SECRETARY OF LABOR, Complainant, v. NEW AGE INTERNATIONAL and its successors, Respondent.	OSHRC DOCKET NO. 99-1533

APPEARANCES:

For the Complainant:
Ernest A. Burford, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas

For the Respondent:
J.B. Gonzalez, I.B. Gonzalez, New Age International, San Antonio, 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").

Respondent, New Age International (New Age), at all times relevant to this action maintained a place of business at the U-Haul building at 6745 FM 78, San Antonio, Texas, where it was engaged in masonry and stucco work. Respondent admits it is an employer engaged in construction, a business affecting commerce, and so is subject to the requirements of the Act.

On May 20, 1999 the Occupational Safety and Health Administration (OSHA) conducted an inspection of New Age's U-Haul work site. As a result of that inspection, New Age was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest New Age brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On November 17, 1999, an E-Z trial hearing was held in San Antonio, Texas. On November 19, 1999, New Age filed additional documents appended to a post-hearing brief written in letter form. Complainant objects to the documents filed after the hearing, and asks that they be stricken. Complainant's motion is DENIED, in that the late filed documents, though

noted in this judge's opinion, did not affect the outcome of this matter. This matter is now ready for disposition.

The Inspection

Antonio Sanchez, the OSHA Compliance Officer (CO), testified that as he drove along FM 78, he noted two workers on a rolling scaffold which was not fully planked, and had no end rails (Tr. 19). Sanchez referred his observations to his area office, and his supervisor instructed him to inspect the site (Tr. 20). Sanchez had no idea who the subcontractors on the site were until he conducted an opening conference with the general contractor (Tr. 20).[1]

Sanchez held an opening conference with the general contractor's superintendent, Brad Colson, then conducted a walk around, at which time he took photographs showing two men, Frank Huerta, a mason, and his helper, Guillermo Saeid, working on the cited scaffold, replacing brick (Tr. 27-28, 84, 101, 106-07; Exh. CX-12).

Employer/Employee Relationship

As a threshold matter, New Age argues that it had no employees on the U-Haul site.

Facts

I.B. Gonzalez testified that New Age has only three employees, himself and his two sons (Tr. 144). Gonzalez testified that no New Age employees worked on the U-Haul site (Tr. 145). Both J.B. and I.B. Gonzalez, stated that New Age had a lump sum subcontract agreement with Genaro Espinoza for the work on the U-Haul site (Tr. 103, 114, 143, 164). Following the hearing, New Age submitted a copy of a bid confirmation dated May 12, 1999, which states that for the sum of $250.00 Genaro Espinoza will replace three bricks on the front of the U-Haul building at 6745 FM 78.

I.B. Gonzalez testified that New Age has subcontracted Mr. Espinoza for two jobs, one in 1998 and the U-Haul job (Tr. 143). Espinoza decides who to hire, and how much to pay for the bid work (Tr. 169). The Gonzalez' did not directly instruct the employees under Espinoza's direction. J.B. Gonzalez felt that his interference would create conflict and confusion, and so he

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[1] A prior citation against New Age became a final Order of the Commission exactly one month prior to the OSHA inspection in this matter (Tr. 6). Based on this coincidence, New Age believed that it was singled out for selective enforcement of the Act. I find the CO's testimony in this matter credible, however, and believe that the self referral in this matter was, in fact, a coincidence.

always gave his instructions to the foreman, Espinoza (Tr. 170). Gonzalez admitted that he did have the right to direct the employees, but would not do so for inconsequential matters (Tr. 170).

Frank Huerta testified that at the time of the inspection he believed he was working for Mr. Gonzalez, Sr., of New Age (Tr. 101), though his immediate supervisor was Genaro Espinoza (Tr. 102). Huerta testified that Espinoza directed the day to day activity, and gave him his paychecks, but it was his understanding that the work was performed for the benefit of New Age (Tr. 102, 104). Guillermo Saeid similarly testified that he believed he was working for Mr. Gonzalez, though Genaro Espinoza directed the daily activities, and his paychecks were issued in Espinoza's name (Tr. 107).

Saeid testified that Espinoza, who is his father-in-law, did not have his own business (Tr. 108). Espinoza was not listed as a subcontractor with the general contractor (Tr. 171).

New Age supplied scaffolding and materials, and had a job trailer on the U-Haul site (Tr. 145, 172). I.B. Gonzalez testified that Espinoza had keys to the job trailer, and was responsible for erecting the scaffolding (Tr. 115, 145, 152). Gonzalez testified that he told Espinoza, the day before the OSHA inspection, to set up scaffolding from another location on the site to perform the bid work (Tr. 160). Gonzales testified that he specifically told Espinoza to be sure to use guard rails (Tr. 159-61). Gonzalez stated that the cited rolling scaffold was set up by one of the other trades, however, prior to Espinoza starting work on May 20, using New Age's materials (Tr. 104, 120, 153, 159, 162). Nonetheless, Gonzalez testified, Espinoza was New Age's eyes and ears on the job site, and it was up to him to ensure that the employees under his supervision worked safely (Tr. 163, 180).

I.B. Gonzalez testified that he held weekly safety meetings for Espinoza and the employees working under Espinoza's supervision (Tr. 165-66). J.B. Gonzales testified that New Age's tailgate meetings are separate from the safety meetings sponsored by the general contractor, and are held whether or not the general contractor holds a meeting (Tr. 167, 180).

J.B. Gonzales testified that Espinoza and the employees working under him are covered by New Age's workers' compensation insurance unless a waiver is signed; I.B. and J.B. Gonzalez testified, variously, that they did and/or didn't know whether or what kind of insurance Espinoza had or whether he signed a waiver (Tr. 168-69).

Discussion

In *Secretary of Labor v. Vergona Crane Co., Inc.* 15 BNA OSHC 1782, CCH OSHD ¶29,775 (No. 88-1745, 1992), the Commission adopted the position that the term "employee" should be interpreted under common law principals. The Commission stated that:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Here, the exposed employees were ostensibly hired, paid, and directed in their daily activities by Genaro Espinoza. However, both the workers and the Gonzales' knew that the work came from New Age, and that New Age had the right to control the manner and means by which the work was done. New Age is in the masonry business; Genaro Espinoza does not run a business. New Age was listed as a subcontractor with the general, had a job trailer on the site, and was ultimately responsible for the performance of the work. New Age owned the scaffolding the exposed employees used in their work, and regularly uses scaffolding in the performance of its masonry work. New Age conducted safety meetings at the U-Haul site for all the employees working on their project, and provided their foreman, Genaro Espinoza, with specific safety instructions regarding the job to be performed at the site.

Taking into account the totality of the evidence, I find that New Age was the employer of the exposed employees, and so was correctly cited in this matter.

Alleged Violation of §1926.451(b)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.451(b)(1): Each platform on all working levels of scaffolds was not fully planked or decked between the front uprights and the guardrail supports:

(a) The employer did not ensure that the lst level of the scaffold was fully planked.

Facts

Sanchez testified that during his inspection, he observed a mason, Huerta, working from a single plank on a 10 foot high outrigger, *i.e.* a plank or planks which rest on brackets extending out from the scaffold (Tr. 42; Exh. CX-12). A second man, Saeid, a helper, handed materials up to Huerta while he, Saeid, balanced on two planks placed on the first level scaffold platform, approximately six feet four inches above the ground. The remainder of the first level was unplanked (Tr. 23, 25-26, 60; Exh. CX-12).

New Age's foreman, Genaro Espinoza, told CO Sanchez that he knew that work had been in progress on the rolling scaffold for approximately 30 minutes, though he was erecting another scaffold on the site at the time, and was not supervising the brick replacement (Ex. CX-9).

The Violation

The existence of the cited conditions was not seriously contested. New Age objects to the classification of the item as serious, arguing that a fall from a two level scaffold would not result in serious injury. In a letter submitted after the close of the hearing[2], Gonzalez stated that he regularly jumped from a two level scaffold platform to demonstrate how it could be done safely.

CO Sanchez testified that should Saeid lose his balance, he would fall to the hard surface below, resulting in scrapes, fractures and/or a concussion (Tr. 26, 29). Sanchez testified that the probability of an accident occurring was greater because there was no alternative fall protection in place (Tr. 31-32).

A falling employee does not have the option to make it to the ground safely, as does one who deliberately jumps. According to §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. This judge finds that the testimony of the CO, based on his training and familiarity with construction hazards is more persuasive than the anecdotal evidence of Mr. Gonzales, and so

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[2] This judge is certain that Mr. Gonzalez, representing New Age *pro se*, did not mean to make any improper suggestions in his post-hearing correspondence. However, Mr. Gonzalez should be advised that as a party it is improper for him to engage in any *ex parte* communications with the judge deciding his case. *Ex parte* communications include letters and/or any other conversations concerning the merits of the case which are not also communicated to the other party. This judge has, therefore, forwarded a copy of Mr. Gonzalez's correspondence to Mr. Burford, Complainant's counsel.

Mr. Gonzalez should also be aware that it is improper to offer any type of gift or gratuity, in money or in kind, to a judge hearing his case.

finds that serious physical harm would probably result from a six foot fall. The violation will be affirmed as "serious;" the likelihood of actual injury will be addressed by the penalty.

Penalty

A penalty of $1,000.00 was proposed.

CO Sanchez stated that he took the small size of the employer into account, calculating a 60% reduction in the proposed penalty (Tr. 31). Sanchez made no adjustment for good faith or history because New Age had previously received citations for infractions of the scaffold standards (Tr. 31).

New Age's I.B. Gonzales stated that New Age had never had any injuries or filed any worker's compensation claims (Tr. 81). The violation was corrected during the inspection (Exh. CX-1).

Though, as stated above, the violation was properly cited as "serious," I find that the CO overstated the gravity of the violation. In considering gravity, the Commission looks at the number of employees exposed, the duration of the exposure, the precautions taken against injury and the likelihood that injury will reuslt. In this case, because of the very small size of the job, only two employees were exposed to the hazard for a relatively short period of time.

Moreover, I find that New Age's earlier citation is properly addressed in the "history" prong of the penalty calculation and that it was improper for the CO to deny New Age credit for good faith based on the identical criteria.

In light of the foregoing, a penalty of $250.00 is considered appropriate and will be assessed.

Alleged Violation of §1926.451(e)(1)

Serious citation 1, item 2 alleges:

29 CFR 1926.451(e)(1): When scaffold platforms were more than 2 feet (.6 m) 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 were not used:

(a) The employer did not ensure that scaffolds were equipped with an access ladder.

Facts

CO Sanchez testified that he observed the employees accessing the scaffold platform by climbing the side of the scaffold (Tr. 34, 37; Exh. CX-12). Each scaffold leg is attached to a vertical pipe brace with three horizontal pipe spreaders or "rungs." The first "rung" is 24 inches above the ground, the second and third are even further apart (Tr. 34, 39; Exh. CX-12). There was no ladder, or other permissible means of access to the scaffold platform (Tr. 33). New Age admitted there was no ladder provided (Tr. 177).

Foreman Espinoza told the CO that the Gonzalez' did not tell him to install a ladder, and that there were none on the site (Exh. CX-9). CO Sanchez testified that the cost of purchasing a scaffold ladder, which can be clamped to the center of the scaffold is approximately $50.00 (Tr. 37-38). The violation was corrected during the inspection (Exh. CX-1).

The Violation

New Age does not contest the violation, but argues that the violation was not serious in nature.

CO Sanchez testified that climbing the scaffold legs was hazardous (Tr. 36). The rolling scaffold is not designed to support the weight of an employee climbing up one corner, and could overbalance (Tr. 35, 39). In addition, an employee could slip from the thin pipe rungs and twist an ankle falling (Tr. 39).

Sanchez testified that an employee slipping from the first scaffold rung would fall only 24 inches, and from the second approximately 3-1/2 feet; from the third rung an employee slipping from the rungs would fall approximately 5 feet (Tr. 40). Sanchez admitted that the gravity of this violation was low and that he almost cited it as non-serious (Tr. 39).

This judge cannot find that a twisted ankle constitutes "serious physical harm" as contemplated by §17 of the Act. Because the CO considered the violation marginal, and because the probable harm to an employee slipping off a rung is a minor sprain, this violation is affirmed as "other than serious."

Penalty

Sanchez testified that he took the New Age's size, history and good faith into account when calculating the proposed penalty, as in the preceding item (Tr. 39). A penalty of $600.00 was proposed.

The cited violation is reclassified as "other than serious." Because the gravity of the offense is the principle factor to be considered in assessing an appropriate penalty, *see, Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972), this judge finds that a penalty of $75.00 is appropriate and will be assessed.

Alleged Violation of §1926.451(g)(4)(i)

Repeat citation 2, item 1 alleges:

29 CFR 1926.451(g)(4)(I): Guardrail systems were not installed along all open sides and ends on scaffolds more than 10 feet above the ground or floor:

> (a) The employer did not ensure that the scaffold being used by employees was equipped with guardrails and end rails on all open sides.

New Age Inc., was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standard 29 CFR 1926.451.(g)(1) which was contained in OSHA Inspection Number 300433687, Citation Number 01, Item Number 001, issued on 12/14/97, and became a final order on 4/20/99.

Facts

Sanchez testified that there were no end rails on the 10 foot outrigger, where the mason worked; a gap of approximately 20 inches between the end of the scaffold and the brick wall was unguarded (Tr. 43, 45). Sanchez testified that he had seen bricklayers use brackets as end rails on outriggers (Tr. 72).

Sanchez further testified that there were no guardrails behind the mason; New Age admits that standard guardrails were not in place (Tr. 43, 179).

There were crossbraces behind the mason, but Sanchez felt they were insufficient to abate the hazard, in that they were too low to serve as a top rail (Tr. 43). The mason used a board resting on the second level scaffold supports as a shelf to store tools and brick (Tr. 44). Sanchez stated that because the board was not secured, it could not serve as an adequate top rail (Tr. 44). An unsecured board would not prevent the mason from falling, and in falling, the mason would dislodge the tools and bricks on the board, creating a falling object hazard to the helper below (Tr. 49).

The Violation

New Age does not dispute the violation, but argues that abatement was infeasible.[3]

Sanchez testified that the board could easily be locked in by sliding it between the top two horizontal scaffold members. The two top members are separated by approximately 6 inches, and are supported by three short vertical spreaders; the vertical bars would secure the board, preventing it from sliding backwards under the weight of a falling employee (Tr. 71). Sanchez testified that he had seen this method used by bricklayers at other sites (Tr. 72). The violation was abated during the inspection (Exh. CX-2).

New Age argues that securing the board is infeasible because "nine times out of ten" one of the workers will need to remove the board to pass materials through the area (Tr. 70, 74).

New Age's argument must be rejected because, though nine times out of ten workers must pass materials up through the V created by the crossbraces, that was not the case here. Only three bricks were being replaced, and Saeid was able to place all the materials Huerta needed on the board without removing it. The violation was in fact abated during the inspection.

The violation has been established.

Repeated Classification

A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). In December, 1997, New Age was cited for a violation of the identical standard, §1926.0451(g)(1) [Exh. CX-6). That citation became a final order of the Commission on April 20, 1999 (Tr. 6, 52). In that case, employees were exposed to fall hazards from scaffolding that had only crossbraces for guarding in some sections rather than standard guard rails (Tr. 52).

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[3] In its post-hearing correspondence, New Age complains that no one at OSHA has ever explained to him how to comply with OSHA guard rail regulations while dismantling a scaffold. Though that question is not at issue in this matter, this judge notes that Texas has a State Consultation Program available to small employers such as New Age. The purpose of the program is to answer the small employer's safety and health questions without fear of a report being made to OSHA. I urge Mr. Gonzalez to avail himself of this service.

The substantial similarity of a hazard turns on the nature of the hazard. *See; Stone Container Corp.*,14 BNA OSHC 1757, 1762, 1987-90 CCH OSHD ¶29,064, p. 38,819 (No. 88-310, 1990). Because the hazards in this matter involve the same type of fall hazard cited in 1997, the violation will be affirmed as "repeated."

Penalty

In its April 20, 1999 decision, the Commission assessed a penalty of $500.00, noting that New Age was a small employer. In that case, five to seven employees were exposed to a fall hazard from a four-tier scaffold where guard rails had been partially installed.

Here one employee was exposed for a relatively short period, at a height of 10 feet. Crossbracing and a weighted, though unsecured, board created a partial barrier behind the employee. Sanchez stated that a fall from 10 feet to a hard surface can result in bone fractures, concussion, and possibly death (Tr. 49). Sanchez felt the likelihood of an accident occurring was greater, because the mason was working from a single, rather than double planked outrigger (Tr. 47).

Though the citation is "repeated," this judge emphasizes the low gravity of the citation at bar, compared to that of the prior violation, which was of moderate to high gravity. Based on New Age's good faith, history and size and taking into account the gravity of the violation, a penalty of $500.00 is appropriate.

However, New Age should recognize that this citation is correctly classified as "repeated," and reemphasize the importance of fall protection, utilizing the services of the Texas State Consultation Program, as noted in fn.3, when necessary.

ORDER

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

2. Citation 1, item 2, alleging violation of §1926.451(e)(1) is AFFIRMED as an Other than serious violation, and a penalty of $75.00 is ASSESSED.

3. Repeat citation 2, item 1, alleging violation of §1926.451(g)(4)(I) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

Stanley M. Schwartz
Judge, OSHRC

Dated: January 3, 2000