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. 98-0295
	:	
WEST WINDS CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Helen J. Schuitmaker, Esquire
Chicago, Illinois
For the Complainant.

Steven Paulus
Lisle, Illinois
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"). The Occupational Safety and Health Administration ("OSHA") inspected a construction site on November 6 and 7, 1997, in Naperville, Illinois, where Respondent was performing plastering work on the building under construction. As a result of the inspection, Respondent was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.451(b)(1) and 1926.451(g)(1). Respondent contested the citation, the case was designated for E-Z Trial pursuant to Commission Rule 203(a), and a hearing was held on July 13, 1998.

The OSHA Inspection

John Maronic, the OSHA compliance officer ("CO") who conducted the inspection, testified he arrived at the site on the afternoon of November 6, and that he saw two employees doing plaster repair work from a scaffold, as shown in C-6, a photo he took of the scene. Maronic further testified that the scaffold was three tiers high, that one employee was on the top level while the other was on an outrigger about 2 feet below, and that the workers were exposed to falls of about 20 and 18 feet,

respectively; neither work area had guardrails, the top level platform was not fully planked, and both conditions could have resulted in falls from the scaffold.[1] The CO discussed the situation with Steven Paulus, Respondent's general manager, who was present; Paulus told him they had finished that part of the building the day before and had been begun removing the scaffold when they noticed some damage to the plaster, and that he felt it was safer to repair the plaster with the scaffold as it was instead of putting the fall protection back in place. The CO returned the next morning and saw the same two employees doing plaster repair work in the same area, as shown in C-5, his photo of the scene; this time, both workers were on the scaffold's outrigger, which was not fully planked, and their work area still had no guardrails.[2] Maronic observed no dismantling of the scaffold on either day; however, when he went back to the site later in the day on November 7, the scaffold section on which the employees had been working had been taken down, as shown in C-1. (Tr. 5-20).

Discussion

Item 1 alleges a violation of 29 C.F.R. 1926.451(b)(1), which requires all platforms on all working levels of scaffolds to be fully planked or decked. Item 2 alleges a violation of 29 C.F.R. 1926.451(g)(1), which requires guardrails or other fall protection on scaffolds when employees are exposed to falls to a lower level of more than 10 feet. The CO's testimony and photos show that the employees were working on scaffold platforms that were not fully decked, that there were no guardrails in the areas where the employees were working, and that the employees were exposed to falls of 18 to 20 feet. Respondent does not dispute the cited conditions, but contends that it lacked knowledge of them. Steven Paulus, the general manager, testified he was not present on November 6, as the CO stated, but on November 7, when the scaffolding was already half disassembled, and that he had no personal knowledge of the violations. (Tr. 29-31). However, the CO was adamant that Paulus was at the site on November 6 and that he spoke to him at that time. (Tr. 14; 18-20). Further, Jim Buschman, Respondent's foreman at the site, testified he was present on November 6 and 7, and that he directed the employees to get up on the scaffold and saw them on it on both days; Buschman

[1]Maronic said the platform had only two planks and should have had four. (Tr. 7-9).

[2]Maronic indicated that the outrigger platform consisted of two overlapping planks, and that the only change to the scaffold was that the outrigger plank on which the second employee had been working on November 6 had been removed. (Tr. 10-11; 15-18; C-4).

also testified that Respondent's foremen know OSHA's scaffolding guidelines and are responsible for making sure scaffolds are set up properly. (Tr. 24-27). Commission precedent is well settled that a foreman's knowledge of an OSHA violation is imputable to the employer. *See Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997), and cases cited therein. Therefore, even if Paulus was not at the site on November 6, Buschman's knowledge of the conditions is imputable to Respondent.

Respondent also contends that the scaffold was being dismantled when the damage to the plaster was discovered and that it was safer to leave the scaffold as it was for the brief period it took to repair the plaster. Buschman testified that the scaffold was properly guarded on November 5 and that it was being disassembled when the damage was discovered; he indicated the employees had not been able to do the repair work on November 6 because of the CO's arrival, that they had just gotten up on the scaffold on both days when the CO arrived, and that it took about five minutes to do the repair work on November 7, after which the scaffold was disassembled. Buschman offered his opinion that it would have been more hazardous to rebuild the scaffold and put the fall protection back up than to work on the scaffold as it was for the short time the repairs took. (Tr. 21-29).

In view of the foregoing, it would appear that Respondent is asserting the affirmative defense of greater hazard. To demonstrate this defense, the employer has the burden of proving (1) that the hazards of complying with the standard were greater than the hazards of noncompliance, (2) that alternative means of protecting employees were unavailable, and (3) that application for a variance from the standard was inappropriate. *See Quinlan Enter.*, 17 BNA OSHC 1194, 1196 (No. 92-654, 1995), and cases cited therein. Based on the record, Respondent has not met these elements. First, I am simply not persuaded that adding the planks required to provide safe work platforms and putting up the necessary guardrails to protect against falls was more hazardous than allowing the employees to work under the cited conditions.[3] Second, the CO testified that the company could have had its employees tie off with safety belts and lanyards, and Respondent did not rebut this testimony. (Tr.

[3]I am also not persuaded the repair work took "about five minutes." The CO testified that he watched the employees for five to ten minutes on November 6 before he approached them and they got off the scaffold; further, Buschman himself said there were two different areas requiring repairs. (Tr. 7; 13; 27). I find as fact that the repairs took longer than Buschman indicated.

9-10). Third, Respondent presented no evidence that it had applied for a variance or that application for a variance was inappropriate. Respondent's asserted defense is consequently rejected.

The Secretary has proposed a penalty of $875.00 for each of the citation items in this case. The record indicates that the gravity-based penalty for each item was $2,500.00, to which reductions of 40, 10 and 15 percent were applied for the company's size, history and good faith, respectively, resulting in a penalty of $875.00 for each item. (Tr. 16-17). Based on the record, I conclude that the proposed penalties are appropriate and they are accordingly assessed.

Conclusions of Law

1. Respondent, West Winds Construction, 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. §§ 1926.451(b)(1) and 1926.451(g)(1).

Order

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

1. Items 1 and 2 of citation 1 are affirmed as serious violations, and a penalty of $875.00 is assessed for each item.

Irving Sommer
Chief Judge

Date: