

Secretary of Labor, :
Complainant, :
v. :
Savenok Construction, Inc., :
Respondent. :

OSHRC Docket No. **00-0363**

EZ

Appearance:

Helen Schuitmaker, Esquire
Office of the Solicitor
U. S. Department of Labor
Chicago, Illinois
For Complainant

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Savenok Construction, Inc. (Savenok) is engaged in the construction business. On January 14, 2000, respondent was engaged in construction work in Troy, Illinois. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite in Troy, Illinois, on January 14, 2000. As a result of this inspection, respondent was issued a citation. Respondent filed a timely notice contesting the citation and proposed penalty.

Citation No. 1, item 1, alleges a serious violation of 29 C.F.R. § 1926.451(c)(1)(ii) as follows:

The scaffold was not tied and securely braced against collapse every 30 feet horizontally and 26 feet vertically.

At the jobsite, the employer failed to ensure that a tubular weld scaffold was adequately tied and securely braced against the west wall of the motel under construction. The scaffold measured approximately 60 feet long with four sections over 30 feet in height. The scaffold was secured by a single piece of metal strap along the northern-most section. Two employees were installing fall protection on this scaffold.

A hearing was held pursuant to the EZ trial procedures in St. Louis, Missouri, on May 3, 2000. The Secretary was represented by her attorney, Helen Schuitmaker. Respondent did not appear at the hearing and its representative, Kenneth J. Yotz, also failed to appear at the hearing. The hearing was delayed for ninety minutes while efforts were made to contact respondent's representative.

The Secretary's attorney moved for an order dismissing respondent's notice of contest when neither Savenok nor its representative appeared at the hearing. She advised the judge of the sequence of events that occurred prior to the hearing in this matter.

The Secretary presented evidence relating to the alleged violation and proposed penalty. She established her right to relief by evidence satisfactory to the judge. At the conclusion of the presentation of this evidence, a decision and order was issued from the bench affirming the serious violation as alleged and assessing a penalty of \$2,000.

Excerpts of relevant transcript pages and paragraphs, including findings of fact and conclusions of law, are attached hereto in accordance with 29 C.F.R. § 2200.209(f).

FINDINGS OF FACT AND
AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Respondent's notice of contest is dismissed; Citation No. 1, item 1, is affirmed as a serious violation; and a penalty of \$2,000 is assessed.

/s/

STEPHEN J. SIMKO, JR.

Judge

Date: May 25, 2000

1 THE COURT: This is the case of the
2 Secretary of Labor vs. Savenok Construction
3 Company, Incorporated and it's OSHRC Docket No.
4 00-0363. It's a case which is being heard under
5 the EZ trial procedures. And I might note for the
6 record that Mr. Ken Yotc, who is the representative
7 of the company, and no one else from the company,
8 has appeared at this time. Ms. Schuitmaker, would
9 you like to enter your appearance for the record?

10 MS. SCHUITMAKER: Yes, I'm Helen
11 Schuitmaker, Office of the Solicitor, U.S.
12 Department of Labor, in Chicago, Illinois.

13 THE COURT: All right. This hearing was
14 scheduled to begin today in this courtroom, which
15 is Courtroom D on the third floor of the U.S.
16 Courthouse at 1114 Market Street, St. Louis,
17 Missouri. It was scheduled to begin at 10:00 in
18 the morning, it's now 11:30 a.m. Neither Mr. Yotc
19 nor any representative of the Savenok Construction
20 has appeared at this time. Ms. Schuitmaker, could
21 you please bring us up to speed on the attempts you
22 have made to contact respondent?

23 MS. SCHUITMAKER: Yes. Initially we had a

24 pre-hearing telephone conference conversation with
25 Mr. Yotc and yourself and me, and at that point we
1 discussed where the hearing was going to be held,
2 not the particular courtroom, but the U.S.
3 Courthouse and the time and the date and Mr. Yotc
4 indicated during the conversation that he
5 understood that.

6 THE COURT: That was the pre-hearing
7 conference on April 26th?

8 MS. SCHUITMAKER: Yes. That's correct.
9 And then this morning I, at approximately 10:30, I
10 called Savenok Construction Inc. at its toll free
11 number and spoke to a Taras Recnikov. That's
12 R-e-c-n-i-k-o-v. He's the regional manager for
13 them in the St. Louis area. And I told him to
14 contact his home office and find out whether
15 someone was going to show up today and told him
16 that I would do a motion to dismiss. And I told
17 him I would call him back at approximately 11:00.

18 At that time I called back and reached him
19 at his mobile number and he said that he had spoken
20 to a Peter -- last name is K-l-y-a-c-h-e-n-k-o.
21 And he was the vice president of Savenok

22 Construction in Chicago. And that Peter had told
23 Taras Recnikov that Peter had not received a notice
24 of hearing, that Mr. Yotc was in charge of it and
25 Mr. Yotc -- this is per Peter, that Mr. Yotc was on

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1 his way to St. Louis, or down here.

2 THE COURT: Mr. Yotc is in the Chicago
3 area?

4 MS. SCHUITMAKER: Yes. And I told him,
5 again, that I was going to do a motion to dismiss
6 and then subsequent to that I called Mr. Yotc at
7 approximately 11:24 at his office in Geneva,
8 Illinois, and inquired -- well, first, I received
9 an answering machine and I left a message that the
10 hearing was supposed to be on this date and that no
11 one had appeared so far and told him that I would
12 do a motion to dismiss, and I related what Taras
13 and Peter from Savenok had told me.

14 Additionally, I called my supervisor, Allen
15 Bean, and got his voice mail and told him that if
16 he had received word of any problem, to call the
17 compliance officer on his cellular phone number.

18 Within the last half hour, we have not received any
19 phone call on the cellular phone. So at this point
20 I would -- I would the ask the court to entertain a
21 motion to dismiss and that the secretary's prepared
22 to put on its witness and do a prima facie case if
23 the court is so inclined.

24 THE COURT: Just one more, did you check
25 your --

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1 MR. GILSON: Yes, sir, and it's been no
2 messages received on the cell phone.

3 THE COURT: Just identify yourself for the
4 record.

5 MR. GILSON: My name is Anthony Gilson.
6 I'm an industrial hygienist with the Department of
7 Labor, Occupational Safety and Health
8 Administration, based out of Fairview Heights,
9 Illinois.

10 THE COURT: No messages and that's been
11 over a half an hour, is that correct?

12 MR. GILSON: Yes.

13 THE COURT: Okay. Well, let me, for the

14 record, indicate that I have called my office, too,
15 and have been informed by my office that no one has
16 called the office to try to get in touch with us as
17 to the location and the time of the hearing or the
18 fact that Mr. Yotc was delayed. We had sent the
19 order segment, the location of the hearing, and the
20 pre-hearing conference order to Mr. Yotc at
21 Environmental Management Training Systems
22 Incorporated, 919 St. Andrews Circle, Geneva,
23 Illinois, 60134. Both notices were sent to the
24 order saying the location hearing was sent on April
25 the 27th and the pre-hearing was sent on April the

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1 26th, both at the same address, and we received
2 nothing by return mail showing that it was not
3 delivered.

4 So since it was sent to the last known
5 address I have to assume that Mr. Yotc received the
6 notification. Counsel for the government has made
7 every effort to contact the respondent's
8 representative, who was the official representative
9 for service. We had telephone conversations, as

10 Ms. Schuitmaker has indicated, on April the 26th,
11 at which time we talked about the hearing being in
12 St. Louis at 10:00. We originally scheduled it for
13 nine a.m. but rescheduled for 10:00. Mr. Yotc was
14 aware of that and was aware that this was going to
15 be at the U.S. Courthouse. That was in addition to
16 the notice that was sent out on the 27th of April.
17 So I have no reason to believe that respondent's
18 representative did not receive notice of the
19 location and time of this hearing.

20 Ms. Schuitmaker, how long would it take for you to
21 put on a prima facie case in this matter?

22 MS. SCHUITMAKER: I can probably do it
23 within 20 minutes.

24 THE COURT: Why don't we proceed with that
25 at this time.

25

13 THE COURT: Okay. All right. Having heard
14 the evidence I'll review on this case, and this
15 is -- I'm going to give you my finding at this
16 time. In order to prove violation of the
17 Occupational Safety and Health Act the secretary

18 must show that the construction standards apply to
19 these working conditions; that the terms of the
20 standard were violated; that employees of the
21 respondent had access to the conditions, that's
22 what we call exposure; and that the respondent knew
23 or should have known to exercise the reasonable
24 diligence that the conditions existed. First,
25 there's one standard allegedly violated 29 CFR,

1 Section 1926.451 (c)(1) II.

2 The allegation was that the scaffolding was
3 not tied and securely braced against collapse over
4 30 feet horizontally and 26 feet vertically. The
5 citation goes on to say that at the jobsite the
6 employer failed to ensure that tubular weld
7 scaffold was adequately tied and securely braced
8 against the west wall of the motel under
9 construction.

10 The scaffold measured approximately 60 feet
11 long with four sections over 30 feet in height.
12 The scaffolding was secured by a single piece of
13 metal strap along the northern most section. Two
14 employees were installing fall protection on this
15 scaffold. The construction standards clearly apply
16 to the work being performed by the respondent's
17 employees. This was a construction project, a
18 motel was under construction, the scaffolding was
19 being used in construction of this motel, so this
20 standard clearly is applicable to the working

21 conditions.

22 Second, the terms of the standard were
23 violated in that there was only one metal strap
24 that held this entire 60 foot by 30 foot section of
25 scaffolding to the wall. In fact, it was not

1 even -- this did not qualify as a secure tie or
2 brace. It was a very thin strap from the
3 photographs, thin line tied to a nail, which was
4 not completely driven into the side of the building
5 wall.

6 I am convinced by the evidence that
7 additional straps or bracing in at least eight
8 locations should have been provided. The
9 scaffolding was swaying. There were five employees
10 on this scaffold, two of whom were the employees of
11 the respondent. These were identified as employees
12 of respondent by Mr. Ramirez, who was an employee
13 of the respondent, and by Mr. Denny, who was the
14 representative of the general contractor. So the
15 terms of the standard were violated and employees
16 were exposed to a fall hazard of up to 26 feet.
17 The scaffold was erected over a sidewalk, which
18 increased the hazard of severe injury, even greater
19 than it is on soft dirt.

20 There was a possibility of death or serious

21 physical harm should an individual fall off the
22 scaffolding. The test is not the probability of
23 the fall occurring but if the accident happened or
24 a fall happened, what is the likely injury in
25 falling from a height of 26 feet or I believe the

1 testimony was 18 feet for one employee, 24 feet for
2 the other employee on to the sidewalk. It's
3 reasonably expected to result in death or serious
4 physical harm.

5 The final element involved here is the
6 knowledge on the part of this employer. Knowledge
7 of employer's imputed to the employer through its
8 agents. On this jobsite Mr. Ramirez was identified
9 as the lead person on the jobsite, he said he was
10 the boss. So his knowledge of the working
11 conditions is imputed to respondent, the
12 corporation.

13 Mr. Ramirez had been on the jobsite from
14 time of the construction, on January the 12th,
15 until the date of inspection, January the 14th. He
16 was on the scaffolding along with another employee
17 respondent while the scaffolding was swaying when
18 the compliance officers arrived on the jobsite. If
19 he did not know of these working conditions or
20 these volitive conditions then clearly the company,

21 through him, should have known with the exercise of
22 reasonable diligence, anyone can tell that the
23 scaffolding is swaying and that the scaffolding is
24 not securely braced to the wall.
25 The penalty proposed by the secretary

1 appears to be reasonable. This is a small employer
2 with only ten employees. There was a history of
3 occupational safety and health inspections,
4 approximately 20 over a five-year period. There
5 was no deduction given for history or for good
6 faith. I find that the penalty proposed by the
7 secretary of \$2,000 is a reasonable and appropriate
8 penalty. Therefore, affirm the citation as alleged
9 and the penalty as proposed in the amount of \$2,000
10 is assessed. Anything further?

11 MS. SCHUITMAKER: No.

12 THE COURT: Okay. We'll conclude the
13 hearing. It's 12:05 p.m.

14

15 (Hearing adjourned.)