SECRETARY OF LABOR, Complainant, v. JERRY BENNETT MASONRY CONTRACTOR, INC., Respondent.	OSHRC DOCKET NO. 96-1798

APPEARANCES:

For the Complainant:
Evert H. Van Wijk, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

For the Respondent:
Donald W. Jones, Esq., Hulston, Jones, Gammon & Marsh, Springfield, Missouri

Before: Administrative Law Judge: James H. Barkley

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, Jerry Bennett Masonry Contractor, Inc. (Bennett), at all times relevant to this action maintained a place of business at 200 Battlefield Mall, Springfield, Missouri, where it was engaged in masonry construction. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 21, 1996, three employees working on a two-point suspended scaffold at Bennett's Springfield work site fell approximately 30 to 35 feet to a flat roof below when the wooden outriggers supporting the scaffolding came out from beneath the sandbag counterweights. On August 29, 1996 the Occupational Safety and Health Administration (OSHA) began an investigation of the Springfield accident. As a result of that investigation, Bennett was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Bennett brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 17-18, 1997, a hearing was held in Springfield, Missouri. At the hearing, citation 1, item 1c was withdrawn (Tr. 16). The parties have submitted briefs on the remaining issues and this matter is ready for disposition.

§8(e) Walkaround Rights

As a threshold matter this judge notes that Bennett's 8(e) claim was rejected at the hearing (Tr. 18-19, 349-351); that matter will not be reopened here.

Alleged Violation of §1926.451(a)(3) and §1926.21(b)(2):

Serious citation 1, items 2a and 2b state:

> The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

29 CFR 1926.451(a)(3): No scaffold shall be erected moved, dismantled, or altered except under the supervision of competent persons:

> (a) Worksite--Battlefield Mall, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996 a two-point suspended scaffold was erected without the presence or supervision of a competent person.

29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

> (a) Worksite--Battlefield Mall, third level of J.C. Penny's Store--On or around August 21, 1996, employees were not instructed or trained on the proper assembly or use of two-point suspended scaffold. Individual designated as the competent person had not received any instructions in regards to working on two-point suspended scaffolds prior to the accident.

Facts

Foreman Harold Traeger testified that on August 21, 1996 Bennett Superintendent Royce Huett, told him that he, James Gertiser and Robert Zimcik were to erect the cited scaffolding and wash down the brick on the face of the J.C. Penny store (Tr. 110-11,193, 205; Exh. C-4 through C-7). Traeger had not worked from a suspended scaffold before; Traeger testified that Huett told him to rely on Gertiser, who was familiar with the scaffolding (Tr. 207). Huett testified that he believed Gertiser was a "competent person" for purposes of scaffold erection (Tr. 274). Gertiser and Zimcik set up the two-point suspended scaffold while Traeger went to another job site (Tr. 114, 193-94).

Gertiser testified that he had set up a two-point suspended scaffold approximately four times before, but had no formal training in load ratings, or in the need to use tie backs to prevent sway and as a secondary

means of anchorage (Tr. 112-19, 141-42). Gertiser admitted that he did not know what the weight capacity of the cited scaffold was, and was not familiar with OSHA regulations applicable to two-point suspended scaffolds prior to August 21, 1996 (Tr. 119).

Huett knew that Gertiser had some experience, but admitted that he did not did not train Gertiser in safe scaffold erection or evaluate Gertiser's knowledge of OSHA standards (Tr. 274-76). Charles Thornton, Gertiser's father-in-law, testified that he had trained Gertiser in the erection of two-point suspension scaffolds (Tr. 321, 328). Thornton admitted that he had not trained Gertiser in the need to use tie backs (Tr. 329). Thornton had never seen the Federal regulations governing two-point suspension scaffolds (Tr. 330).

Discussion

1926.451(a)(3). "Competent person," is defined at §1926.32(f) as "one who is capable of identifying existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."

The evidence establishes a violation of the cited standard, in that James Gertiser was incapable of identifying and eliminating predictable hazards associated with scaffolding generally, or the cited scaffold in particular.

Gertiser had no formal training, and only minimal experience in the erection of two point suspended scaffolding. Neither Gertiser nor Thornton, who ostensibly trained Gertiser, were familiar with OSHA regulations governing the safe erection of two-point suspension scaffolds. Gertiser had not been trained to use tie-backs as required by §1926.451(i)(4). Gertiser did not know what the rated load capacity of the cited scaffold was, and so could not have identified any of the hazards associated with supporting or exceeding the rated load which are found at §1926.451(i)(5) and (i)(8). The Commission has found a violation of the cited standard where the "competent person" was ignorant of applicable OSHA standards and failed to address hazards identified therein. *Degioia Brothers Excavating, Inc.,* 17 BNA OSHC 1181 (No. 92-3024, 1995); *E. L. Davis Contracting Co.*, 16 BNA OSHC 2046 (No. 92-0035, 1994).

The cited violation has been established.

§1926.21(b)(2). The citation alleges that the competent person had not received any instructions in regards to working on two-point scaffolds. As stated above, though Gertiser had received some on the job training in assembly and use of the cited scaffolding, that training was clearly inadequate, in that it did not allow him to recognize and avoid the hazards cited by the Secretary.

I find, however, that the citation under §1926.21(b)(2) is duplicative, in that both standards require the same abatement conduct. *J.A. Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). Had Gertiser been trained as a competent person, *i.e.*, to identify existing and predictable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, his training would also have satisfied the requirements of subsection 21(b)(2).

Citation 2b will be vacated.

Penalty

The Secretary proposed a combined penalty of $4,200.00. Bennett maintains that the penalty is excessive in that no credit was provided for good faith.

In 1993, Bennett paid $3,500.00 for a safety program from Risk Control Specialists, although the training contracted for was not provided (Tr. 299-303; Exh. R-14). Since the accident, Bennett has hired Lee Johnson to improve the safety program and training (Tr. 292-94).

This judge finds that Bennett's 1993 purchase of a safety program does not demonstrate good faith. There is no evidence that the safety program was more than haphazardly implemented. The record establishes that the program was printed up and placed in binders which were distributed to some of Bennett's foremen, who put them in their trucks (Tr. 262, 281-82, 300). That the foremen had safety programs in their trucks hardly constitutes an adequate safety program, and certainly does not demonstrate good faith. Finally, Bennett's effort improve its safety program after the fact does not justify a penalty adjustment, though it may bring Bennett into compliance with the Act, and avoid future training citations.

The penalty proposed by the Secretary is appropriate in that the violation here is clearly a high gravity "serious" violation. Failure to properly train employees engaged in the erection of job made scaffolding of the type used here can result in its improper assembly and its collapse. The collapse of improperly erected scaffolding will almost certainly result in severe bodily harm, such as was suffered by Bennett's employees.[1]

No separate penalty was proposed for item 2b, which was based on the identical violative conduct. I find $4,200.00 an appropriate penalty for that conduct, despite the dismissal of the duplicative allegations.

[1] Zimcik broke six ribs had a separated right shoulder, torn muscles and tendons in his shoulder and back, neck injuries and an injury to his right hip (Tr. 179-80). Traeger was hospitalized for 19 days with a broken back (Tr. 218).

Alleged Violation of §1926.451(i)(4)

Serious citation 1, item 3 alleges:

29 CFR 1926.451(i)(4): On two-point suspension scaffold(s), tie backs of 3/4 inch manila rope, or the equivalent, secured to a structurally sound portion of the building, were not installed as a secondary means of anchorage:

> (a) Worksite--Battlefield Mall, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996 at approximately 12:00 pm., three employees were injured when a two-point suspended scaffold's left counterweight failed and the scaffold had no secondary means of anchorage:
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> The cited standard states:
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> . . . Tiebacks of 3/4 inch manila rope, or the equivalent, shall serve as a secondary means of anchorage, installed at right angles to the face of the building, whenever possible, and secured to a structurally sound portion of the building.

Bennett admits that no tiebacks were used on the cited two-point suspended scaffold on August 21, 1996 (Tr. 120). Bennett maintains, however, that §1926.451(i)(4) only requires the use of tiebacks "whenever possible." Bennett states that it was not possible to use tiebacks at the Battlefield Mall site.

Applicability. The Secretary maintains that the phrase "whenever possible" refers not the requirement that tiebacks be installed as a secondary means of anchorage, but to the phrase which immediately precedes it, "installed at right angles to the face of the building."

The interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). *See; Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994). In this case, not only is the Secretary's reading of the standard the most grammatically sound, it most effectively carries out the purposes of the Act, *i.e.*, to protect the employee. I find that the cited standard requires the use of tiebacks in all cases. The required tiebacks are to be installed at right angles to the face of the building whenever possible.

Infeasibility. At the hearing Bennett objected to the Secretary's attempt to introduce evidence relating to the affirmative defense of infeasibility, representing that it was not raising the affirmative defense. Bennett's counsel stated that any evidence regarding the feasibility of installing tiebacks was relevant only to the extent its interpretation of the standard was upheld. The Secretary's evidence, which may have shown the availability of alternative means of protection, was subsequently excluded (Tr. 265-73). The issue of the infeasibility of compliance was, therefore, abandoned at the hearing.

The cited violation is established.

Penalty

The Secretary has proposed a penalty of $4,200.00. Three employees were exposed to an improperly secured two-point suspension scaffold. The exposure was of short duration only because the scaffold fell. Though it was not proven, or argued, that the failure to provide the required tiebacks was the proximate cause of the scaffold failure, failure to provide a secondary means of anchorage deprived the injured employees of a failsafe measure which might have prevented their injuries. The penalty reflects the high gravity of the violation and is deemed appropriate.

Alleged Violation of §1926.451(i)(8)

Serious citation 1, item 4 alleges:

> 29 CFR 1926.451(i)(8): Each employee on two-point suspension scaffold(s) was not protected by an approved safety life belt attached to a lifeline:
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> (a) Worksite-Battlefield Mass, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996 at approximately 12:00 pm., three employees fell approximately 40 feet from their two-point suspended scaffold when the left counterweight failed. Employees were not wearing any type of personal fall protection such as, but not limited to a safety life belt attached to a lifeline.

Facts

Royce Huett brought two safety harnesses to the J.C. Penny job site (Tr. 149-50, 250). Traeger believed that he was to work with the other two men from the scaffolding (Tr. 206, 238). Huett stated that he intended only Zimcik and Gertiser to work from the scaffold and never told Traeger that all three men should get on the scaffolding (Tr. 250, 253).

Neither Traeger nor Zimcik were aware of any Bennett work rule requiring fall protection; both stated that they had never used or been trained to use a safety harness (Tr. 174-75, 210, 216). Gertiser stated that he had been trained to use a lifeline, but didn't put one on August 21 (Tr. 122-23, 153). Traeger and Zimcik stated that they did not use their safety harnesses because there weren't any safety ropes to attach the lanyards to (Tr. 174, 176, 212-13). One rope did hang down the side of the building, though it was not used as an anchor line (Tr. 122-23, 148). Traeger testified that three workers were spaced along the 20 foot scaffold platform and could not all have reached the anchor rope. Traeger stated that the safety harnesses provided by Bennett had two foot lanyards, which were intended to be attached to safety lines anchored to the roof (Tr. 174, 211-12, 216). Gertiser testified that the lanyards were four to six feet long,

and that two men could both hook up to a single safety line, moving in unison across the scaffold as they worked (Tr. 163-65).

Huett stated that Bennett did have a safety program, a copy of which he kept in his truck (Tr. 245, 262; Exh. R-14). The only training Huett conducted, however, was to verbally correct employees working unsafely (Tr. 261). Huett admitted he did not give Traeger, his foreman, a copy of the safety program, or require him to read it even though it was his job to train Traeger (Tr. 280). Huett admitted it was not Bennett's practice to provide copies of the safety program to laborers (Tr. 280).

Discussion

The underlying violation is not disputed; none of the men involved in the August 21 incident were using personal fall protection. Bennett raises the affirmative defense of employee misconduct, arguing that two employees working from the scaffold should have tied off using the safety harnesses and anchor line provided by Bennet. In order to establish an unpreventable employee misconduct defense, however, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD ¶30,745 (No. 91-2897, 1995).

The Commission has noted that unanimity of noncomplying conduct by all employees suggests ineffective enforcement. *Gem Industrial, Inc.,* 17 BNA OSHC 1184, 1996 CCH OSHD ¶31,197 (No. 93-1122, 1996). It is more than a suggestion where, as here, the employer fails to establish that it took any steps whatsoever to communicate, discover violations of or enforce any work rule requiring fall protection.

Neither Zimcik nor Traeger had been trained to use fall protection. There is no evidence that any fall protection training was ever provided to any Bennett employees. It was not Bennett's policy to provided laborers with a copy of the safety program. Traeger was never provided with a copy of Bennett's safety program even though he was in training as a foreman. Huett admitted that the only safety training he ever provided was to correct employees he found working unsafely. No measures were ever taken to discipline employees violating company safety policy.

Bennett failed to prove its affirmative defense; the violation is established.

Penalty

A penalty of $4,200.00 was proposed. As discussed above, I find the penalty appropriate in that it properly reflects the high gravity of the cited violation.

Alleged Violation of §1910.1200(e)(1), (e)(1)(i) and (h)

Serious citation 1, item 1a alleges:

29 CFR 1910.1200(e)(1), as referenced in 29 CFR 1926.59: The employer did not develop, implement, and maintain at the workplace a written hazard communication program.

> (a) Worksite--Battlefield Mall, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996, no program was maintained at worksite for chemicals such as, but not limited to, acid being used to wash down walls.

Serious citation 1, item 1b alleges:

29 CFR 1910.1200(e)(1)(i), as referenced in 29 CFR 1926.59: The written hazard communication program did not include a list of the hazardous chemicals known to be present using an identity that was referenced on the appropriate material safety data sheet.

> (a) Worksite--Battlefield Mall, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996, a list of the hazardous chemicals known to be present on the jobsite was not readily available at the worksite at the time this accident occurred.

Serious citation 1, item 1d alleges:

29 CFR 1910.1200(h), as referenced in 29 CFR 1926.59: Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduce into their work area: (Construction reference: 1926.59)

> (a) Worksite--Battlefield Mall, J.C. Penny's Store, Springfield, MO--On or around August 21, 1996, employees were working with chemicals such as, but not limited to acid, with inadequate knowledge of the hazards associated with these chemicals.

Facts

It is admitted that Vana Trol, a hazardous chemical, was in use at the Battlefield work site (Exh. R-6). The Material Safety Data Sheet (MSDS) for Vana Trol states that it contains hydrochloric acid: user exposure may result in burns; users should utilize protective gloves, goggles, apron and boots; in the event of a spill, acid should be diluted with water and neutralized with soda ash or lime water (Exh. C-8).

Bennett maintained a hazard communication program at its main office. Bennett's main office was five or six miles from Battlefield work site (Tr. 128). Copies of the program were provided to some of its foremen, who carried them in their trucks (Tr. 158, 163. 300). Royce Huett could not recall ever telling any of the employees at the Battlefield site that the hazard communication program was maintained in the

foreman's truck (Tr. 282). In any event, Traeger, the foreman on the Battlefield site had never received a copy of the program (Tr. 203-04).

Traeger did not recall receiving any hazard communications training, but had apparently signed off on a "Training Outline" for hazard communications training (Tr. 223-24; Exh. R-29, p. 306). Huett testified that he had never given Traeger any training specifically on the hazards of Vana Trol (Tr. 281).

Gertiser was never given a copy of Bennet's hazard communication program, or received any training in its contents (Tr. 128, 131). Gertiser testified that he knew from previous jobs and from high school science courses that Vana Trol, an acid, and could burn you, and that you should avoid getting it on your skin (Tr. 129-30, 135). Gertiser knew that in the event he got acid on his skin or in his eyes, the affected area should be flushed with water (Tr. 137-40). Gertiser stated that he had never been required to look over the MSDS for Vana Trol, and received no training as to what protective equipment should be worn when using it (Tr. 130).

Zimcik testified that he received no training from Bennett as to the effects of exposure to Vana Trol, or the need for personal protective equipment when using it (Tr. 176-77). Zimcik did not know what an MSDS was on August 21, and had received no training in regard to Bennett's hazard communication program (Tr. 177-180). Zimcik had previous experience with Vana Trol's generic equivalent, muriatic acid, and knew to keep it away from his skin and eyes, and to flush the area with water if he was splashed with acid (Tr. 183-86).

Discussion

§1910.1200(e)(1) and (e)(1)(i) provide:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); . . .

The evidence establishes that the required hazard communication (HazCom) program was not maintained at the Battlefield site; no list of hazardous chemicals was maintained at the site. The Commission has held that the mere failure to maintain the HazCom program at the worksite is a *de minimis* violation when the program has been implemented as required by the standard. Implementation of the HazCom plan requires provision of the requisite training, "familiarizing employees with the hazardous chemicals present in their workplace, the hazards posed by those chemicals, [the] methods of avoiding

exposure, and with treatment in the case of exposure." *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1314-15, 1991-93 CCH OSHD ¶29,498 (No. 89-2253, 1991). In this case, however, it is clear that Bennett's HazCom program was never implemented. Zimcik and Gertiser were aware that acid, as a general rule, could cause burns and should be avoided; however, neither ever received any training specific to the hazards posed by Vana Trol. Neither were unaware of the need to wear protective clothing, and none were worn. Traeger may have received some generalized HazCom training, but was never instructed about Vana Trol in particular.

1910.1200(h) provides:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.
> . . .

Discussion

As discussed above, no training specific to the hazards of Vana Trol was ever provided to the named employees. The cited violation is established.

Penalty

A combined penalty of $1,200.00 was proposed for the HazCom violations.

The cited violation is serious, in that failure to utilize appropriate protective equipment can result in chemical burns to the skin and/or eyes. Employees use hydrochloric acid regularly in their work and are frequently exposed to acid burn hazards. Gertiser and Zimcik received burns to their skin, eyes sinuses, and mouth tissues when Vana Trol spilled on them during the accident (Tr. 160-61, 179). Implementation of a safety program which alerted Bennett's employees of the need to use protective equipment, such as goggles might have minimized those injuries.

The proposed penalty is deemed appropriate and will be assessed.

ORDER

1. Serious citation 1, item 1a, 1b and 1d, alleging violations of §1910.1200(e)(1), (e)(1)(i), and (h), respectively, are AFFIRMED, and a combined penalty of $1,200.00 is ASSESSED.

2. Serious citation 1, item 2a, alleging violation of §1926.451(a)(3) is AFFIRMED, and a penalty of $4,200.00 is ASSESSED.

3. Serious citation 1, item 2b, alleging violation §1926.21(b)(2), is VACATED.

4. Serious citation 1, item 3, alleging violation of §1926.451(i)(4) is AFFIRMED, and a penalty of $4,200.00 is ASSESSED.

5. Serious citation 1, item 4, alleging violation of §1926.451(i)(8) is AFFIRMED, and a penalty of $4,200.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: