United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Applied Masonry, Inc. Respondent.	OSHRC Docket No. 12-2030

Appearances:

Joseph B. Luckett, Esq., U. S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee
For Complainant

Paul Chamblee, *Pro Se*, Hanceville, Alabama
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Applied Masonry, Inc. (Applied) is in business as a masonry contractor in Hanceville, Alabama. On July 25, 2012, a compliance safety officer with the Occupational Safety and Health Administration (OSHA) initiated an inspection of the renovation work for the city courthouse in Cullman, Alabama. After observing an employee walking/working on what he considered improperly installed scaffolds, a repeat citation was issued to Applied on September 17, 2012, for alleged violations of OSHA's scaffold standards at 29 C.F.R. § 1926.450 *et seq.* Applied timely contested the repeat citation.

The repeat citation alleges that Applied violated 29 C.F.R. § 1926.451(e)(1) (item 1) by failing to provide employees a safe means of access to the upper level of the scaffold platform; 29 C.F.R. § 1926.451(g)(4)(i) (item 2) by failing to install guardrails on the scaffolds; and 29 C.F.R. § 1926.451(b)(1) (item 3) by failing to fully plank the scaffolds. The repeat citation proposes total penalties of $28,800.00.

A hearing was held on March 12, 2012, in Cullman, Alabama. Applied was represented *pro se* by owner/president Mr. Paul Chamblee. Jurisdiction and coverage were stipulated by the parties (Tr. 10). At the conclusion of the hearing, Mr. Chamblee made closing arguments. The Secretary's counsel opted to file a post hearing brief on April 29, 2013.

Applied denies the alleged violations, the repeat classifications, and the proposed penalties. Applied argues that the employees were in the process of dismantling the scaffold and moving the components to other locations. Also, Applied claims that it has provided all necessary safety equipment and training to employees but cannot continually monitor the worksite. Applied was permitted to assert for the first time an unpreventable employee misconduct defense after the court explained the company's burden of proof (Tr. 7-8).[1] The defense was allowed because Mr. Chamblee was not an attorney and appeared unfamiliar with the affirmative defense. Although the Secretary's counsel was given an opportunity to supplement the record after the hearing to address the misconduct defense, counsel decided at the conclusion of the hearing that no additional evidence was necessary (Tr. 6-9, 88-89).

For the reasons discussed, the repeat violations of § 1926.451(e)(1) (item 1) and § 1926.451(b)(1) (item 3) are affirmed and total penalties of $15,000.00 are assessed. The alleged violation of § 1926.451(g)(4)(i) (item 2) is vacated.

The Inspection

Applied is a corporation engaged in business as a brick and block masonry contractor. Mr. Chamblee is the president/owner and the company's only full-time employee. The business is located at Mr. Chamblee's home/office in Hanceville, Alabama. Applied has been in business for approximately 11 years. Employees are hired as masons when Applied has contracts to perform (Tr. 60-61, 68, 88).

In November 2011, Applied was contracted to perform the brick masonry and decorative tile work on the three-story city courthouse in Cullman, Alabama. The courthouse was being renovated after a tornado struck earlier in the year. Applied hired approximately eight brick masons to perform the masonry work. Applied used fabricated frame scaffolds which it owned. [2]

[1] Other issues not asserted are deemed waived. See *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[2] According to OSHA, a *Fabricated frame scaffold (tubular welded from scaffold)* is defined as "a scaffold consisting of a platform(s) supported on fabricated end frames with integral posts, horizontal bearers, and intermediate members." 29 C.F.R. § 1926.450(b) *Definitions*.

Each scaffold buck was approximately 6 feet, 4 inches high, 5 feet wide, and 7 feet in length. The courthouse project was completed in August 2012. At the time of the OSHA inspection, Applied was also performing concrete work at a ball field approximately 1 mile from the courthouse (Exh. C-1; Tr. 17-18, 61-64, 72).

On July 25, 2012, at approximately 9:00 a.m., an OSHA compliance safety officer (CO) initiated an inspection of the courthouse project after observing two employees of another contractor on the roof without fall protection. While watching the two employees on the roof, the CO observed an Applied employee accessing and walking across the scaffold platform which extended over a white building attached in front of the courthouse. The CO observed the employee climb the scaffold's cross brace to access the platform. He walked the length of the platform which was not fully planked and lacked adequate guardrails. He then observed the employee taking measurements at the roof line where the decorative tiles were to be installed. Although four other employees were on site, the CO did not observe any other employees on the scaffold platform (Exhs. C-2, C-3, C-4; Tr. 17-18, 26, 56).

After taking photographs, the CO entered the property and held an opening conference with Mr. Chamblee when he returned from the ball field project (Tr. 20). The CO left the courthouse project at approximately 12:30 p.m. (Tr. 64). Applied was issued the repeat citation on September 17, 2012.

Discussion

The Secretary has the burden of proving a violation of the OSHA scaffold standards and must establish:

> (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).

Applied does not dispute the application of OSHA's scaffold standards to its masonry work on the courthouse. During the hearing Applied did not present evidence disputing: (1) that the scaffold lacked access to the upper platform level; (2) that the scaffolds failed to have an adequate guardrail system; and (3) that the scaffolds' platform was not fully planked.

Applied argues that the scaffolds were being dismantled and the components were being moved to other locations. If the cited standards are found applicable, the issue of whether the Secretary has met her burden of proof remains.

Record Lacks Evidence of Dismantling

Applied argues that at the time of the OSHA inspection, its employees were dismantling the scaffolds and moving the components (Tr. 65). The cited standards at issue, § 1926.451(e)(1), § 1926.451(g)(4)(i), and § 1926.451(b)(1), do not apply if Applied was erecting or dismantling the scaffolds. The requirements for scaffold access, fall protection, and planking during dismantling are covered by OSHA standards at § 1926.451(e)(9), § 1926.451(g)(2) and § 1926.451(b)(1)(ii) and are not required unless there is a determination such requirements are feasible and do not create a greater hazard.

The record in this case fails to show that the Applied employee on the scaffold platform was engaged in dismantling or moving components. The employee was observed walking across the platform and measuring at the roof line where Applied was to install the decorative tile (Exhs. C-5, C-6). There is no evidence that he at any time was engaged in dismantling the scaffold. The photographs support the CO's observations of the lack of dismantling work. The photographs show decorative tiles and bricks on the scaffold platform. Where the employee is observed on the scaffold, a large area of the wall remained without brick or decorative tile installed indicating that Applied still had masonry work to perform before dismantling the scaffolds (Exhs. C-2, C-3; Tr. 82). Also, according to the CO, Mr. Chamblee never claimed Applied was dismantling the scaffolds during the OSHA inspection which lasted more than 3 hours (Tr. 64). Since he was on another project when OSHA initiated the inspection, Mr. Chamblee admitted that he did not know what instructions were given to the employee by the superintendent (Tr. 78). Neither the superintendent nor the employee testified. Applied presented no evidence through sworn testimony or documents supporting its claim of dismantling the scaffolds.

The cited standards, § 1926.451(e)(1), § 1926.451(g)(4)(i), and § 1926.451(b)(1), applied to the worksite.

REPEAT CITATION

Item 1 - Alleged Violation of § 1926.451(e)(1)

The citation alleges that "On or about 07/25/2012 – 500 2nd Ave SW, Cullman, AL, employees were not provided a safe means of access to the upper levels of the scaffolding system they were working from."

Section 1926.451(e)(1) provides:

> When the scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stair-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

Section 1926.451(e)(1) requires a safe means of access such as a ladder to a scaffold platform when the platform is 2 feet or more above or below the point of access. The CO observed the employee climbing the cross brace at the end of the scaffold frame approximately 6 feet to access the next level platform. The ladder from the ground accessed only the first level of the platform. There was no ladder to the upper platform. The employee was exposed to a fall hazard of 6 feet to the lower platform level or approximately 16 feet to the ground. The employee's exposure to the hazard was approximately 5 minutes (Exh. C-2; Tr. 22, 24, 26).

As discussed, the record fails to show that the scaffold was being dismantled/erected where the employee was accessing the platform. Therefore, § 1926.451(e)(9)(i) does not apply and there was no evidence presented by Applied that "a competent person determine whether it is feasible or would pose a greater hazard to provide and have employees use a safe means of access." Regardless, both standards prohibit the use of cross braces as a means of access. *See* § 1926.451(e)(9)(iv).

The record shows without dispute that the terms of § 1926.451(e)(1) were violated and an employee was exposed to a fall hazard because of the lack of safe access. The issue of employer knowledge is addressed subsequently.

Item 2 - Alleged Violation of § 1926.451(g)(4)(i)

The citation alleges that "On or about 07/25/2012 – 500 2nd Ave SW, Cullman, AL, employees were working from scaffolding near the end without protection."

Section 1926.452(g)(4)(i) provides:

> Guardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erecting/dismantling crews.

As a means of fall protection, a *Guardrail system* is defined by OSHA as "a vertical barrier, consisting of, but not limited to, toprails, midrails, and posts, erected to prevent employees from falling off a scaffold platform or walkway to lower levels. *See* § 1926.450(b), *Definitions*. The record, as discussed, fails to show that the scaffold was being dismantled/erected where the employee was walking/working on the platform. Therefore, § 1926.451(g)(2) does not apply and Applied presented no evidence that "a competent person determined the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds."

The CO did not observe guardrails (top rail or midrail) at the end of the scaffolding where the employee was standing and measuring at the roof line. There were cross braces along the length of the platform, which was approximately five bucks long. According to the CO, the cross braces constituted a top rail or midrail but not both (Exhs. C-3, C-4; Tr. 28-29).

However, since the scaffold was located on top of the white building connected in front of the courthouse, there was no fall hazard of 10 feet or more as required by § 1926.451(g)(1). The platform was only one scaffold buck high or less than 7 feet. The employee was exposed to a fall of less than 7 feet to the roof of the white building. This was also the situation at the end of the scaffold. The CO's claim of a 16-foot fall hazard to the ground is rejected as not supported by the record (Exh. C-5; Tr. 31, 38). The standard requires guardrails (or other fall protection) if the scaffold platform is "more than 10 feet (3.1 m) above the lower level" which in this case was the roof of the white building. See § 1926.451(g)(1). The scaffold was less than 7 feet above the lower roof level. There is no showing the employee at the end of the scaffold would fall to the ground as opposed to the roof (Tr. 31-32). The CO acknowledges that there is no guardrail requirement for scaffolds if the fall hazard is less than 10 feet (Tr. 84).

A violation of § 1926.451(g)(4)(i) is not established.

Item 3 - Alleged Violation of § 1926.451(b)(1)

The citation alleges that "On or about 07/25/2012 – 500 2nd Ave SW, Cullman, AL, employees were working from fabricated frame scaffolding that was not fully planked."

Section 1926.451(b)(1) provides:

> Each platform unit (e.g., scaffold plank, fabricated plank, fabricated deck, or fabricated platform) shall be installed so that the space between adjacent units and the space between the platform and the uprights is no more than 1 inch (2.5 cm) wide, except where the employer can demonstrate that a wider space is necessary (for example, to fit around uprights when side brackets are used to extend the width of the platform).

The CO observed that the platform where the employee was walking/working was not fully planked. The scaffold platform contained only one to four planks. The width between scaffold uprights was approximately 60 inches or 5 feet. The planks used by Applied were "two by tens" which are 10 inches wide. None of the platforms on the approximate five scaffold bucks were fully planked (Exhs. C-3, C-7; Tr. 35-36, 72).

As discussed, the record fails to show that the scaffold was being dismantled/erected where the employee was walking/working on the platform. Therefore, § 1926.451(b)(1)(ii) does not apply and Applied offered no evidence that "only the planking the employer establishes is necessary to provide safe working conditions is required."

The record shows the terms of § 1926.451(b)(1) were violated and an employee was exposed to the lack of a fully planked platform. The issue of employer knowledge is addressed next.

Employer Knowledge

In order to show employer knowledge of violations of § 1926.451(e)(1) (item 1) and § 1926.451(b)(1) (item 3), the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of the hazardous conditions. *Dun Par Engd Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer has constructive knowledge of a violation if the employer fails to exercise reasonable diligence to discern the presence of the violative condition. *Pride Oil Well Serv*., 15 BNA OSHC 1809, 1814 (No. 87-692, Aug 17, 1992). The employer is expected to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980).

Mr. Chamblee testified that the employee observed on the scaffold platform was not a supervisor but a brick mason who had worked for Applied for less than one year "on and off." He

claimed the employee lacked any supervisory responsibility (Tr. 63-64). When he and the superintendent were away from the site, he testified that no one was placed in charge (Tr. 67).

Applied's knowledge of the unsafe conditions addressed by 29 C.F.R. § 1926.451(e)(1), and § 1926.451(b)(1) is established. During the OSHA inspection, the CO understood that the employee on the scaffold platform was in charge. The employee told the CO that he was in charge (Tr. 19). Also, according to the CO, Mr. Chamblee said the employee was in charge (Tr. 27). The CO further testified that nothing was mentioned by Mr. Chamblee about a superintendent (Tr. 82). Neither Mr. Chamblee nor a superintendent was at the courthouse when the CO initiated the OSHA inspection. Even Mr. Chamblee acknowledged that his superintendent may have placed the employee in charge when he left to pick up a saw (Tr. 64-65, 67). As a supervisor, even if temporarily, the employee's knowledge of the conditions is imputed to Applied. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (Nos 86-360 86-469, 1992).

However, even if the employee was not a supervisor, Applied still should have known of the unsafe conditions. The lack of a safe means of access and full planking were obvious and in plain view to anyone on the worksite. There is no showing that the employee was trained on safe access and full planking and that the company ensured such requirements were followed. Mr. Chamblee conceded that his superintendent may have instructed the employee to obtain the measurements before leaving the worksite. Based on the lack of reasonable diligence, Applied's constructive knowledge of the violative conditions is also established.

Employee Misconduct Defense

Applied was allowed to assert the employee misconduct defense for the first time at the hearing. However, Applied offered no evidence to the support the defense (Tr. 7-8). As explained to Applied, in order to establish the affirmative defense of unpreventable employee misconduct, Applied was required to prove that it has (1) established work rules designed to prevent the violation, (2) adequately communicated the rules to its employees, (3) taken steps to discover violations of the safety rules, and (4) effectively enforced the rules when violations are discovered. *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997).

The record fails to show (1) that Applied had safety rules addressing safe means of access or full planking of scaffold platforms; (2) that such rules regarding safe means of access and full planking were communicated to its employees; (3) that Applied took steps to discover or

monitor employees for violations of rules involving safe means of access and full planking; or (4) that Applied enforced rules of safe means of access or full planking when violations were discovered. There was no showing that Applied has a disciplinary program. Applied offered no evidence of written or verbal work rules which addressed the hazards. Although Mr. Chamblee testified that employees received training consisting of safety meetings every Monday which lasted approximately 30 minutes, the record fails to show the employees on the courthouse project had received training on the requirements for safe means of access and that the scaffold platform needed to be fully planked (Tr. 74-75). Applied made no showing of monitoring its worksites, including the courthouse project to ensure safe access and full planking were maintained. Despite claiming that he purchased safety equipment for employees and provided employees training, there is no showing of enforcement by Applied through a disciplinary program if employees failed to comply.

Applied's employee misconduct defense is not established.

Repeat Classification

The Secretary classified Applied's violations of § 1926.451(e)(1) (item 1) and § 1926.451(b)(1) (item 3) as "repeated" under § 17 of the Occupational Safety and Health Act (Act). A violation is deemed repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity in several ways including showing the violations are of the same standard or if different standards by showing similar hazards and means of abatement. *Monitor Construction Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

Applied was previously cited for violations of the same standards as in this case as a result of an OSHA inspection at a worksite in Trussville, Alabama on September 15, 2009. The serious and repeat citations were issued to Applied on October 16, 2009 (Exh. C-8). The same standards, § 1926.451(e)(1) and § 1926.451(b)(1), under similar conditions were cited in 2009 as repeat citations (Citation no. 2, items 2 and 3). Applied settled the previous citations by informal settlement agreement with only a reduction in penalties on December 2, 2009 (Exh. C-9; Tr. 43-44). The settlement agreement was signed by Mr. Chamblee and became a final order of the Commission in January 2010.

Applied was also inspected on November 5, 2007, at a worksite in Alabaster, Alabama. After the inspection, OSHA issued to Applied serious and repeat citations on December 27, 2007 (Exh. C-10). The same standards, § 1926.451(e)(1) and § 1926.451(b)(1), cited in this case were cited in 2007 (Citation no. 2, item 2, and Citation no. 1, item 3). The parties resolved the citations by informal settlement agreement on January 24, 2008 (Exh. C-11). The settlement agreement was signed by Mr. Chamblee and became a final order in February 2008.

The prior citations show substantially the same unsafe conditions as found by the CO during the present inspection. Applied's violations of 29 C.F.R. § 1926.451(e)(1) (item 1) and § 1926.451(b)(1) (item 3) were properly classified as repeat. Applied offered no evidence disputing the repeat classifications.

Penalty Consideration

The Review Commission is the final arbiter of penalties in contested cases. In determining an appropriate penalty, the Commission is required, pursuant to § 17(j) of the Act, to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor in considering a reasonable penalty.

Applied is entitled to credit for size because it is a small employer with one full-time employee and other employees hired as needed for specific projects (Tr. 68). Only one employee was shown exposed to the scaffold violations at issue. Applied is not entitled to credit for history because it has received prior OSHA citations which have become final orders. Applied is entitled to partial credit for good faith based on his attempts, although inadequate, in providing safety equipment and safety meetings to employees. Mr. Chamblee indicated a desire to comply with the OSHA standards but his methods are deficient by relying too much on the employees to comply. Applied needs to take responsibility to ensure that employees are complying through having clear safety rules, monitoring, and enforcement of its safety program.

A penalty of $8,500.00 is reasonable for Applied's repeat violation of § 1926.451(e)(1) (item 1). There was no safe access to one platform level and one employee was exposed. The time of exposure was approximately 5 minutes. This was a second repeat violation. It is noted that in 2009, this violation was resolved by OSHA with a reduction in penalty to $6,000.00 (Exh. C-9).

A penalty of $6,500.00 is reasonable for Applied's repeat violation § 1926.451(b)(1) (item 3). The scaffold platform was not fully planked and one employee was exposed. The time of exposure was approximately 15 minutes. This was a second repeat violation of this standard. It is noted that in 2009, this violation was resolved by OSHA with a reduction in penalty to $2,500.00 (Exh. C-9).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that repeat Citation:

1. Citation No. 1, Item 1, alleged repeat violation of § 1926.451(e)(1), is affirmed and a penalty of $8,500.00 is assessed.
2. Citation No. 1, Item 2, alleged repeat violation of § 1926.451(g)(4)(i), is vacated and no penalty is assessed.
3. Citation No. 1, Item 3, alleged repeat violation of § 1926.451(b)(1), is affirmed and a penalty of $6,500,00 is assessed.

SO ORDERED.

Ken S. Welsch

Judge Ken S. Welsch
1924 Building, Suite 2R90
100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104
Phone (404) 562-1640

Dated: May 20, 2013
Atlanta, Georgia