UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR
Complainant,
v.
SIRAVO CONTRACTING, INC.
Respondent.

OSHRC DOCKET
NO. 93-0445

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 14, 1994. The decision of the Judge will become a final order of the Commission on November 14, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 3, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 14, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0445

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Catherine Oliver Murphy
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

James F. Sassaman, Director of
Safety
GBCA
P.O. Box 15959
36 So. 18th Street
Philadelphia, PA 19103

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

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One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
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PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 93-0445
SIRAVO CONTRACTING, INC.,	:	
Respondent.	:	

Appearances:

Theresa C. Timlin, Esq.
Office of the Solicitor
U.S. Dept. of Labor
Philadelphia, Pennsylvania

For Complainant

James F. Sassaman
General Building Contractors
Association
Philadelphia, Pennsylvania

For Respondent

BEFORE: ADMINISTRATIVE LAW JUDGE JOHN H FRYE, III

DECISION AND ORDER

A hearing was held in the above-captioned case on Thursday, July 8, 1993 in Philadelphia, Pennsylvania. In lieu of closing arguments, the parties were directed to submit briefs.

I. FACTUAL BACKGROUND

Respondent, Siravo Contracting, Inc., is a corporation which had a workplace at 1-79 Mifflin Street, Philadelphia, Pennsylvania 19148. Complaint, ¶ II; Answer ¶ II. In December of 1992, Respondent was performing masonry work in connection with the

construction of a Caldor department store at this workplace. Tr. 13, 15. Respondent had approximately 18 employees at the work site. Complaint, ¶ III; Answer, ¶ III.

On Tuesday, December 1, 1992, Hiliary H. Holloway, Jr., a Compliance Safety and Health Specialist with the Occupational Safety and Health Administration, inspected Respondent's work site.[1] Mr. Holloway was accompanied by Dominick Salvatore, Assistant Area Director for Safety, Occupational Safety and Health Administration. Tr. 13-14. Upon first arriving at the work site Mr. Holloway and Mr. Salvatore introduced themselves to the general contractor (Geoffrey M. Brown) and asked that representatives from all the contractors on site be gathered for an opening conference. Tr. 14. Al Zuback, Superintendent for Siravo Contracting, Inc., attended the opening conference as the representative for Respondent. Tr. 15, 79.

A. Citation 1, Item 1a.

Inspector Holloway and Mr. Salvatore observed more than one day's worth of concrete block stored on the tubular welded frame scaffold. Tr. 20, 81; Government Exhibit ("GX") 2, 3. Mr. Zuback told Mr. Salvatore that the concrete block stored on the third buck of the West Elevation had been there since the prior Friday. Tr. 81. Mr. Holloway and Mr. Salvatore observed that the concrete block was still present at the end of the day. Tr. 21, 84-85; GX 4. No work was done on the East Elevation on December 1, 1992. Tr. 21, 84-85; GX 4. The excess block was stored in plain view of Siravo management.

B. Citation 1, Item 1b

In another area, Inspector Holloway observed concrete block stacked higher than 6 feet which was not tapered back one-half block per tier above the 6 foot level. Tr. 26-27; GX 5. The concrete block was leaning to one side and there was a space in the middle of the block. Tr. 86; GX 5. The ground where the 8 foot 5 inches high pile of block was stacked was muddy and not level. Tr. 27, 86; GX 5. The block was unstable as stacked, and could have fallen on a worker causing serious injury. Tr. 27. The operator of the lull (a piece of heavy equipment used to transport and place block) told Mr. Holloway that he

[1]Inspector Holloway received the assignment to conduct the inspection as a result of a referral from another OSHA compliance officer alleging that employees were working on an unguarded scaffold, and that the scaffold appeared to be overloaded. Tr. 13, 78-79.

sometimes walks in the area of the unstable stack of block. Tr. 29. Respondent was aware of the way the block had been stacked as the block was in plain view. Tr. 28-29.

C. Citation 1, Item 2a

An access ladder or equivalent safe access was not provided for employees working on the second level of the tubular welded frame scaffold. Tr. 33-34; GX 7. There was one ladder provided that did not extend high enough to reach the top buck of the scaffold. Tr. 34, 92; GX 7, 8. One employee was observed climbing from the outrigger to the first level of scaffolding by way of the scaffold cross bracing. Tr. 31-32; GX 7. The scaffold frame was a stirrup type, which did not have evenly spaced rungs. Tr. 34-35; GX 7.

D. Citation 1, Item 2b

The access ladder that was present did not have slip resistant feet and was not lashed or otherwise secured to the scaffold. Tr. 38-39, 93; GX 8, 9, 10. The foot of the ladder was placed on a concrete surface which was covered with loose, sandy soil. Tr. 39; GX 9. Mr. Holloway observed Respondent's employees using the unsecured access ladder. Tr. 41. An employee who fell from the ladder could sustain injuries ranging from contusions to sprains to broken bones. Tr. 40. Respondent was aware of the unsecured access ladder as it was in plain view. Tr. 41.

E. Citation 1, Item 3

Standard guard rails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground. Employees were present on the West Elevation of the scaffold without benefit of guard rails or other fall protection. Tr. 42-44, 91, 140; GX 7, 12, 13, 14. Respondent's employees were thus exposed to fall hazards of up to approximately 14 feet. Tr. 45-46. Respondent was aware of the lack of guard rails as the scaffolds were in plain view. Tr. 46.

II. DECISION

To establish a violation of a standard, Complainant must show that "(1) the standard applies to the cited condition; (2) the employer violated the terms of the standard; (3) its employees were exposed or had access to the violative conditions; and (4) the employer had

actual or constructive knowledge of the violation." *Secretary of Labor v. Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1610 (Rev. Comm. 1992).[2]

A. Complainant Sustained His Burden of Proving That Respondent Violated 29 C.F.R. § 1926.250(b)(5)

29 C.F.R. § 1926.250(b)(5) provides that "materials shall not be stored on scaffolds or runways in excess of supplies needed for immediate operations." Under the construction regulations, all material is considered "stored" until it is actually used. *Sierra Construction Corp.*, 6 OSHC BNA 1278, 1281 (Rev. Comm. 1978), citing *Brennan v. Underhill Constr. Corp.*, 513 F.2d 1032 [2 OSHC 1641] (2d Cir. 1975); *Whitcomb Logging Co.*, 2 OSHC BNA 1419, 1974-75 CCH OSHD ¶ 191,128 (No. 1323, 1974). Inspector Holloway understood the phrase "supplies needed for immediate operations" as meaning one day's worth of supplies. Tr. 20. Inspector Holloway testified that at the rate the Respondent's employees were working, they could not have used all of the block stored on the West Elevation scaffold within one day. Tr. 20; GX 2, 3. In fact, the block observed on top of the scaffolds at the East Elevation was present at the beginning of the inspection and was untouched by the end of the day. Tr. 21, 84; GX 4. Employees were not even working on the East Elevation on December 1, 1992. Tr. 21, 85; GX 4.

Respondent argues that the Secretary would have it operate hand-to-mouth, keeping a just-in-time inventory, as it were, of block on the scaffold. The scaffold is used as a

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[2] The Secretary believes that a demonstration of actual or constructive knowledge of the violation is not properly an element of her *prima facie* case of violation, but rather is relevant to showing the characterization of the violation as "serious" under 29 U.S.C. §666(k). The Secretary recognizes, however, that the Commission continues to adhere to the analysis articulated in *Astra Pharmaceuticals*, 9 BNA OSHC 2126 (No. 78-6247, 1981) and cases following it.

material stocking area for the masons working on an outrigger attached to the scaffold (Tr. at 114). As Mr. Siravo explained:

> ...you are stocking block during the course of the day so that you have [a steady supply] for your [masons]. You also have to stock block and make sure there [is a supply] ready for the first thing in the morning. ... So, therefore, when you leave at the end of the day, you have to stock in those areas where they have to work at 7:00 in the morning. If not, then the bricklayers will stand on the ground until whoever is available and they cannot work an eight hour day.

(Tr. at 123, 124).

Moreover, Mr. Siravo also explained that this is a general practice throughout the masonry industry and that at the time of OSHA inspection working employees earlier in the morning was not possible because of the late sunrise at that time of year (Tr. 143). Respondent submits that the overnight stocking comports with the cited standard in that it provides materials needed for the bricklayers' immediate operations first thing in the morning.

Moreover, Mr. Siravo explained that it was conceivable that the cubes of block in question had been stocked on the plank for a few days in that Respondent followed another subcontractor on the job and if the other subcontractor delays Respondent, then Respondent is forced to wait until the other subcontractor's work is completed (Tr. 124-25).

Even assuming that Respondent is correct that block must be placed on the scaffold the night before in order to supply the needs of the bricklayers at the beginning of the next day's shift, Respondent was nonetheless in violation of the standard. The block in question had been in place for three days when the inspection began and was not used during the day of the inspection. Further, Respondent's argument with respect to the possibility that it was

held up in its work by another contractor is both speculative in that Respondent did not provide any particulars and an insufficient justification given the length of time that the block was present on the scaffold.

"To show employee exposure, the Secretary only needs to show that the employee was in the zone of danger during the employee's assigned workduties." Mueller Pipeliner, Inc., 15 BNA OSHC 1607, 1608 (ALJ 1992) (serious citation for violation of 29 C.F.R. § 1926.652(a)(1) affirmed). Respondent's employees were exposed to the hazard presented by the excess concrete block in that they were working inside the wall and also walked beneath and beside the scaffold. Tr. 23, 82-83.

Mr. Zuback told Mr. Salvatore that the block had been present on the scaffold since the Friday before the inspection. Tr. 83. Clearly, Respondent knew that excess block was stored on the scaffold.

The hazard which the standard addresses, according to Mr. Holloway, is that wood fibers have a tendency to breakdown under the loads imposed by the stored block. Tr. 19. Respondent submits that, if affirmed, the violation ought to be downgraded to a *de minimis* notice because Complainant has failed to prove any direct or immediate relationship to employee safety. Respondent points out that Mr. Holloway conceded that he had no idea of the stability or the instability of the plank on which the block was stored (Tr. 69) while Mr. Salvatore readily admitted at that neither he nor Mr. Holloway performed any calculations to that end (Tr. 81).

However, "[u]nder Commission precedent, a serious violation is established if an accident is possible and there is a substantial probability that death or serious physical harm

could result from the accident." *Secretary of Labor v. Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324 (Rev. Comm. 1991) citing *Dravo Corp.*, 7 BNA OSHC 2095, 2101, 1980 CCH OSHD ¶ 24,158, p. 29,370 (No. 16317, 1980), *aff'd.*, 639 F.2d 772 [9 OSHC 2144] (3d Cir. 1980). *See also* 29 U.S.C. § 666(k). In the event of the scaffold collapsing, employees would be subject to serious physical harm, either from falling off the scaffold, or from being struck by materials falling off the scaffold. Here, the hazardous condition addressed by the standard -- the possibility that the weight of the block over an extended period of time could cause a failure of the scaffold planking -- had existed for three days when the inspection began, and continued throughout the course of the inspection. In these circumstances, it was not necessary for the Secretary to establish that the presence of the block had in fact caused the planking to deteriorate in order to establish that the violation was not *de minimis*.

Having established that the violation of 29 C.F.R. § 1926.250(b)(5) was serious, Inspector Holloway testified regarding how he determined the penalty. Tr. 48-50. Inspector Holloway testified that he calculated a gravity-based penalty by assigning a value for the severity of the injury to be expected and a value for the probability of an accident. This violation was classified as low probability, greater severity because, in Mr. Holloway's judgement, while the probability of an accident was low, the resulting injury could be serious. The gravity-based penalty for a greater severity/lesser probability injury is $2,500. The $2,500 penalty was then reduced by 85% because of the small size of Respondent's company, Respondent's good faith in that it had safety programs in place, and Respondent's lack of prior history with OSHA. The final recommended penalty, therefore, was $375.00.

Mr. Holloway's reasoning in assessing this penalty was sound and the record furnishes no basis to change the amount.

B. Complainant Did Not Sustain His Burden of Proving That Respondent Violated 29 C.F.R. § 1926.250(b)(7)

This standard provides that "when masonry blocks are stacked higher than 6 feet, the stack shall be tapered back one-half block per tier above the 6-foot level." Mr. Salvatore measured the stack of block as 8 feet, 5 inches high. Tr. 26. It was not tapered in any way. Tr. 26, 86; GX 5.

The evidence in support of employee exposure consists of the facts that, first, Respondent's employee, Willie Walden, told Inspector Holloway that he worked in the area where the block was stacked, sometimes on foot (Tr. 29), and second, that the stacks on the far right of the offending stack (see GX 5) have individual blocks on top, indicating that employees had been in the area.[3] Respondent points out that the inspectors conceded on cross-examination that they had no idea if the 8-foot, 5-inch block configuration existed at the time any employees may have been in the vicinity. Tr. 69-71, 87-88, 99. The Secretary has failed to establish that employees were exposed to this condition. Therefore, Citation 1, item 1b is vacated.

[3]The individual blocks would have been hand stacked, as the blocks are delivered from the manufacturer in interlocked, plastic-wrapped cubes. Compare GX 5 with GX 6. In GX 6, blocks are stacked in lower, interlocked, uniform piles and wrapped in plastic.

C. Complainant Sustained His Burden of Proving That Respondent Violated 29 C.F.R. § 1926.451(a)(13)

This standard provides that "an access ladder or equivalent safe access shall be provided" for scaffolding. Inspector Holloway and Mr. Salvatore observed one of Respondent's employees climbing down the cross bracing of the scaffold. Tr. 31-34; GX 7. No ladders or other equivalent safe access were provided[4] for access above the first buck of the scaffold.

Respondent takes the position that it provided ladders. Mr. Siravo testified that Respondent had four ladders (at 12 feet, 16 feet, 20 feet and a 40 foot extension ladder) at the job site. Tr. 128. Respondent submits that the provision of ladders is all that is required by the plain and clear language of the standard, citing *Secretary of Labor v. Rust Engineering Co., supra*, footnote 4, *Usery v. Kennecott Copper Corp.*, 6 BNA OSHC 1197 (10th Cir. 1977); and *Borton, Inc. v. OSHRC, supra*, footnote 4.

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[4] The Commission has interpreted § 1926.451(a)(13) to mean that an employer must not only provide a ladder or equivalent safe access, but must also ensure the use of an access ladder or equivalent safe access when employees seek to access scaffolding, but this interpretation has not been accepted by the Court of Appeals for the Tenth Circuit. *Atlas Industrial Painters*, 15 OSHC BNA 1215, 1218 (Rev. Comm. 1991), citing *Borton, Inc.*, 10 OSHC BNA 1462, 1465 (Rev. Comm. 1982), *rev'd Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 [11 OSHC 1921] (10th Cir. 1984). *See also Truax & Hovey Drywall Corporation*, 6 OSHC BNA 1654 (Rev. Comm. 1978), (29 C.F.R. § 1926.451(a)(13) contains implicit requirement that ladders be used); *Wilson Builders*, 15 OSHC BNA 1362, 1368 (ALJ 1991) (Review Commission has ruled that under § 1926.451(a)(13) an employer must ensure that its employees are using the ladder). *But see Rust Engineering Company*, 15 OSHC BNA 1104 (ALJ 1991) (an employer is required only to provide its employees with safe access, not to make them use it); *Knuth Masonry*, 13 OSHC BNA 1281 (ALJ 1987) (employer provided ladder, but employees preferred climbing the scaffolding because the scaffolding was more secure). *See also Contractors Welding of Western New York, Inc.*, 15 OSHC 1249 (Rev. Comm. 1991), *vacated* 15 OSHC 1874 (Rev. Comm. 1992) (employer that made life jackets accessible to welders but did not require employees to wear them did not violate 29 C.F.R. §1926.106(a)); *Pratt & Whitney Aircraft Group, Div. of United Technologies Corp.*, 12 OSHC BNA 1770 (Rev. Comm. 1986) (meaning of "provide" in 29 C.F.R. § 1910.94(d)(9)(iii) does not impose duty on employer to ensure use of equipment by employees).

Mr. Siravo's testimony that he delivered four ladders to the job site is uncontradicted. However, because Mr. Siravo did not indicate where the other three ladders were located, his testimony is not sufficient to establish that ladders were provided. In order to satisfy the standard, Respondent must provide the ladders in a place or position where they can be used by the employees. Simply having them on the job site does not provide them to employees who must ascend and descend a particular scaffold. The photographs entered into evidence show only one ladder,[5] and that does not provide access above the first buck.

The Secretary correctly urges that the scaffold frame itself cannot be considered as providing equivalent safe access since the rungs on the vertical legs of the scaffold were not evenly spaced or of even width.[6] The vertical rungs on Respondent's scaffold were in a

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[5]The Secretary maintains that this ladder was not safe as it was not secured and did not have slip resistant feet. *See* discussion *infra*. Tr. 38; GX 9, 10.

[6]The Secretary relies on the following cases. *Secretary v. Brickfield Builders, Inc.*, 15 OSHC BNA 1940 (ALJ 1992). See also *Mel Jarvis Construction Co., Inc.*, 9 OSHC BNA 2124, 2125 (Rev. Comm. 1981) (violation of 29 C.F.R. §1926.451(a)(13) affirmed where horizontal members of the scaffold did not follow a vertical progression and therefore "did not bear the resemblance to a ladder which is necessary to satisfy the standard's requirements"); *Rodney E. Fossett d/b/a/ Southern Lightweight Concrete Company*, 7 OSHC BNA 1915 (Rev. Comm. 1979) (scaffold frame does not provide equivalent safe access if means of access provided by frame does not comport with the requirements of the ANSI specifications incorporated into §1926.450(a)(5), the standard for fixed ladders); *Truax & Hovey Drywall Corporation, supra*, footnote 4, at 1656; *Charles H. Tompkins*, 6 OSHC BNA 1045, 1047 (Rev. Comm. 1977). "An equivalent means of access must be virtually identical to a ladder and be as safe as that provided by a properly constructed ladder." *Otis Elevator Company*, 6 OSHC BNA 1515, 1517 (Rev. Comm. 1978). "Gaining access to a scaffold by climbing its frame is unacceptable under Occupational Safety and Health Review Commission precedent." *J & A Interior Systems, Inc.*, 15 OSHC BNA 1526, 1527 (ALJ 1992). *See also Wilson Builders*, 15 OSHC BNA 1362, 1368 (ALJ 1991) (violation of § 1926.451(a)(13) affirmed where employees and owner were climbing up cross bracing to access scaffold).

Respondent, overlooking the cases cited by the Secretary, believes that the Secretary must rely on *Secretary of Labor v. Perini Corporation*, 5 BNA OSHC 1343, 1346, (Rev. Comm., 1977), for the proposition that scaffold rungs do not provide "equivalent safe access." Respondent then proceeds to explain why *Perini* does not support that proposition. While Respondent is correct that *Perini* does not support that proposition, it does not defeat it either. *Perini* involved a mobile scaffold cited under 29 CFR §1926.451(e)(5), which requires that ladders be affixed to or built into mobile scaffolds. The cases cited by the Secretary amply demonstrate that the Commission has long held that scaffold frames do not provide "equivalent safe access" under 29 CFR §1926.451(e)(13).

stirrup configuration, of increasing widths, and not evenly spaced. GX 7, 8. Likewise, the cross bracing which at least one employee was seen using to climb from the second level buck to the first level was not similar to a ladder and did not provide safe access. GX 7. Respondent had knowledge of the violation of § 1926.451(a)(13) as the condition was in plain view and both Respondent's President, Mr. Siravo, and Respondent's Superintendent, Al Zuback, were on the work site on a daily basis.

The fact that no access ladder or other safe access to the upper levels of the scaffold was provided exposed employees to a hazard of falling from the scaffold. Inspector Holloway testified that employees were exposed to a fall hazard of approximately 7 feet. Tr. 36. An individual falling 7 feet could sustain serious injuries ranging from contusions, to sprains, to broken bones or fatalities. Tr. 36.

Having established that the violation of 29 C.F.R. § 1926.451(a)(13) was serious, Inspector Holloway calculated that the gravity-based penalty for item 2a would be $2,500. Tr. 50-51; RX-1. The $2,500 penalty was then reduced by 85% because of the size, good faith, and history. The final recommended penalty is $375.00. Tr. 51. Mr. Holloway based his calculation on the proposition that the probability of an accident was great, but the consequences were low. I find that the probability of an accident is low.[7] The OSHA Field Operations Manual assesses an unadjusted penalty for a low probability, low consequences

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[6](...continued)
under 29 CFR §1926.451(e)(13).

[7]Respondent has advanced no argument with respect to the calculation of the penalty for this item. I note from the case citations furnished by the Secretary that the Commission has often found that similar violations were *de minimis*. Here there is testimony to support the serious classification, but no evidence indicates that the probability of an accident is great.

violation at $1,500. Applying the 85% reduction to this figure yields a penalty of $225. This amount is assessed.

D. Complainant Did Not Sustain His Burden of Proving That Respondent Violated 29 C.F.R. § 1926.1053(b)(7)

The standard under which Respondent was cited provides that "ladders shall not be used on slippery surfaces unless secured or provided with slip-resistant feet to prevent accidental displacement." The ladder provided for the employees working on the first buck level of the West Elevation was not secured at the top, and did not have slip-resistant feet. Tr. 38; GX 9, 10. Inspector Holloway testified that the surface on which the ladder rested was sandy soil on top of concrete, which was unstable and slippery. Tr. 39-40; GX 9. As a result, in Mr. Holloway's view, steps should have been taken to secure the ladder.

Respondent points out that the standard addresses concrete surfaces that are constructed so they cannot be prevented from becoming slippery, and that the Secretary presented no evidence to support a claim of a smooth finished concrete surface. Mr. Siravo recalled that the ladder sat on blacktop which he described as rough. Tr. 133-34. Exhibit G-9 supports Mr. Siravo's assessment that the surface, whether blacktop or concrete, was rough. The Secretary has not established that the ladder was resting on a slippery surface, thus bringing into play the provisions of 29 C.F.R. § 1926.1053(b)(7). Citation 1, item 2b, is vacated.

E. Complainant Sustained His Burden of Proving That Respondent Violated 29 C.F.R. § 1926.451(d)(10)

The standard under which Respondent was cited, § 1926.451(d)(10), provides that

> guard rails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 x 6 lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. . .

The evidence establishes that some of Respondent's employees were working on scaffolding more than ten feet high that lacked standard guard rails.

In GX 7 and GX 8, an employee is seen walking along the second buck level of scaffold without any fall protection. No guard rails are present on second buck level. GX 7. Each buck is approximately 6½-7 feet high. Tr. 32. In GX 11 and 12, employees can be seen on the second buck level in an area that is unguarded. Guard rails have been erected along part of the second buck in GX 11, 12, 13. In GX 13, however, one employee is working in the area that does not have guard rails. The area that is protected by guard rails, moreover, is not in compliance with § 1926.451(d)(10) as an employee is working behind a section of guardrail that does not have a midrail. Tr. 43; GX 12, 13.

Mr. Siravo explained what is happening in these photographs. In the course of building a masonry wall, it becomes necessary to add bucks to the scaffolding as the wall rises. When the crew of masons has built a particular section of the wall to the maximum height which they can reach, they move laterally to the next section and begin working there. The laborers add a buck to the scaffold in the section which the masons have vacated to permit the wall to be built higher. Block and mortar are placed on the higher scaffold.

The photographs relied on by the Secretary were taken during this process. Mr. Siravo indicated that the usual sequence of events in for the bucks to be added and planked, the block to be placed on the bucks, the guard rails to be erected, and then selectively and

temporarily removed to permit delivery of the mortar. For example, in RX-2, the same photograph as GX-13 (Tr. 65), one sees where the block has been landed and, in the distance, the lull landing more planking. Tr. 114-16, 118-20, 137-38.

This description of what was occurring is consistent with Mr. Salvatore's description of his conversation with Siravo's foreman, Mr. Zuback, concerning the guard rails. Mr. Salvatore indicated that he suggested to Mr. Zuback that the guard rails be installed as the scaffolding was erected. Tr. 88-89.

While the explanation of why the guard rails were not completely installed is credible, the photographs (GX-7, 8, 11, 12, 13) indicate that workers whose activities are not associated with the installation of guard rails are present in unprotected areas. Given Mr. Siravo's description of the process of the work, there appears to be no reason for those workers to be present other than to install guard rails. The scaffold has been erected and the block landed on it. According to Mr. Siravo, the next step is to install guard rails. Yet none of the workers depicted are engaged in that activity. It is clear that Respondent had knowledge of the violation as the unguarded scaffolding was in plain view and both Mr. Siravo and Mr. Zuback were at the work site on a daily basis. Tr. 45. I find that the standard is applicable and was violated by Respondent.[8]

Mr. Holloway testified that he determined a gravity based penalty for this violation of $3,500, based on his judgement that there was "a fairly good probability" of a "significant serious injury" if a fall were to occur. Tr. 52 After the 85% reduction for the size, good

[8]The Secretary also points out that employees were working on the outrigger without benefit of a standard guardrail. Tr. 43; GX 7, 8, 13, 14. However, there is no showing that the outrigger was more than ten feet above the ground. Hence the Secretary has not made a established that this condition was also violative of the cited standard.

faith and history adjustment factors, he recommended a penalty of $525.00. Tr. 52. I concur in Mr, Holloway's assessment of consequences. However, in light of the short period of time that the scaffold would remain unguarded given Respondent's method of operation, I find that there is a lesser probability of an accident. Therefore, I assess a penalty of $375.[9]

III. CONCLUSIONS OF LAW

A. Respondent utilizes tools, equipment, machinery, materials, goods and supplies which have originated in whole or in part from locations outside the Commonwealth of Pennsylvania and is therefore engaged in business affecting commerce and is subject to the requirements of the Occupational Safety and Health Act of 1970 ("Act"). 29 U.S.C. § 652(5).

B. Respondent is an employer within the meaning of the Act and is therefore subject to its requirements.

C. Respondent was in serious violation of the terms of 29 C.F.R. § 1926.250(b)(5). A penalty of $375.00 for Citation 1, Item 1(a), is appropriate.

D. Respondent did not violated the terms of 29 C.F.R. § 1926.250(b)(7). Citation 1, Item 1(b) is vacated.

E. Respondent was in serious violation of the terms of 29 C.F.R. § 1926.451(a)(13). A of penalty of $225 for Citation 1, item 2a, is appropriate.

F. Respondent did not violate the terms of 29 C.F.R. § 1926.1053(b)(7). Citation 1, Item 2(b) is vacated.

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[9]The Field Operations Manual indicates a penalty of $2500. Reducing this by 85% yields $375.

G. Respondent was in serious violation of the terms of 29 C.F.R. § 1926.451(d)(10). A penalty of $375.00 for Citation 1, Item 3, is appropriate.

IV ORDER

Citation 1, items 1a, 2a, and 3 are affirmed as serious violations of the Act. A total penalty of $975 is assessed.

It is so ORDERED.

JOHN H FRYE, III
Judge, OSHRC

Dated: OCT 14 1994
Washington, D.C.