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

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

SECRETARY OF LABOR
Complainant,
v.
D. H. SHELTON & ASSOCIATES, INC.
Respondent.

OSHRC DOCKET
NO. 90-0143

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 March 30, 1993. The decision of the Judge will become a final order of the Commission on April 29, 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 April 19, 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 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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 30, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-0143

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

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

David H. Shelton
14457 Loving Lane
El Paso, TX 79936

E. Carter Botkin
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242 0791

00103401386:06

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242-0791

PHONE:
COM (214) 767-5271
FTS 729-5271

FAX:
COM (214) 767-0350
FTS 729-0350

SECRETARY OF LABOR,

Complainant,

v.

D.H. SHELTON & ASSOCIATES, INC.,

Respondent.

OSHRC DOCKET NO. 90-0143-S

APPEARANCES:

Jack F. Ostrander, Esquire
Dallas, Texas
For the Complainant.

David H. Shelton
El Paso, Texas
For the Respondent, *pro se.*

Before: Administrative Law Judge E. Carter Botkin

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

On November 2 and 3, 1989, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of a worksite in El Paso, Texas, where Respondent was a subcontractor in a project involving the construction of a building to house an automobile dealership. As a result of the inspection, Respondent was issued one serious citation alleging a violation of 29 C.F.R. § 1926.451(a)(4), wherein a penalty of $210.00 was sought. Respondent contested not only the citation, but also the propriety of the inspection itself, and a hearing addressing these matters was held in El Paso, Texas.

The Inspection

Bonita Horton, the OSHA compliance officer ("CO") who conducted the inspection, was the only individual who testified in this case. Horton testified she met with Frank Bacquera, the job superintendent for Arrow Building Corporation, the general contractor at the site, and that after he granted permission for the inspection to take place she held an opening conference to which the subcontractors were invited. Luis Garcia, who attended as the representative of D.H. Shelton & Associates, represented himself to be the foreman. Horton identified herself and explained her mission, giving each representative the opportunity to notify his employer that an OSHA inspector was at the site. Garcia did not object to the inspection and returned to his work after the conference, and Horton commenced her inspection with the activities of the general contractor's employees. When Horton inspected Respondent's activities at the site, Garcia answered her questions about the scaffolding he had been using. (Tr. 15-28; 33-37).

Respondent asserts OSHA had no right to conduct the inspection without a warrant, and that its rights were further compromised by the CO's failure to give it an opportunity to have a representative accompany her during the inspection.[1] It is well settled that OSHA must have either valid consent or a warrant to conduct an inspection. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). It is clear from the record that no warrant was obtained in this case. However, it is equally clear OSHA obtained valid consent to conduct the inspection, and that Respondent was not denied the opportunity to have a representative present during the inspection. My reasons follow.

Frank Bacquera, the job superintendent for the general contractor, gave the CO permission to inspect the site, and Luis Garcia, who represented himself to be Respondent's foreman, did not object to the inspection or request a warrant; Garcia was also given the opportunity to notify Respondent of the inspection, and he answered the CO's questions about the scaffolding. Although David Shelton, Respondent's president, asserted on the record that Garcia was not a foreman and was not fluent in English, unsworn statements are

---

[1] *See* Respondent's notice of contest and correspondence to the Commission.

not evidence.[2] Moreover, the CO testified that Garcia spoke English, that she had no trouble understanding him, and that when she asked him if he wanted an interpreter he said he did not. (Tr. 32-33). Since there was no evidence to rebut the CO's testimony, which I found credible, it can only be concluded that the CO reasonably relied on Garcia's representation that he was a foreman, that OSHA had valid consent to inspect the site, and that Respondent was not denied its right to accompany the CO. Accordingly, Respondent's challenge to the inspection is denied.[3]

The Citation

The subject standard provides, in pertinent part, as follows:

> Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

Bonita Horton testified the scaffold Garcia had been using, as shown in C-1 and C-2, had two levels of planking; the first, on which Garcia had been working, was about 9 feet from the ground, and the second, on which he had laid his tools, was about 10 feet from the ground. The planks were 19 inches wide, making the first level, on which two planks were laid, 38 inches wide. Garcia told Horton he had been using the scaffold to strap pipe to the walls and ceiling of the building, that it had been up a week, and that he had been using it about six hours a day; he also told her he had been working over the unplanked opening, as shown in C-2, and that he thought the cross braces on the scaffold were guardrails. Horton opined Garcia could have fallen and been seriously injured. (Tr. 20-29; 33-37).

Shelton asserted at the hearing that Garcia was in the process of moving the scaffold, and that Garcia had informed the CO of this fact. However, as noted *supra*, unsworn statements are not evidence. Moreover, the CO unequivocally testified that Garcia told her

---

[2]Shelton was advised of this fact several times during the hearing; however, he declined to testify or present any witnesses on behalf of the company. (Tr. 14-15; 43-46).

[3]In so doing, the undersigned has noted Shelton's assertion he had asked the OSHA area director to inform the company of inspections and to present warrants for inspections. However, the CO testified she was unaware of the request, and that in any case it is impermissible to give advance notice of inspections. (Tr. 38-39). Moreover, while an employer has the right to request a warrant before allowing OSHA access to the worksite, no such request was made in this case.

he had worked on the scaffold in the condition in which she observed it. (Tr. 33-36). Based on the record, the Secretary has established a serious violation of the cited standard.

As noted above, the Secretary proposed a penalty of $210.00 for this citation. In assessing penalties, the Commission is required to give due consideration to the employer's size, history and good faith, and to the gravity of the violation. I note that while Respondent had approximately 50 employees at the time of the inspection there were just two at the site, only one of whom, based on the record, was exposed to the hazard. I note also that Respondent is no longer in business, and that while there was evidence in the record of previous citations, those citations, which did not involve the same standard as the one at issue, had settled.[4] Under the circumstances of this case, it is concluded that the assessment of a penalty of $25.00 is appropriate.

Conclusions of Law

1. Respondent, D.H. Shelton & Associates, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act.[5] The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. § 1926.451(a)(4).

Order

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

1. Item 1 of serious citation number 1 is AFFIRMED, and a penalty of $25.00 is assessed.

E. Carter Botkin
Administrative Law Judge

Date: MAR 24 1993

[4]Those citations apparently settled for $1.00 each. (Tr. 41-43).

[5]*See* Tr. 11-13 and attachment to Respondent's correspondence to the Commission dated May 8, 1990.