection. As discussed above, Texas Masonry's foreman, Finney, should have been aware that the workmen were accessing the top planks. The violation is established.

Penalty

A penalty of $3,000.00 was proposed for this item.

CO Dark testified that a worker could easily fall while performing the tasks Texas Masonry's employee was engaged in (Tr. 43). Dark further testified that death was a probable result of a fall in the cited circumstances (Tr. 43). The cited violation is serious, as defined by the Act, and the gravity of the violation is high. A penalty of $3,000.00 is deemed appropriate.

Serious citation 1, item 7 alleges:

29 CFR 1926.451(h)(2)(ii): A toeboard was not erected along the edge of platform more than 10 feet (3.1m) above lower levels, for a distance sufficient, to protect employees below from falling tools and materials:

> a) At 2030 Hwy 242. There were no toeboards or nets to prevent material from falling from one level to the level below and striking employees.

The cited standard provides:

> A toeboard shall be erected along the edge of platforms more than 10 feet (3.1m) above lower platforms for a distance sufficient to protect employees below. . ..

Discussion

Texas Masonry admits that there were no toeboards on the top staging level. Respondent argues that toeboards would hinder the masons who work from the first planked level. In its brief, Respondent states that the toeboards would create a greater hazard, in that the masons reaching over the toeboards would suffer strains.

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). Respondent has shown none of the required elements. The danger to employees from falling bricks, which could result in head injury, is clearly more serious than the possibility of muscle strains. An alternative means was clearly available to eliminate the hazard, i.e. Texas Masonry could have prevented employees from working on the staging planks, which constituted the only platform on the site which was more than 10 feet above the ground level. Finally, Texas Masonry made no showing that an application for a variance would have been inappropriate. Respondent did not make out the named affirmative defense.

Penalty

A penalty of $2,100.00 was proposed for this item.

CO Dark testified that an employee working below could be struck by falling bricks or mortar (Tr. 44-45). Only one employee was shown to have been exposed, however. CO Dark testified that the worker pitching bricks could have been struck (Tr. 45). Dark also stated that a worker he photographed on the walk board was exposed to the hazard of falling bricks. There was no showing, however, that the employee on the walk board ever worked below the worker stacking bricks on the staging platform, and no reason to believe that the bricks on the staging platform would spontaneously fall off onto workers passing below. Nor did Complainant establish that any of Respondent's masons would be working from the staging area while bricking the project, or that there was any real danger to employees from falling mortar.

The violation is properly characterized as serious; however, the gravity of this violation is overstated. The only exposed employee was actually involved in tossing bricks and was unlikely to be surprised by bricks falling from the staging platform. This judge finds that a penalty of $250.00 is appropriate.

Serious citation 1, item 8 alleges:

29 CFR 1926.452(a)(2): Crossbracing was not installed between the inner and outer sets of poles of double pole scaffolds.

a) At 3020 Hwy 242. Tubular welded scaffold was not braced so as to be square and plumb.

The cited standard provides:

Pole scaffolds.. . .(2) Crossbracing shall be installed between the inner and outer sets of poles on double pole scaffolds.

Discussion

The cited section applies to pole scaffolds. Respondent was using Tubular welded scaffolding, as noted under the item description at subparagraph a) [*see above*]. The applicable paragraph, at §1926.452(b)(2) states:

> Transverse bracing forming an "X" across the width of the scaffold shall be installed at the scaffold ends and at least at every third set of posts horizontally (measured from only one end) and every fourth runner vertically. Bracing shall extend diagonally from the inner or outer posts or inner posts or runners.. . .

No motion was made to amend the pleadings. *Sua sponte* amendment of the item would be inappropriate. Complainant did not adduce evidence intended to show a violation of the applicable section; neither party addressed the issues raised by subparagraph (b)(2) in their briefs. *See, Peavey Co.,*16 BNA OSHC 2022, 1994 CCH OSHD ¶30,572 (No. 89-2836, 1994). Item 8 is, therefore, dismissed.

Serious citation 1, item 9 alleges:

29 CFR 1926.454(a): The employer did not have each employee who performs work while on a scaffold trained, by a person qualified in the subject matter, to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards.

a) At 3020 Hwy 242. Employees were not trained on how to work safely off of scaffolds.

The cited standard provides:

> The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. . ..

Discussion

CO Dark testified that Texas Masonry's employees were working in unsafe conditions and, therefore, must have been untrained, or told to work in unsafe conditions (Tr. 51). Dark admitted that none of the employees spoke English, and that he was unable to get any information from them about their training (Tr. 51). The Secretary has the burden of showing, by a preponderance of the evidence, the existence of the alleged violative conditions. The Commission has found that an employer's failure to enforce compliance with work rules on the job does not establish a failure to train. *N & N Contractors, Inc.,* 18 BNA OSHC 2121, 2000 CCH OSHD ¶32,101 (No. 96-0606, 2000). Because the Secretary did not introduce any other evidence tending to show that Texas Masonry's employees were not trained in working from scaffolds, this item must be vacated.

ORDER

1. Serious citation 1, item 1, alleging violation of §1926.100(a) is AFFIRMED and a penalty of $250.00 is ASSESSED.

2. Serious citation 1, item 2, alleging violation of §1926.102(a)(1) is AFFIRMED and a penalty of $500.00 is ASSESSED.

3. Serious citation 1, item 3, alleging violation of §1926.451(a)(6) is AFFIRMED and a penalty of $1,500.00 is ASSESSED.

4. Serious citation 1, item 4, alleging violation of §1926.451(b)(1) is AFFIRMED and a penalty of $1,500.00 is ASSESSED.

5. Serious citation 1, item 5, alleging violation of §1926.451(e)(1) is AFFIRMED and a penalty of $1,000.00 is ASSESSED.

6. Serious citation 1, item 6, alleging violation of §1926.451(g)(1)(vii) is AFFIRMED and a penalty of $3,000.00 is ASSESSED.

7. Serious citation 1, item 7, alleging violation of §1926.451(h)(2)(ii) is AFFIRMED and a penalty of $250.00 is ASSESSED.

8. Serious citation 1, item 8, alleging violation of §1926.452(a)(2) is VACATED.

9. Serious citation 1, item 9, alleging violation of §1926.454(a) is VACATED.

/S/
Stanley M. Schwartz
Judge, OSHRC

Dated: June 13, 2001