

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

Oregon Occupational Safety & Health Division)	Docket No. 09-00144SH
)	
Plaintiff,)	
)	
vs.)	Citation No.: C9048-047-09
)	
BRAND ENERGY SERVICES)	
Defendant.)	OPINION AND ORDER

Hearing convened and closed before Administrative Law Judge John Mark Mills in Portland, Oregon on November 17, 2011. OR-OSHA, was represented by Senior Assistant Attorney General, Susan Bischoff. The employer, Brand Energy Services, Inc., was represented by their attorney, Thomas P. Holt.

Prior to the time of hearing, the parties entered into a stipulation. Pursuant to the stipulation, OR-OSHA's exhibits 1 through 36 and employer's exhibits 1A, 2A, and 26A were received into evidence. The parties also stipulated to a number of facts relevant to the issue in this case. OR-OSHA also presented testimony at the time of the hearing.

ISSUES

The employer contests the citation issued in this matter on August 24, 2009. There are three items cited in the citation. Initially all three were at issue. OR-OSHA withdrew Item 1-3 prior to the time of hearing. The employer withdrew its appeal of Item 1-2 prior to the time of hearing. The only item in dispute is Item 1-1 and the only issue raised by the employer is the applicability of the rule that the Item relies on to the facts of this case.

FINDINGS OF FACT

The factual stipulations of the parties are incorporated by reference and are set forth in exhibit 37. Those facts are supplemented as follows:

29 CFR Part 1926 is a Federal OSHA rule regarding safety standards for the use of scaffolds in the construction industry. The rule was revised and became effective on November 29, 1996 except for section 1926.451(g)(2) (hereinafter (g)(2)) which became effective September 2, 1997. That section requires employers to have a competent person determine the feasibility and safety of providing fall protection for employees during the erection and dismantling of supportive scaffolds. Section 1926.451(g)(1)(vii) (hereinafter (g)(1)) is the general fall protection rule requiring the use of fall protection when an employee is exposed to a fall of more than 10 feet while on a scaffold.

Oregon OSHA has adopted the Federal rule in total. OR-OSHA interprets the rule as requiring the employer to have a competent person determine the feasibility of using fall protection during the erection or dismantling of scaffolds pursuant to (g)(2). If fall protection is deemed feasible, OR-OSHA then interprets the rule to require the use of fall protection during the erection and dismantling of scaffolds pursuant to (g)(1).

On March 30, 2009, employees of the employer were dismantling a scaffold which the employer had constructed at a facility in Newberg, Oregon. The employer had determined through a competent person that fall protection was feasible during the erection and dismantling of the scaffold and enforced a 100 percent tie off rule above six feet to provide fall protection. See e.g., Exhibit 5, pages 3, 6, 7, 72, 73. The scaffold which had been erected was called the "dance floor" by the employees and was approximately 180 feet in length. (Ex. 10). The scaffold was constructed with aluminum I-beams, 20 feet in length and spaced 16 inches apart. They were covered with 4 x 8 foot $\frac{3}{4}$ inch plywood sheeting secured by 16 penny nails. The employees had been directed to remove all of the nails from the plywood. One employee was handing a sheet of plywood to an employee, Mark Wolf, who was then handing them to another employee. In doing so, Mr. Wolf stood on a edge of one of the sheets of plywood which had shifted and was not supported by the I-beam. It gave away and both Mr. Wolf and the plywood fell approximately 40 feet to the ground. Mr. Wolf was wearing a harness, but was not tied off at the time of the fall.

OR-OSHA was notified of the accident and began an investigation. The employer was cited for not having fall protection under (g)(1). It was not cited under (g)(2) because the employer had complied with that provision by having a competent person determine the feasibility of using fall protection during the erection and dismantling of the scaffold.

CONCLUSIONS AND OPINION

As noted above, the sole issue in this case is whether 29 CFR 1926.451(g)(1) applies to the facts of this case. OR-OSHA has the burden of proof. Pursuant to the parties stipulation, OR-OSHA agrees that if the rule does not apply citation Item 1-1 should be dismissed. The employer admits the violation if the rule is applicable. In essence the employer's position is that (g)(1) does not apply during the erecting and dismantling of scaffolds because (g)(1) itself provides that (g)(2) addresses scaffolds during erection and dismantling. The applicable rules are as follows:

(g)(1)(vii)

(g) Fall Protection

- (1) Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

* * * * *

(vii) For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

(g)(2)

- (2) Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall

protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

I do not set forth the entirety of (g)(1). Subparts i through vi provide for specific fall protection in particular circumstances which are not applicable in this case. Subsection vii is the general catchall for all other scaffolds not specified in those sections.

As noted in my findings of fact, when Federal OSHA amended part 1926, the scaffold rule, it delayed implementation of the effective date of (g)(2). This was because the prior scaffold rules had not required fall protection use during erection and dismantling of scaffolds. It had been generally understood that fall protection under those circumstances was often not feasible and in many cases was more dangerous than the risk of a fall itself. This history is discussed in the commentary to the rule. See e.g., exhibit 1A, page 43. However, when the rule was amended it was determined that fall protection was often feasible and appropriate during erection and dismantling and accordingly, (g)(2) was adopted to require a competent person to determine when fall protection was feasible during erection and dismantling. Implementation of that provision was delayed in order to allow employers to essentially catch up with the change in law.

The question here is what if any interplay there is between (g)(1), the general fall protection requirement and (g)(2). Employer argues that the two are incompatible because (g)(1) specifically indicates that paragraph (g)(2) addresses fall protection for scaffold erectors and dismantlers. The employer's position, therefore, is that (g)(1) has no applicability during the erection and dismantling of scaffolds.

OR-OSHA's interpretation of the rule is to the contrary. OR-OHSA's position is that (g)(2) is simply a feasibility standard requiring the employer to determine whether fall protection is feasible during the erection and dismantling of scaffolds. If it is, OR-OSHA's position is that (g)(1) then applies to require the use of such fall protection. Consistent with that interpretation, the employer was not cited under (g)(2) because the employer did have a competent person determine the feasibility of the use of fall protection and it was determined that fall protection

was feasible. The employees were directed to use fall protection. The employee who was injured in this case, due to a fall, had a harness on for the use of fall protection, but was simply not tied off. Accordingly, the employer was cited under (g)(1) for the employee's failure to use the fall protection.

I find OR-OSHA's interpretation of rule more persuasive for a number of reasons. First, it is a general principle of administrative rule interpretation that the agency's interpretation of its own rule is entitled to deference. *Booth v. Tektronix*, 312 Or 463, 473 (1991); *Branscom v. LCDC*, 297 Or 142, 145 (1984). Given this requirement of deference it is not within the province of the Administrative Law Judge to substitute his judgment regarding the interpretation of the rule over the agency. *Oregon Occupational Safety and Health Div. v. Madcreek Logging*, 123 Or 453, 458 to 9.

In this case the testimony of OR-OSHA's representative, Ron Haverkost is consistent with OR-OSHA's position. The agency recognizes that it not always feasible under all circumstance for fall protection to be provided to employees during the erection and dismantling of scaffolds. This is the reason for (g)(2). Under (g)(2) a competent person for the employer is required to determine whether such protection is feasible. If it is, the general fall protection rule, (g)(1), applies. If it is not feasible, the use of fall protection is not required under (g)(1).

The employer argues that neither (g)(1) nor (g)(2) actually require the use of fall protection and it was therefore improper for OR-OSHA to cite the employer under (g)(1) where feasibility had been determined under (g)(2), and fall protection was provided, but was not used. I agree with OR-OSHA that (g)(1) resolves that issue. Subsection IV specifically requires that the employee be protected "by the use of personal fall" protection. Again, this is consistent with OR-OSHA's position. It is true that (g)(2) does not provide for the use of fall protection, it simply requires that the determination of whether fall protection should be provided. Use is required by (g)(1). (g)(1) does not just require that the employer provide fall protection, it requires its use. Since I agree with the employer that (g)(2) does not itself require the use of fall protection, but only a determination of feasibility, its interpretation of (g)(1) as only requiring that fall protection be provided would mean that an employer would be free to advise its employees that it was not necessary to actually use the fall protection. It is not surprising that OR-OSHA does not interpret the rule in that fashion.

I note that this is an issue of first impression in Oregon and, as far as I can tell, at the Federal level as well. The rule at issue is the same as the Federal rule and accordingly guidance from Federal Appellate Courts would be helpful in evaluating the interplay of (g)(1) and (g)(2). There are no Federal appellate cases that reference (g)(2). There are five, including one cited by the employer, at the Federal Administrative Law Judge level. As I review those cases, none provide any guidance in this matter. *Secretary of Labor v. Rebuilders, Inc.*, 23 O.S.H. Cas. (BNA) 1662 (2011), *Secretary of Labor v. Bast Hatfield, Inc.*, 18 BNA, 1848 (1999), *Secretary of Labor v. New England Synthetic Systems, Inc.*, 18 BNA, 1818 (1999), *Secretary of Labor v. Western Water Proofing Company, Inc.*, 5 BNA 1191 (1976), *Secretary of Labor v. Atlantic Heydt Corp.*, exhibit 2A (2004).

In sum, I find OR-OSHA's interpretation of the rules at issue in this matter persuasive. 29 CFR 1926.451(g)(1) applies to the factual circumstances of this case. I therefore affirm Item 1-1 of the citation.

ORDER

IT IS HEREBY ORDERED as follows:

1. Item 1-1 of the citation issued in this matter on August 24, 2009 is approved.
2. Item 1-2 of the citation is approved based on the employer's withdrawal of its appeal of that citation.
3. Item 1-3 is dismissed based on OR-OSHA's withdrawal of that item.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Portland, Oregon on January 11, 2012.

Workers' Compensation Board

John Mark Mills
Administrative Law Judge