



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
CCM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR
Complainant,
v.
HARRIS MASONRY, INC.
Respondent.

OSHR DOCKET
NO. 92-1071

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 February 8, 1993. The decision of the Judge will become a final order of the Commission on March 10, 1993 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 March 1, 1993 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
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

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 S1004
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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Date: February 8, 1993

DOCKET NO. 92-1071

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

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Henry G. Beamer, Esquire
Attorney for Respondent Harris
Masonry, Inc.
1330 Grant Building
Pittsburgh, PA 15219 2203

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/C
1825 K Street, N.W.
Washington, DC 20006 1246

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 FTS 634-4008

LYNN MARTIN, SECRETARY OF LABOR,
 UNITED STATES DEPARTMENT OF LABOR

Complainant,

v.

HARRIS MASONRY INC.
 and its successors,

Respondent.

Docket No. 92-1071

Appearances:

Michael H. Rosenthal, Esquire
 Office of the Solicitor
 United States Department of Labor
 Philadelphia, Pennsylvania

For Complainant

Henry G. Beamer, Esquire
 Attorney at Law
 1330 Grant Building
 Pittsburgh, PA

For Respondent

BEFORE: Administrative Law Judge John H Frye, III

DECISION AND ORDER

I. INTRODUCTION

This case results from an inspection of Respondent's worksite at the North East Middle School in North East, Pennsylvania, which occurred on January 28, 1992. As a result of that inspection, the Secretary alleged that Respondent violated one construction safety standard: 29 C.F.R. 1926.451(d)(1). Respondent filed a notice of contest. A

complaint and answer followed. Trial of the case was in Pittsburgh on September 30, 1992.

II. FINDINGS OF FACT

1. Respondent, Harris Masonry, Inc., is a corporation with a principle place of business at 420 Greentree Road, Pittsburgh, Pennsylvania 15220. (Admitted in Answer).
2. Respondent uses tools, equipment, machinery, materials, goods, and supplies which originated in whole or in part from locations outside the State of Pennsylvania. Specifically respondent uses Cosmos II, Portland Cement which is manufactured in Kentucky (Tr. 20).
3. Respondent does business in Ohio as well as Pennsylvania (Tr. 20).
4. On January 28, 1992, respondent maintained a worksite at North East Middle School, 1901 Freeport Rd., North East, Pennsylvania 16428 (Admitted in Answer).
5. Respondent was engaged in masonry work at the North East Middle School job site (Admitted in Answer, Tr. 7).
6. Respondent had approximately 27 employees at the worksite (Admitted in Answer).
7. Respondent had approximately 100 employees for all its business activities (admitted in Answer, Tr. 19).
8. On January 28, 1992, Beverly Braughler, a Compliance Officer with the Occupational Safety and Health Administration ("Inspector Braughler"), inspected respondent's worksite (Tr. 6, 9).
9. Inspector Braughler saw tubular welded frame scaffolds on the north and south sides of the gymnasium (Tr. 6).
10. There were two employees on the south scaffold and one on the north. (Tr. 7).
11. Inspector Braughler observed the employee on the north side for about 10 minutes and the employees on the south side for approximately 15 minutes

before continuing with her inspection (Tr. 7). The employees were not installing guardrails during this time frame (Tr. 13-14).

12. Inspector Braughler later determined that all three workers were employed by Harris Masonry (Tr. 14).

13. The scaffolds on which respondent's employees worked were approximately 15 feet above the ground. (Tr. 7).

14. At the time of Inspector Braughler's initial observations, neither of the scaffolds had a guardrail system to protect the employees from a fall hazard (Tr. 8-9, 11-13).

15. On the north side the employee was approximately four feet from the unguarded edge of the scaffold (Tr. 12).

16. On the south side, an employee tending a mortar pan was approximately two feet from the unguarded edge of the scaffold (Tr. 12).

17. Inspector Braughler observed guardrails being installed on the north side about forty-five minutes after her initial observations (Tr. 15, 49).

18. Inspector Braughler observed the scaffold on the south side of the gymnasium a second time about an hour to an hour and a half after her initial observations (Tr. 86).

19. Inspector Braughler did not observe a change in the height of the scaffolding during her inspection. The scaffold on the north and south side were each three bucks (15 feet) high the entire time (Tr. 7, 49, 85-86).

20. The absence of appropriate guardrails created a fall hazard of 15 feet (Tr. 16).

21. The scaffolds were in plain view (Tr. 17). Inspector Braughler could see that there was a violation from a hundred yards away. Therefore respondent could have and should have known of the hazard created by the absence of the guardrails.

22. If an employee fell off respondent's scaffold he could suffer from broken bones, abrasions or contusions (Tr. 17).

IV. DISCUSSION

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." *Trumid Construction Co.*, 14 BNA OSHC 1784, 1788 (No. 86-1139, 1992).

There is no dispute with regard to the applicability of 29 C.F.R. § 1926.451(d)(10) to the scaffolds in use at Respondent's worksite. When Inspector Braughler inspected the worksite she saw a new gymnasium under construction. Inspector Braughler's un rebutted testimony established that tubular welded frame scaffolding with a height of 15 feet was in place on the north and south sides of the gym. She observed two employees on the south scaffold and one on the north.¹ Inspector Braughler later determined that all three workers were employed by Harris Masonry (Tr. 6, 7, 12-14).

When initially observed by Inspector Braughler neither the north or south scaffolds had a guardrail system to protect the employees from a fall hazard (Tr. 8-9, 11-13). The Secretary argues that Respondent was thus in violation of the standard. Respondent's sole defense developed at trial was that the employees on the scaffolds were not engaged in masonry work but instead were engaged in scaffold erection. However, Inspector Braughler observed the employee on the north side for about ten minutes and the employees on the south side for approximately fifteen minutes before continuing with her inspection (Tr. 7). No erection activity was happening at that time.

Inspector Braughler again observed the north scaffold about forty-five minutes (Tr. 49) and the south scaffold about an hour to an hour and a half after her initial observations (Tr. 86). She saw the employee installing guardrails on the north scaffold. The height of both scaffolds was unchanged (Tr. 49, 86). Thomas Hoover, a laborer for

¹Ms. Braughler took two photographs of the scaffolding which were admitted in evidence. Respondent takes the position that these photographs were taken at such great distances and are of such poor quality as to require "... guess work on behalf of the compliance officer, the scaffolding rigger, counsel, and the Court in their attempt to determine what the pictures actually showed." (Respondent's proposed conclusion of law #4.) I agree that these photographs are essentially useless in resolving the factual controversies presented by this case and have not relied on them.

Harris Masonry who served as scaffold erector at the worksite, testified that adding a buck (one scaffold section) takes thirty to forty-five minutes (Tr. 56-57, 62).

If respondent were truly engaged in scaffold erection during the inspection, an additional buck should have been added to the north and south sides by the time Inspector Braughler observed the scaffolding at those locations the second time. Because there was no change in height, it is reasonable to conclude that the employees were not erecting scaffolding.² When employees are not engaged in actually raising scaffolding, this argument must fail.

The Review Commission and the Third Circuit recognize that the Secretary may establish exposure by proving that employees had access to the hazard. *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812, 12 BNA OSHA 1393, 1399, (3rd Cir. 1985) ("the Secretary need only prove that employees have access to an area of potential danger"); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (1976) ("a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure"). The Secretary need not show that the employee was teetering at the edge of a fall hazard before establishing a violation. *F.L. Heughes and Company, Inc.*, 11 BNA OSHC 1391, 1395 (1983).

There were a total of three employees in this case who were access to the unguarded edge of the scaffold. On the south side, one employee was approximately two feet from the unguarded edge of the scaffold (Tr. 12). The other two employees, one on the north side and one on the south side, were within four to five feet of the edge of an

²Ms. Braughler's testimony is inconsistent with Mr. Hoover's testimony that he was engaged in raising the scaffolding that morning. I credit Ms. Braughler's testimony on this point. Indeed, in part, Mr. Hoover's testimony corroborates Ms. Braughler's testimony on this point rather than his own. Ms. Braughler testified that masonry operations, not scaffold erection, were underway during her inspection on January 28, 1992. Mr. Hoover admitted on cross-examination that there was a pile of brick on the south scaffold (Tr. 65, 70). He was somewhat evasive about why the brick was there and whether it was going to be "scattered" before or after the next buck was added. (Compare Tr. 71, "we have already scattered them brick" with Tr. 72, "It would be scattered after the other buck is set so they can keep going."). It is clear, however, that the brick was going to be used for masonry operations which is consistent with Inspector Braughler's observations and inconsistent with a claim that scaffold erection was occurring.

outrigger set just below the top of the scaffolding (Tr. 12).³ All three clearly had access to the fall hazard created by respondent's failure to install guardrails. *Pace Construction Corp.*, 14 BNA OSHC 2216, 2222 (1991) (employees exposed to a fall hazard when they stood as close as two feet from the edge with no fall protection). *Daniel Construction Company*, 10 BNA OSHC 1549, 1551 (1982) (employees who came within 4 feet of an unprotected edge had access to a fall hazard); *Avalotis Painting Company*, 9 BNA OSHC 1226, 1229 (1981) (employees who moved freely on a scaffold had access to a fall hazard).

The scaffolds were in plain view, and Respondent does not contest that it had knowledge of the fact that the scaffolds were unguarded. Indeed, its defense that the scaffolds were in the process of being erected assumes that they were unguarded. (See Tr. 58-59, 63).

Under section 17(k) of the Occupational Safety and Health Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical injury occur. Inspector Braugher testified that a 15 foot fall could cause injuries such as broken bones, abrasions and contusions. In her opinion, these consequences require that the violation be classified as serious (Tr. 17). The Review Commission agrees that fall hazards between 10 and 15 feet are serious violations of the Act. *Brown-McKee, Inc.*, 8 BNA OSHC 1247, 1252 (1980). Accordingly, the Secretary has proven that the violation was properly classified as serious.

Inspector Braugher testified about the factors she considered in recommending a gravity-based penalty of \$625 (Tr. 17-20). Inspector Braugher considered all the factors required by Section 17(j) of the Act, 29 U.S.C. §666(i). Based on those factors, \$625 is an appropriate penalty for the violation.

³It is not clear from the testimony whether these employees may have been protected from falling off the end of the outrigger by another outrigger support set above the one supporting their work platform. Ms. Braugher testified that there was no such protection, while Mr. Hoover testified that it was customary to employ such protection. Tr. 42, 64. Given that Mr. Hoover's testimony was often confused and hard to follow, I credit Ms. Braugher's testimony rather than his.

III. CONCLUSIONS OF LAW

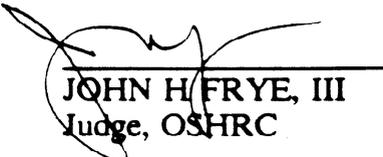
1. Respondent is engaged in a business affecting commerce and is subject to the requirements of the Occupational Safety and Health Act of 1970, as amended ("Act").

2. 29 C.F.R. § 1926.451(d)(10) applies to the scaffolds on which respondent's employees worked.

3. Respondent violated 29 C.F.R. § 1926.451(d)(10) by failing to install guardrails on all open sides and ends of the scaffold on both the north and south sides of the gymnasium. The proposed penalty of \$625 was calculated in conformity with the requirements of section 17(j) of the Act and is an appropriate penalty for the violation.

IV. ORDER

Citation 1, item 1, is affirmed as a serious violation of the Act. A civil penalty of \$625 is assessed.


JOHN H. FRYE, III
Judge, OSHRC

Dated: FEB - 5 1993
Washington, D.C.