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Secretary of Labor,  
Complainant,

v.

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C & D European Stucco and Stone, Inc.,  
Respondent.

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OSHRC Docket No. **96-929**

Appearances:

Curtis Gaye, Esquire  
Frances B. Schleicher, Esquire  
Office of the Solicitor  
U. S. Department of Labor  
For Complainant

J. Larry Stine, Esquire  
Wimberly & Lawson  
Atlanta, Georgia  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

### ***DECISION AND ORDER***

C & D European Stucco & Stone, Inc. (C&D), contests a citation issued to it by the Secretary on June 20, 1996. The Secretary issued the citation following an inspection of C&D's worksite on June 6, 1996, by Occupational Safety and Health Administration (OSHA) compliance officer Walter Dierks.

The Secretary alleged that C&D committed serious violations of three construction standards. At the hearing, the Secretary moved to dismiss item 2 of the citation, alleging a violation of § 1926.21(b)(2), which the undersigned granted (Tr. 5). The remaining items at issue are item 1, which alleges a violation of § 1926.20(b)(2) for failure to have a competent person make frequent and regular inspections of the job site, materials, and equipment; and item 3, which alleges a violation of § 1926.451(d)(10) for failure to install guardrails on all open sides and ends of scaffolds.

#### Background

General contractor Moore & Associates hired C&D as a subcontractor in May 1996 to work on the construction of the Summer Suites Motel, located in Duluth, Georgia. C&D was to apply insulation and stucco to the exterior of the six-story motel (Tr. 53, 66).

In order to apply the insulation and stucco, C&D erected tubular welded scaffolding (Tr. 55). C&D's employees would use the scaffolding to gain access to the exterior of the

building, to which they would use adhesive to attach large, flat panels of Styrofoam insulation, measuring 2 feet by 4 feet or 4 feet by 8 feet. The employees would then hang a fiberglass mesh over the surface and apply concrete or acrylic stucco with a trowel over the entire surface.

C&D's employees worked on the building from the top down (Tr. 42, 57, 110).

Compliance officer Dierks arrived at the construction site at approximately 1:00 p.m., on June 6, 1996, on a referral made by OSHA's Area Director. Dierks met with William Woods, the general superintendent for Moore & Associates, who accompanied Dierks on a walkaround inspection of C&D's scaffolding (Tr. 9, 72). At the time of the inspection, C&D employees were working on scaffolds on the northern and eastern sides of the building (Tr. 9, 13, 55). Dierks attempted to speak with some C&D employees, who either did not understand him or were ignoring him (Tr. 28).

### The Alleged Violations

Item 1 alleges that C&D violated § 1926.20(b)(2) by failing to have a competent person inspect the scaffolding. Because the basis of this allegation is that the alleged inadequacy of the scaffolding would not have been countenanced by a competent person, the condition of the scaffolding (item 3) will be addressed first.

#### Item 3: Alleged Serious Violation of § 19126.451(d)(10)

Section 1926.45(d)(10) provides:

Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection) and toeboards, shall be installed at open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

The Secretary has the burden of proving this violation.

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).

It is undisputed that the § 1926.451 (scaffolding) standard applied to C&D's scaffolding. The Secretary alleges that C&D's scaffolding was not in compliance with the terms of § 1926.451(d)(10) because it failed to have guardrails on its scaffolding. C&D contends that compliance officer Dierks was mistaken in his testimony, and that its scaffolding was in compliance with § 1926.451(d)(10).

#### Dierks's Testimony

Dierks testified that C&D's employees were working on two metal boards that were placed across the interior of the scaffolding on the northern and eastern sides of the building (Tr. 38, 41). Dierks stated that the scaffolding structure was erected 6 to 8 inches away from the side of the building where insulation and stucco were being installed. He said that the employees reached through the scaffolding to apply the materials to the exterior of the wall (Tr. 39, 49). Dierks testified that there were no outriggers or brackets on the north side (Tr. 40). Dierks contended that there were no guardrails behind the employees as they stood working on the two metal boards (Tr. 41).

Dierks conceded that no guardrails were required on levels of the scaffolding where employees were not working, and that C&D would have been in compliance if its employees had been working off of brackets or outriggers with the building wall in front of them and a guardrail behind (Tr. 42). Dierks testified that he had videotaped C&D's scaffolding, but that the last time he attempted to view the tape, "it didn't work. There was nothing on the tape" (Tr. 37).

#### Testimony of Daniel and Constantin Moraru

Constantin Moraru is the president of C&D (Tr. 87). His brother, Daniel Moraru, is the vice-president and secretary of C&D (Tr. 52). Neither of them was at the worksite the time of Dierks's inspection.

Both Moraru brothers testified that their employees only worked on the area outside the scaffolding structure that was supported by brackets or outriggers (Tr. 58, 134). Thus, they worked on the area with guardrails behind them and the building exterior in front of them (Tr. 133). Constantin Moraru stated that, other than when C&D's employees were erecting the scaffold, they did not work on the inside of the scaffolding.

Constantin Moraru was at the site in the morning and the afternoon of Dierks's inspection (Tr. 88). When Moraru was on the site in the morning, he observed guardrails erected behind the outriggers or brackets where the C&D employees were working. C&D employees were engaged in dismantling other areas of the scaffolding (Exh. J-1; Tr. 123-125).

#### Woods's Testimony

The Secretary discounts the testimony of the Moraru brothers because neither of them was on the site during Dierks's inspection. Therefore, they cannot refute Dierks's testimony regarding what he observed. Woods accompanied Dierks on his walk-around inspection. Woods corroborates Dierks's testimony that there were no guardrails on the back of the main scaffolding frame (Tr. 75-76). However, Woods testified that C&D's employees were not working from the main scaffolding frame. Rather, they were working from the brackets, which Woods referred to as "toe board hangers," with cross-bracing behind them (Tr. 82-84). Unlike the Moraru brothers, Woods, a disinterested third party, was with Dierks at the time of his inspection. His testimony casts doubt on the reliability of Dierks's observations.

As C&D points out in its brief, if its employees were attempting to perform their work in the manner attested to by Dierks, it would be with great difficulty (C&D's Brief, pp. 9-10):

The employees would be working on a 20-inch wide platform on the interior of scaffolding, reaching past the vertical and horizontal supports of the scaffolding as well as the cross-bracing and guardrails Dierks admitted were there to maneuver 2' by 4' or 4 by 8' sheets of Styrofoam insulation into place where they could be affixed to the building's exterior with adhesive. The sheets of insulation would have to be tilted sideways to fit through the openings, then rotated within the 6 to 8 inches of open space between the scaffolding and the building wall to be positioned on the adhesive. When it came time to apply the stucco, the scaffolding would hamper the trowel movements, in all likelihood producing an uneven finish. . . .

In contrast, by using the brackets or outriggers in the manner testified to by both Constantin and Daniel Moraru, the employees have unobstructed access to the building surface upon which they are working. The 20-inch wide workspace supported by brackets permits the employees to work on the entire surface of the building exterior without having to work around scaffolding supports. The insulation sheets, stacked behind the guardrail on the interior of the scaffolding, can be moved into position without requiring the workers to reach around posts. The unobstructed

access to the building surface permits the even application of stucco or effus.

The testimony of the Moraru brothers regarding their work practices, along with Woods's eyewitness testimony regarding Dierks's walkaround inspection is deemed more credible than Dierks's observations. Dierks may not have been as familiar with the stucco process as were the other witnesses. Dierks apparently focused on the outside edge, which was without the guardrails, not on the area from which the employees actually worked. The Secretary's case is hampered by the absence of photographic or videotaped evidence that shows the configuration of the scaffolding and the location of the employees.

The Secretary has failed to establish that C&D did not guard the area of the scaffolding where employees were working. There was no employee exposure on the main part of the scaffolding, which was without guardrails but from which the employees did not work. C&D provided guardrails on the backs of the outriggers where its employees were working. Item 3 is vacated.

Item 1: Alleged Serious Violation of § 1926.20(b)(2)

Section 1926.20(b)(2) provides:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

The Secretary's evidence on this issue rests primarily on Dierks's belief that if the scaffolding was in violation of OSHA standards, no competent person could have inspected it. The Secretary also presented Woods's testimony that he had not seen Daniel or Constantin Moraru at the worksite during the week of the inspection (Tr. 77).

Constantin Moraru testified that he was C&D's competent person within the meaning of the standard and that he had visited the site twice the day of the inspection and had inspected the scaffolding (Tr. 88, 107). Woods admitted that Constantin Moraru could have come to the site without his knowledge (Tr. 80-81).

The Secretary has failed to establish a violation of § 1926.20(b)(2). C&D's designated competent person testified without contradiction that he made frequent and regular inspections of the worksite. In addition, the Secretary failed to prove its supporting theory for the violation, *i.e.*, that the scaffolding was inadequate. Item 1 is vacated.

FINDINGS OF FACT 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 hereby ORDERED:

1. Item 1 of the citation (§ 1926.20(b)(2)) is vacated and no penalty is assessed;
2. Item 2 of the citation (§ 1926.21(b)(2)) was withdrawn; and
3. Item 3 of the citation (§ 1926.451(d)(10)) is vacated and no penalty is assessed.

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NANCY J. SPIES  
Judge

Date: March 16, 1998