United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-2088
	:	
BAKER DRYWALL COMPANY, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Ann G. Paschall, Esquire	Jim Dunn
Atlanta, Georgia	Dallas, Texas
For the Complainant.	For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On May 21, 1998, the Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent ("Baker") in Jacksonville, Florida. As a result of the inspection, Baker was issued a three-item serious citation and a three-item "other" citation. Baker contested the citations, and this case was designated for E-Z Trial pursuant to Commission Rule 203(a). The hearing in this matter was held in Jacksonville, Florida, on March 30, 1999.

Serious Citation 1, Item 1

This item alleges a violation of 29 C.F.R. 1926.453(b)(2)(v), which provides as follows:

> A body belt shall be worn and a lanyard attached to the boom or basket when working from an aerial lift.

Harold Ciancio, the OSHA compliance officer ("CO") who the inspected the site, testified that he had just completed an inspection of a nearby construction site when he saw two employees exposed to falls at the subject site. The employees were relocating the vertical studs on one of the

four simulated "smoke stacks" on the movie theater under construction. One employee was standing on the "ring" to which the studs were attached and holding a stud in place, while the other was standing in the basket of an aerial lift and screwing the stud into place; neither employee was tied off, and both were about 16 feet above the steel roof of the building.[1] CO Ciancio noted that aerial lifts are hydraulic, that they have a tendency to jump and shake when starting and stopping, and that they can also malfunction; he further noted that such events can cause falls from aerial lift baskets and that using the lift at the subject site without tying off could have resulted in an employee falling 16 feet to the steel roof and being seriously injured or killed. The CO met with Mr. Garza, Baker's foreman, who said the employees worked for him. Garza had the employees come down, at which point Roy White, Baker's superintendent, arrived. The CO told White why he was there, and White said the employees should have been tied off. The CO then spoke to the employees, after which they got their body harnesses and lanyards before going back up to resume their work. (Tr. 7-31; 39; 55).

Based on the foregoing, the Secretary has established a violation of the cited standard. Baker does not dispute that the violation occurred, but contends that the violation was non-serious, in light of the protection afforded by the basket itself, and that the penalty is too high. (Tr. 40-42; 57-61). However, the standard as written requires the use of a body belt and lanyard. Moreover, while the CO agreed that the railing around the basket provided some fall protection, he explained how using an aerial lift can cause an employee to fall out of the basket; he also testified that a fall from the lift at the site would have been 16 feet, which could have caused serious injuries or death. (Tr. 16-17; 40; 55). Baker did not rebut the CO's testimony, and Commission precedent is well settled that violations that can result in serious injury or death are properly classified as serious. *See, e.g., Dravo Corp.*, 7 BNA OSHC 2095 (No. 16317, 1980). This item is affirmed as a serious violation.

The proposed penalty for this item is $5,000.00. The CO testified that this amount was based on the high gravity of the condition, that is, the number of exposed employees, the probability of an accident, and the injuries that could have resulted from a 16-foot fall. He also testified that no credit for size or good faith was given, due to the employer's size and the high gravity of the violation. Finally, the CO testified that he gave no credit for history but should have, and that the proposed

[1]C-1 shows the first employee, and C-2 shows the second, although not very clearly.

penalty should have been $4,500.00. (Tr. 22-24; 49-52). In view of the record, I conclude that a penalty of $4,500.00 is appropriate for this item. A penalty of $4,500.00 is accordingly assessed.

Serious Citation 1, Item 2

This item alleges a violation of 29 C.F.R. 1926.453(b)(2)(iv), which states that:

> Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

CO Ciancio testified that one of the employees at one point straddled the top rail of the aerial lift basket to work; he said the employee could have fallen from that position to the steel roof 16 feet below and been seriously injured or killed.[2] (Tr. 14-17). As in the preceding item, Baker concedes that the violation occurred but disputes the serious characterization. (Tr. 42-45; 57-58). Regardless, the discussion in item 1 establishes the serious nature of a fall from the lift, and the hazard in this instance was exacerbated by the employee's act of straddling the basket's top rail. This item is affirmed as a serious violation, and a penalty of $4,500.00 is assessed for the reasons set out *supra*.

Serious Citation 1, Item 3

This item alleges a violation of 29 C.F.R. 1926.501(b)(1), which provides that:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

CO Ciancio testified there were two instances that violated the subject standard at the site. The first incident, also described in item 1, was when one of the employees stood on the "ring" to which the studs were attached; the employee, who was standing between two studs and holding on to the stud the other employee was screwing in place, could have fallen forward or backward through the studs to the steel roof 16 feet below and been seriously injured or killed. The second incident is depicted in photo C-4, which shows an employee walking between the framework of a sign and a 12-inch parapet wall; the CO noted that the space between the framework and the wall was 24 inches wide, that the distance to the concrete surface below was 14 feet, and that if the employee had fallen he could have sustained serious injuries or died. (Tr. 10-14; 17-19; 55-56).

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[2]C-3, the CO's photo of this scene, does not clearly show the employee straddling the rail.

Baker concedes the cited instances were violations but disputes their serious classification. (Tr. 57-58). At the hearing, Baker suggested that the studs were essentially walls that would have kept the first employee from falling and that the parapet wall offered some fall protection to the second employee; Baker also pointed out the disparity between the cited standard and the steel erection standard, which allows exposure to falls of much greater distances without fall protection. However, the CO testified that the studs provided no fall protection, particularly since the employees were removing and relocating them, and that the parapet wall was more of a tripping hazard than fall protection. (Tr. 46-51; 55-56). Further, as noted at the hearing, the steel erection standard does not apply to this case. (Tr. 49). The record establishes the serious nature of the cited conditions. Item 3 is therefore affirmed as a serious violation, and a penalty of $4,500.00 is assessed.

"Other" Citation 2, Item 1

Item 1 alleges a violation of 29 C.F.R. 1926.24, which provides as follows:

> The employer shall be responsible for the development and maintenance of an effective fire protection and prevention program at the job site throughout all phases of the construction ... work. The employer shall ensure the availability of the fire protection and suppression equipment required by subpart F of this part.

CO Ciancio testified that when he asked about a fire prevention plan, superintendent Roy White told him Baker was following the general contractor's plan. Ciancio further testified that while there was nothing wrong with this, he also learned that there were no fire extinguishers in the area where Baker's employees were working; in fact, there were only three extinguishers in the entire 101,000-foot building, all three were in the north side of the building, and Baker was on the south side. The CO said there was a portable light on the floor in an area where Baker was working, as well as insulation and plastic wrapping, as shown in C-7. He considered this an "other" violation because he did not believe it would cause serious harm to employees. (Tr. 31-37; 52-53).

Based on the foregoing, which Baker did not rebut, the company violated the cited standard. This item is affirmed as an "other" violation. No penalty was proposed and none is assessed.

"Other" Citation 2, Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.25(a), which states that:

> During the course of construction, ... form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

CO Ciancio testified that C-7 depicts the basis of this item, in that it shows a portable light, an extension cord, and insulation material and plastic wrapping on the floor in an area where Baker was working. (Tr. 33-35; 52-53). However, as Baker indicated at the hearing, the very nature of its work required the presence of at least some work materials, and I agree with the company that C-7 does not depict debris to an extent warranting a citation. (Tr. 59-60). Item 2 is vacated.

"Other" Citation 2, Item 3

Item 3 alleges a violation of 29 C.F.R. 1926.150(c)(1)(i), which provides as follows:

> A fire extinguisher, rated not less than 2A, shall be provided for each 3,000 square feet of the protected building area, or major fraction thereof. Travel distance from any point of the protected area to the nearest fire extinguisher shall not exceed 100 feet.

The evidence set out in item 1, *supra*, establishes that Baker did not have a fire extinguisher in its work area as required. This item is therefore affirmed as an "other" violation. No penalty was proposed for this citation item, and none is assessed.

Conclusions of Law

1. Respondent, Baker Drywall Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.453(b)(2)(v), 1926.453(b)(2)(iv) and 1926.501(b)(1).

3. Respondent was in "other" violation of 29 C.F.R. §§ 1926.24 and 1926.150(c)(1)(i).

4. Respondent was not in violation of 29 C.F.R. § 1926.25(a).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1-3 of Citation 1 are AFFIRMED. A penalty of $4,500.00 is assessed for each item.

2. Items 1 and 3 of Citation 2 are AFFIRMED. No penalties are assessed for these items.

3. Item 2 of Citation 2 is VACATED.

Irving Sommer
Chief Judge

Date: