United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. CONNELLY CONSTRUCTION CORP., Respondent.	OSHRC DOCKET NO. 95-1392

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 July 3, 1996. The decision of the Judge will become a final order of the Commission on August 2, 1996 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 July 23, 1996 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:

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Petitioning parties shall also mail a copy to:

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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: July 3, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1392

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR Complainant v. CONNELLY CONSTRUCTION CORP., Respondent	Docket Nr. 95-1392

Appearances

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For Respondent

BEFORE: JOHN H FRYE, III, Judge, OSHRC

DECISION AND ORDER

I. INTRODUCTION

This case involves an action filed by the Secretary of Labor pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678, (the Act). Respondent, Connelly Construction Company, is a corporation with its principal address at 1126 Upper State Road, Montgomeryville, Pennsylvania. At all times relevant to this matter it

maintained a worksite at the King of Prussia Mall in King of Prussia, Pennsylvania, (the worksite).

On June 8-29, 1995, Compliance Safety and Health Officer George Boyd of the Allentown area office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of the worksite. The inspection revealed violations of regulations promulgated by the Secretary at 29 C.F.R. §1926 pursuant to Section 5(a)(2) of the Act. As a result, five serious, one willful, and one repeat citation were issued to Respondent on August 21, 1995. Following Respondent's timely notice of contest, the complaint in this matter was filed on October 11, 1995. Trial of this case took place on March 5, 1996, in Philadelphia. Jurisdiction over the subject matter and the parties has been established.

II. THE CITATIONS

A. Standard of Proof

To establish a violation of any standard, Complainant must establish by a preponderance of the evidence that the standard is applicable, that the employer violated the standard, that at least one employee was exposed to or had access to the resulting hazard, and that the employer knew of the hazard. Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); aff'd, 681 F.2d 69 (1st Cir. 1982).

B. Citation 2, Item 1

29 C.F.R. §1926.451(d)(10) provides:

> Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toe boards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or

floor. Toe boards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

This standard required guardrails on Respondent's scaffolding on this worksite. Respondent has conceded that violations existed on both the south and east sides of the building (Tr. 136, 137, 138). Respondent disputes the willful characterization of the violation.

The Secretary contends that the citation is properly classified as willful for several reasons. First, Respondent's foreman, Richard O'Neill, and job superintendent, John Pico, knew of the requirement for guardrails, but did not supply them because they were being pushed to complete the job. (Tr. 152, 180, 181). The Secretary believes that this knowing disregard of the fall hazard constitutes a willful violation.

Second, after Mr. Boyd raised the issue on June 8, 1995, the Secretary contends that Respondent allowed its employees to continue to work on unguarded scaffolding. The Secretary urges that his videotape shows two employees working on unguarded scaffolding on June 9, 1995 (GX 1 3:50 - 5:20). At trial, Mr. Pico testified that he brought midrails to the worksite on the afternoon of the eighth after being informed that OSHA wanted them. He further testified that on Monday, the twelfth, he purchased two-by-fours to be used as top rails and delivered those to the site. According to Mr. Pico, the installation of guardrails began on the eighth and continued until the end of the job. The Secretary maintains that, even if Mr. Pico's testimony is accepted, it is clear from the video tape that work continued on the unguarded portions of the scaffolding, thus exposing employees to the hazard on the ninth.

The Secretary contends that the exposure of employees to the significant fall hazards was pervasive and justifies a willful classification. He argues that on the eighth, employees working on the east side of the building were in close proximity to the unguarded, outside edge of the scaffolding from the fifth and sixth frames (32½ to 39 feet high) (GX 1 at 0:00 - 0:50, 2:30 - 3:30; Tr. 13, 16, 37). He further argues that on the ninth, after having been advised by Mr. Boyd of the violation, Respondent continued to expose its employees to the hazard. (GX 1 at 3:50 - 4:30; Tr. 27-28, 29-30, 37, 115).

Respondent counters the Secretary's position with the following arguments. First, Respondent attacks Mr. Boyd's credibility. (See Respondent's brief, pp. 2-7.) Respondent's attack is not sufficient to call Mr. Boyd's testimony into serious question. Moreover, it appears aimed principally at Mr. Boyd's testimony that he had previously advised Mr. O'Neill of the need to guard scaffolding, and that this furnished 10% of the basis for the willful classification of this violation. Mr. Boyd's testimony sharply conflicts with Mr. O'Neill's on this point, and the latter's memory appears to be the more reliable. However, in his brief the Secretary does not rely on this purported conversation to support the willful classification, and I have not considered it.

Second, Respondent points out that while Mr. Boyd found that Mr. O'Neill knew of the need to guard the scaffolding, he questioned whether Mr. O'Neill understood the need to guard walkways connecting separate scaffolds. Respondent maintains that this is inconsistent. If Mr. O'Neill did not appreciate the seriousness of the hazard in the second situation, it should

be assumed that similarly, he did appreciate it in the first. However, Mr. Boyd testified that Mr. O'Neill clearly knew that guarding was required for the scaffolding, had installed it on the top level, and admitted that the press of the construction schedule had prevented him from installing it elsewhere. In contrast, Mr. Boyd testified that Mr. O'Neill did not seem to appreciate the seriousness of the fall hazard associated with the short span of planking connecting one scaffold structure to another. Rather than being inconsistent, Mr. Boyd appears to have been sensitive to the state of Mr. O'Neill's awareness of potential hazards. The differing classifications of these two violations does not tend to mitigate the willful citation.

Respondent relies on *Secretary v. Hartford Roofing Co.*, 17 OSHC 1361 (Rev. Comm. 1995). Apparently, Respondent believes that this case parallels *Hartford* in that Mr. O'Neill was confused about the requirements for the guarding of scaffolds. Respondent points to Mr. Boyd's classification of one citation as willful and one as serious and to the confusion in the testimony concerning whether Mr. Boyd had in fact instructed Mr. O'Neill on the fall protection requirements. The record does not support this position. Mr. O'Neill testified that he was aware of the fall protection requirements, but had not implemented them because of schedule considerations. (Tr. 152.) Mr. Pico testified to the same effect. (Tr. 180-81.)

Respondent apparently also takes the position that the schedule considerations dictated by the general contractor frustrated its efforts to prevent a violation, pointing to language in *Hartford* which indicates that a violation should not be classified as willful in the face of an employer's

good faith efforts to prevent it. However, the press of work can never properly be considered to excuse or mitigate a violation. The requirements of the Act must not be subjected to the dictates of schedules. Otherwise, the purpose of the Act to assure safe workplaces would be undermined. *Secretary v. Sommer Buildings, Inc.*, 17 OSHC 1117 (ALJ 1995), relied on by Respondent is not to the contrary. The fact that the press of work may have inhibited the Sommer's foreman in complying with the standard was not considered. There, the Sommer's interpretation of the standard, although unreasonable, was found to be insufficient, by itself, to support a willful citation.

Secretary v. Atlantic Battery Company, 16 OSHC 2131 (Rev. Comm. 1994), relied on by Respondent, similarly is distinguishable from the instant case. In *Atlantic Battery*, the Commission found that the respondent had engaged in a good faith effort to bring its operations into compliance and had made extensive changes in its procedures as a part of that effort prior to the inspection. No such effort has been shown in this case.

This hazard easily could have been abated. Nothing more sophisticated than securing two by fours to the scaffold frame was necessary. In addition, only the actively used sections of scaffolding had to guarded. Respondent's course of conduct of failing to guard the scaffolding because the general contractor was rushing their work and continuing to expose its employees to the fall hazard on June 9, 1995 after the inspector pointed out the hazard constitutes an indifference to employee safety which the willful designation was created to address and deter. *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-59 (No. 85-355, 1987). It is not unlike that course

of conduct found properly classified as a willful violation in *Universal Auto Radiator Manufacturing Company v. Marshall*, 631 F.2d 20, 23, 8 OSHC 2026, 2028-29 (3d Cir. 1980). There, a manufacturer deliberately removed a safety device from a power press because it slowed operations excessively and proceeded to use a device which was specifically disapproved by the standard. Here, Respondent proceeded to work from scaffolds which it knew lacked required safety devices (guardrails) because of the press of the construction schedule. The Commission found that a similar set of facts involving unguarded scaffolding constituted a willful violation in *Sal Masonry Contractors, Inc.*, 15 BNA 1609, 1613-1614 (Rev. Comm. 1992).

The Secretary proposes a $56,000 penalty. Presumably, this was calculated in accord with the procedures set out in ¶ C.2.m. of the OSHA Field Inspection Reference Manual. (See Tr. 42.) Those procedures dictate a $56,000 penalty for a high severity violation by an employer of 51-100 employees who is not entitled to any penalty reductions other than for size. I find this amount to be excessive in these circumstances. Here, the willful classification results principally from the fact that Respondent continued to expose employees to the hazard after it was pointed out by Mr. Boyd. However, Respondent did not ignore the hazard. Both Mr. O'Neill and Mr. Pico took steps to abate it. The former testified that the guardrails were being installed when Mr. Boyd arrived and that that process continued. (Tr. 160-61.) The latter testified that he purchased and delivered material to the worksite for this purpose. (Tr. 184.) "Abatement efforts subsequent to the citation ... may be considered in evaluating a Respondent's good faith for purposes of determining the penalty." *Secretary of Labor v. Acme*

Fence & Iron Company, Inc., 7 BNA OSHC 2228 (Rev. Comm. 1980). Moreover, neither Mr. O'Neill nor Mr. Pico questioned the requirement for guardrails, nor did either illustrate an attitude of indifference toward it. I find that a penalty of $25,000 is appropriate. *Cf.* Field Inspection Reference Manual, ¶ C.2.m.(1)(A)4.

C. Citation 3, Item 1

29 C.F.R. §1926.451(d)(6) provides:

> Where uplift may occur, panels shall be locked together vertically by pins or other equivalent suitable means.

Mr. Boyd speculated that Respondent's forklift could place its prongs either under the scaffold frame or planks. (Tr. at 46.) Because only the top two scaffold frames were locked together, Mr. Boyd concluded that, should this occur, there was nothing to give "substantial resistance" to the lull and indicate to the operator that he was lifting the scaffold. (Tr. at 49.)

This is insufficient to meet the Secretary's burden of persuasion. Because the top two frames were locked together, the lull necessarily could not accidentally lift less than these two frames should it make contact with the scaffolding anywhere within them, and would lift three or more frames should it make contact with the scaffolding anywhere below the top two frames. In order to conclude that "uplift may occur," I must assume that the lull had sufficient capacity to lift at least the weight of the top two scaffold frames. No evidence was presented as to either the lifting capacity of the lull or the weight of the scaffold frames. Consequently the Secretary did not demonstrate that uplift might have occurred at this worksite. Citation 1, item 3, is vacated.

D. Citation 1, Item 1

29 C.F.R. §1926.100(a) provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

Employees are required to wear hard hats where a hazard exists. The Secretary's video tape shows a number of employees working without hard hats (GX 1 at 0:00 - 0:55). They are shown working on scaffold frames while other employees are working above them (GX 1 at 0:40 - 0:55; 2:30 - 3:30). Most importantly, employees walked under the scaffolding and beneath sections with active work proceeding (Tr. 19, 21, 22). The employees were obliged to use a building entrance beneath the scaffolding to obtain access to the scaffold (GX 1 at 0:50 - 1:24; Tr. 167-69).

Serious injuries would occur should tools or materials fall on employees below. On June 8, 1995, the work on the fifth frame was 32½ feet above employees using the entrance. Moreover, neither screening nor toe boards were in place to minimize the chance of objects falling to the entrance below (Tr. 55, 56).

Respondent's position expressed in its brief is that proper consideration of the factors set out in § 17(j) of the Act would dictate that the proposed $1,200 penalty be reduced. However, Respondent has furnished no substantial reason in support of its position. Citation 1, item 1, is affirmed and a $1,200 penalty assessed.

E. Citation 1, Item 2

29 C.F.R. §1926.451(a)(13) provides that "[a]n access ladder or equivalent safe access shall be provided."

Respondent did not provide safe means of access to all levels of its scaffolding at the worksite. On June 8, 1995, on the east side of the building, employees had to walk under the scaffolding, enter the building, walk up an unguarded stairway, and cross the unguarded scaffolding to reach a ladder which would take them to the fifth frame where work was proceeding (Tr. 62-64). To reach the sixth frame they had to climb the exterior of the scaffolding (GX 1 at 0:20 - 0:40; Tr. 17). Respondent failed to ensure that it had ladders or equivalent safe access sufficient to reach all of the active working levels on its scaffolding.

The external frame of the scaffolding, which was used in some instances by employees, was not intended to act as a ladder (Tr. 64, 65). The rungs are unevenly spaced, have increasingly narrow widths, and do not extend the entire height of the scaffold frame (GX 1 at 3:25 - 3:30). Such a scaffold frame does not provide an equivalent or safe means of access and thereby constitutes a serious violation.

Respondent notes that it did provide ladders, pointing to Mr. Boyd's testimony that there were several ladders on the worksite (Tr. at 61). Relying on *Borton, Inc., v. OSHRC*, 734 F. 2d 508, 11 BNA OSHC 1921 (10th Cir. 1984), Respondent argues that it need only provide ladders, and that the standard does not require it to ensure their use. However, Mr. Boyd made clear that the ladders or other means of safe access were not available at all levels of the scaffold. (Tr. 62-63.) In order to satisfy the standard, Respondent must at least provide ladders in places where they are readily available for use by all employees working at all levels of the scaffold. *Siravo Contracting, Inc.*, 17 BNA OSHC 1013, 1015 (ALJ

1994). The fall hazard from the sixth level of the scaffolding was 39 feet. Death is the probable result of such a fall. The Secretary established all the elements of a serious violation. The citation is affirmed and a penalty of $1,200 assessed.

F. Citation 1, Item 3

29 C.F.R. §1926.451(a)(6) provides:

> Where persons are required to work or pass under the scaffold, scaffolds shall be provided with a screen between the toe board and the guardrail, extending along the entire opening, consisting of No. 18 gauge U.S. Standard wire ½-inch mesh, or the equivalent.

Respondent did not provide screening on the scaffolding above the entrance on the east side of the building (Tr. 66, 67). Employees had to use this entrance to access the scaffolding on the east side of the building (Tr. 69). Respondent created an obvious hazard by proceeding with the masonry work without screening the sections of scaffolding above this entrance. Respondent did not deny that it failed to screen its scaffold over the entrance. However, in its brief Respondent takes the position that the Secretary failed to establish that Mr. O'Neill was aware of the violation. Clearly, Mr. O'Neill was aware that the entrance was located under the scaffold and either knew or should have known that the screening was absent. Moreover, the Secretary did establish that the lack of screening was in plain view. (See Tr. 67.)

Respondent was performing masonry work on the fifth and sixth frames above the entrance on June 8, 1995 (GX 1 at 1:20 - 1:24; Tr. 56). Bricks, hand tools or other objects could have fallen over 30 feet onto employees below and caused serious injury (Tr. 67, 68). The Secretary established all of the elements of a serious violation; a penalty of $900 is assessed.

G. Citation 1, Item 4

29 C.F.R. §1926.1052(c)(1) provides:

> Stairrails and handrails. The following requirements apply to all stairways as indicated:
>
> (1) Stairways having four or more risers or rising more than 30 inches (76 cm), whichever is less, shall be equipped with:
>
> (i) At least one handrail; and
>
> (ii) One stairrail system along each unprotected side or edge.
>
> Note: When the top edge of a stairrail system also serves as a handrail, paragraph (c)(7) of this section applies.

Respondent's employees were obliged to use the stairway on June 8 on the east side of the building to access its scaffolding (Tr. 19, 21, 22, 69). The stairway had no guardrails or handrails. Some metal studs were in place but were not adjacent to each flight of stairs or landings to prevent a fall from the stairway (Tr. 132).

Respondent was aware of its employees use of the stairway. CSHO Boyd and Mr. O'Neill witnessed one employee using the stairway on June 8, 1995. Indeed, Mr. O'Neill testified that he and his employees used the stairway (Tr. 167-69).

In its brief, Respondent points out that the cited standard states, at 29 CFR § 1926.1052(c)(12), that "[g]uardrail system criteria are contained in subpart M of [Part 1926]." Respondent's reliance on § 1926.1052(c)(12) is misplaced. By its terms, that provision applies only to landings, not to stairways.

The fall hazard created by the lack of guardrails was from 12 to 18 feet depending on which flight or landing an employee fell from (Tr. 70). Serious injuries, however, could result from such falls (Tr. 71). The

Secretary has established all the elements of a serious violation; a penalty of $1,200 is assessed.

H. Citation 1, Item 5

As set forth in section B above, guardrails were required on Respondent's scaffolding pursuant to 29 C.F.R. §1926.451(d)(10). An unguarded plankway consisting of several adjacent but unsecured boards connected two scaffold towers on the east side of the building on June 8, 1995 (Tr. 24, 71). The plankway was located on the fifth scaffold frame (Tr. 72).

As shown on the video tape, employees used the plankway to cross from one tower to the other and performed work form it (GX 1 at 0:00 - 0:50; 2:30 - 3:30). The absence of guardrails on the plankway was an obvious hazard that Mr. O'Neill was aware of (Tr. 72, 73). Serious injuries could have occurred from a fall to the ground 32½ feet below (Tr. 74).

The Secretary did not combine this item into Citation 2, item 1, because he viewed it as constituting a separate hazard that may not have been as apparent to Mr. O'Neill as the absence of guardrails along the scaffolding itself (Tr. 72). Respondent admits to the violation, but objects that this item involves the same standard and same abatement as Citation 2, item 1. Respondent, relying on *Secretary of Labor v. J.A. Jones Construction Company*, 15 BNA OSHC 2201, 2207 (Rev. Comm. 1993), argues that the two should be combined as a single serious violation. Respondent is correct; this item is added as a separate instance to Citation 2, item 1. The willful classification of and penalty for Citation 2, item 1 remains unchanged.

III CONCLUSIONS OF LAW

A. Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 652(5) ("the Act").

B. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, 29 U.S.C. § 659(c).

Citation 1, Item 1.

C. Respondent was in serious violation of the standards set out at 29 CFR §§ 1926.100(a). A penalty of $1,200 is appropriate.

Citation 1, Item 2.

D. Respondent was in serious violation of the standard set out at 29 CFR § 1926.451(a)(13). A penalty of $1,200 is appropriate.

Citation 1, Item 3.

E. Respondent was in serious violation of the standard set out at 29 C.F.R. § 29 CFR § 1926.451(a)(6). A penalty of $900 is appropriate.

Citation 1, Item 4.

F. Respondent was in serious violation of the standard set out at 29 C.F.R. § 29 CFR § 1926.1052(c)(1). A penalty of $1,200 is appropriate.

Citation 1, Item 5; Citation 2, Item 1.

G. Respondent was in willful and serious violation of the standard set out at 29 C.F.R. § 29 CFR § 1926.451(d)(10). A penalty of $25,000 is appropriate.

Citation 3, Item 1.

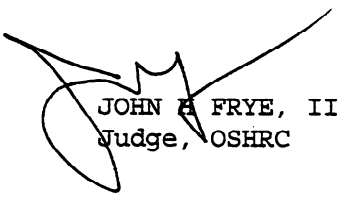
H. Respondent was not in violation of the standard set out at 29 C.F.R. § 1926.451(d)(6).

IV. ORDER

A. Citation 1, Items 1, 2, 3, and 4 are affirmed as serious violations of the Act.

B. Citation 1, Item 5, and Citation 2, Item 1, are affirmed as willful and serious violations of the Act.

C. A total civil penalty of $29,500 is assessed.



JOHN H. FRYE, III
Judge, OSHRC

Dated: JUL - 3 1998
Washington, D.C.