

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2000-3944
OSHA INSPECTION NO. 303542534
CSHO ID NO. I2539

v.

STONE RESTORATION OF AMERICA,

ORDER

RESPONDENT.

THIS MATTER was heard by the undersigned on February 22, 2001, in Concord, North Carolina. Complainant was represented by Ralf F. Haskell, Special Deputy Attorney General. Respondent was represented by its manager, John Lambert, Sr. Present for the hearing for the Department of Labor, OSHA Division, were Health Compliance Officer, Sonja Murphy; Health Compliance Supervisor, John Saunders; and observer, Jerry Barker. Present at the hearing for respondent were Charles Cole, respondent's corporate safety consultant; and Luis Lagos, respondent's employee.

Prior to the hearing, attorney Haskell dismissed Citation 1, Item 1e, a serious violation of 29 C.F.R. 1926.454(b).

After reviewing the record file, receiving the evidence, hearing the arguments of the parties and reviewing the applicable legal authorities, the undersigned makes the following:

FINDINGS OF FACT

1. The complainant is charged by law with responsibility for Compliance with and enforcement of the provisions of N.C. Gen. Stat. §95-126 et seq., the Occupational and Safety and Health Act of North Carolina (the Act).
2. The respondent is a North Carolina corporation, duly organized and existing under the laws of the State of North Carolina, which does business in North Carolina and maintains a place of business in Charlotte, North Carolina. Respondent, among other things, provides painting subcontractors on construction projects. It employs approximately 22 employees. It is subject to the provisions of the Act.
3. On April 20, 2000, Health Compliance Officer Sonja Murphy ("HCO ") and Health Compliance Supervisor John Saunders ("HCS") were driving on West Morehead Street in Charlotte, North Carolina, a public thoroughfare within their jurisdiction. In

plain view, they observed an individual standing on top of a scaffolding without guardrails or personal fall protection. They determined that a potential hazard existed. They photographed the scene from the public way and then sought out the general contractor for the project. (Complainant's Exhibit #6)

4. HCO Murphy and HCS Saunders spoke with the foreman for the general contractor, Heard Ratzliff Construction. The general contractor was restoring an old building consisting of two floors and a basement. The HCO and HCS addressed the hazard with the Heard Ratzliff foreman, who informed them that the scaffolding in question belonged to a subcontractor, respondent Stone Restoration of America. They identified the individual working on the platform, Luis Lagos, as one of respondent's employees. Someone from Heard Ratzliff called respondent's foreman to come to the site.

5. The HCO and HCS initiated an opening conference with the individual working on the scaffold, Luis Lagos. They explained the purpose of their inspection and photographed the scaffold in question. (Complainant's Exhibits #1, 2, 3, 7)

6. The scaffold was located on the first floor of the building. It was constructed so that the front of the scaffold faced a set of windows which respondent had been subcontracted to paint. The scaffold was two bucks high and of tubular construction. The platform on which Lagos was working was 10' 5" from the concrete floor. The construction of the scaffold was as follows:

a) From front to back, the total width of the platform level upon which Lagos was painting was 61". However, the platform level on which he was working was not fully planked. Lagos was standing on a plank 19" wide, which was fitted at the front of the platform level in order to enable Lagos to paint the windows. No planking had been installed behind him on the same platform level. Thus, behind Lagos on the same level was 42" of open space through which he could have fallen directly to the concrete floor below. There were two other 19" planks installed on the scaffold at levels below that on which Lagos was working, which could have been used to fully plank the level on which he was working.

b) The level on which Lagos was working had no guard rails, nor was Lagos fitted with any personal fall protection to prevent him from falling over the side of the scaffold. There were sufficient components located in the general area on the first floor to have completed construction of the guard rails.

c) In two places, on the top buck in the front and on the bottom buck in the rear, the scaffold was not braced by cross, horizontal, or diagonal braces, or a combination thereof, to prevent movement or collapse of the scaffold. There were sufficient

additional components in the same general area on the first floor to have completed the bracing of the scaffold; and

d) The wheels of the scaffold were not locked with positive wheel and/or wheel swivel locks, or equivalent means, to prevent movement of the scaffold while the scaffold was being used in a stationary manner.

7. The HCO and HCS interviewed Lagos. His primary language is Spanish, but he was able to communicate in broken English. Lagos told the HCO and HCS that he had been working for respondent for approximately three weeks. He stated that he had completed his work painting the windows on the second floor and went down to paint the windows on the first floor. He stated that he had received training on the erection and use of scaffolds from his previous employer, but not from respondent.

8. Approximately an hour after the HCO and HCS began their inspection, respondent's foreman, Carl Eaton, arrived at the site. The HCO and HCS had already completed their inspection on the first floor and were inspecting the second floor. They presented their credentials to respondent's foreman and addressed the hazards which had caused them to inspect the site.

9. Eaton did not indicate to the HCO or HCS whether he had shown Lagos how to properly construct and maintain a scaffold. Eaton did not indicate to the HCO or HCS whether Lagos had previous experience constructing and maintaining scaffolds.

10. At the time of the inspection, the scaffold on the second floor was constructed properly and Lagos had completed painting the windows on the second floor.

11. The HCO and HCS requested that Eaton provide documentation regarding safety programs, training and meetings. The information was not available on the construction site and they were referred to John Lambert, Sr.

12. The HCO and HCS continued their opening conference with Lambert, Sr., who provided to the OSHA officers what he represented to be the company's health and safety programs, safety meeting minutes and training records. (Complainant's Exhibits # 4, 5)

13. Respondent's safety program included (1) "Section 4.0 Ladder Inspection and Scaffolding Use" (Respondent's Exhibit #2)⁽¹⁾; and (2) "Appendix A - Scaffold Instructions (Part of Safety Program)." (Complainant's Exhibit #5). The instructions included guidance on how to properly plank, brace, lock and install guard rails on mobile scaffolds. The instructions were written in English.

14. Respondent provided safety minutes for two meetings. (Complainant Exhibit #4) One safety meeting was held on April 10, 2000 - shortly before the inspection. The other was held on May 1, 2000, after the inspection. The minutes from the safety meeting on April 10, 2000 did not address proper construction of scaffolding, nor did Lagos sign the safety meeting attendance sheet.

15. Respondent's Human Resources Guide warns as follows:

All employees are responsible for learning the Company's safety procedures, which are outlined in the Company's Environmental Health and Safety Manual. A copy of the Environmental Health and Safety Manual will be distributed to each new employee. Employees who disregard the Company's safety procedures will be subject to disciplinary action, up to and including termination, as warranted by the circumstances.

(Respondent's Exhibit #1). The Human Resources Guide has an "Employee Acknowledgment Form" at the back for employees to sign acknowledging that they received the guide and that they understand they are "responsible for becoming familiar with the policies described in it."

16. In order to enforce the Act, complainant issued citations on June 7, 2000, for violations of the Act as follows:

Citation 1, Item 1a

A serious violation of 29 C.F.R. 1926.451(b)(1): Each platform on all working levels of scaffolds were not fully planked or decked between the front uprights and the guardrail supports:

(a) job site first floor, employee was working on a 10' 5" two buck high mobile scaffold which did not have platforms fully planked and had spaces greater than one inch, exposing employees to a potential fall hazard.

The proposed penalty for this violation was the minimum penalty of \$100.00.

Citation 1, Item 1b:

A serious violation of 29 C.F.R. 1926.451(g)(1)(vii): Each employee on a mobile scaffold more than 10 feet above lower level was not protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section:

(a) job site first floor, employee was working on a 10' 5" two buck high mobile scaffold without the use of guardrails or a fall protection system.

This item was grouped with Citation 1, Item 1a with no proposed penalty.

Citation 1, Item 1c:

A serious violation of 29 C.F.R.1926.452(w)(1): Scaffold was not braced by cross, horizontal, or diagonal braces, or combination thereof, to prevent racking or collapse:

(a) job site first floor, employee was working on a 10' 5" two buck high scaffold without cross braces on each section to prevent swaying and displacement.

This item was grouped with Citation 1, Item 1a with no proposed penalty.

Citation 1, Item 1d:

A serious violation of 29 C.F.R. 1926.452(w)(2): The casters and wheels on mobile scaffolds were not locked with positive wheel and/or wheel swivel locks, or equivalent means, to prevent movement of the scaffold while the scaffold is used in a stationary manner:

(a) job site first floor, employee was working on a 10' 5" two buck high mobile scaffold without the wheels being locked to prevent movement.

This item was grouped with Citation 1, Item 1a with no proposed penalty.

17. The case was initiated by a Notice of Contest filed by respondent which followed the issuance of the citations.

Citation 1, Item 1a

A serious violation of 29 C.F.R. 1926.451(b)(1)
(Scaffold Platform Not Fully Planked)

18. The HCO and HCS personally observed and photographed one of respondent's employees, Luis Lagos, standing on a scaffolding platform which was over ten feet high and which did not have planking across the back two-thirds of the platform.

19. The partially planked platform created a hazardous condition in that an employee could fall through the area not covered with planks.

20. The substantial probable result of such a fall would be abrasions, contusions, sprains, strains and possibly bone fractures.

21. One of respondent's employees was exposed to the hazard, to wit: Luis Lagos.

22. Respondent knew or should have known about the violations in that they were (1) in plain view; (2) respondent's foreman had personally constructed the defective scaffold; and (3) respondent's foreman had left Lagos at the site to paint the windows, without instructing him to complete the defective scaffold prior to using it or to not use the defective scaffold until the foreman had completed it.

23. The \$100.00 penalty imposed for the violation cited in Citation 1, Item 1a was in accordance with the North Carolina Department of Labor Manual as follows:

a) the severity of the violations was properly determined to be low in that the foreseeable injuries would be temporary, but reversible and would result in only minor treatment and not hospitalization;

b) the probability assessment was properly deemed to be low in that only one employee was exposed to the hazard for only a few hours and respondent abated the condition immediately;

c) the gravity based penalty was properly calculated to be \$750.00;

d) the maximum adjustment factor of 60% for the size of the employer was properly applied;

e) the maximum adjustment factor of 10% for respondent's cooperation with the inspection was properly applied;

f) the maximum adjustment factor of 10% for no history of prior violations was properly applied;

g) the adjustment factor of 10% for having a basic safety and health program in place was properly applied in that respondent's program was sufficient as a full safety program on the construction of scaffolding, but it was still in the development stages and did not document the training it provided regarding the construction and maintenance of scaffolding to its employees, including Lagos; and,

h) the 90% total reduction of the \$750.00 gravity based penalty was properly applied to reduce the penalty to the minimum of \$100.00.

24. The hazard could be avoided by fully planking scaffold platforms over 10'.

Citation 1, Item 1b

A serious violation of 29 C.F.R. 1926.451(g)(1)(vii)
(No Guardrails Around or Fall Protection on Scaffold Platform)

25. The HCO and HCS personally observed one of respondent's employees, Lagos, standing on a scaffolding platform which was over ten feet high and which did not have guardrails or another acceptable personal fall protection system.

26. The lack of fall protection created a hazardous condition in that an employee could fall over the side of the scaffold to the concrete floor.

27. The substantial probable result of such a fall would be abrasions, contusions, sprains, strains and possibly bone fractures.

28. One of respondent's employees was exposed to the hazard, to wit: Luis Lagos.

29. Respondent knew or should have known about the violations in that they were (1) in plain view; (2) respondent's foreman had personally constructed the defective scaffold; and (3) respondent's foreman had left Lagos at the site to paint the windows, without instructing him to complete the defective scaffold prior to using it or to not use the defective scaffold until the foreman had completed it.

30 Respondent abated the hazard immediately.

31. The hazard could easily be avoided in the future by erecting guard rails on the four sides of any scaffold platform over 10' or by providing employees suitable alternative fall protection.

32. This item was properly grouped with Citation 1, Item 1a and no penalty was imposed.

Citation 1, Item 1c

A serious violation of 29 C.F.R.1926.452(w)(1)
(Scaffold Was Not Braced to Prevent Racking or Collapse)

33. The HCO and HCS personally observed one of respondent's employees, Luis Lagos, standing on a scaffolding platform which was over ten feet high and which was not properly braced in two places by cross, horizontal, or diagonal braces, or combination thereof, to prevent racking or collapse.

34. The lack of proper bracing of the scaffold created a hazardous condition in that the scaffold could move or collapse and an employee could fall to the concrete floor.

35. The substantial probable result of such a fall would be abrasions, contusions, sprains, strains and possibly bone fractures.

36. One of respondent's employees was exposed to the hazard, to wit: Luis Lagos.

37. Respondent knew or should have known about the violations in that they were (1) in plain view; (2) respondent's foreman had personally constructed the defective scaffold; and (3) respondent's foreman had left Lagos at the site to paint the windows, without instructing him to complete the defective scaffold prior to using it or to not use the defective scaffold until the foreman had completed it.

38. Respondent abated the hazard immediately.

39. The hazard could easily be avoided in the future by properly bracing all four sides of each buck of any scaffold platforms over 10'.

40. This item was properly grouped with Citation 1, Item 1a and no penalty was imposed.

Citation 1, Item 1d

A serious violation of 29 C.F.R. 1926.452(w)(2)
(The Wheels of the Mobile Scaffold Were Not Locked)

41. The HCO and HCS personally observed one of respondent's employees, Luis Lagos, standing on a scaffolding platform which was over ten feet high on which the wheels were not locked to prevent movement.

42. The unlocked wheels on the scaffold created a hazardous condition in that the scaffold could move while being used in a stationary manner and an employee could fall to the concrete floor.

43. The substantial probable result of such a fall would be abrasions, contusions, sprains, strains and possibly bone fractures.

44. One of respondent's employees was exposed to the hazard, to wit: Luis Lagos.

45. Respondent knew or should have known about the violations in that they were (1) in plain view; (2) respondent's foreman had personally constructed the defective scaffold; and (3) respondent's foreman had left Lagos at the site to paint the windows, without instructing him to complete the defective scaffold prior to using it or to not use the defective scaffold until the foreman had completed it.

46. Respondent abated the hazard immediately.

47. The hazard could easily be avoided in the future by locking the wheels of any mobile scaffold with platforms over 10'.

48. This item was properly grouped with Citation 1, Item 1a and no penalty was imposed.

Respondent's Defense
(Isolated Incident of Employee Misconduct)

49. After the citations were issued, respondent hired Charles Cove, a safety consultant, to investigate the violations and to assist in formalizing respondent's safety and health program. Cove attended respondent's safety meetings.

50. Cove testified at the hearing on behalf of respondent.

51. Respondent's management, John Lambert, Sr., John Lambert, Jr. and Carl Eaton, informed Mr. Cove that all of respondent's jobs do not require the use of scaffolds. They informed Cove that when a job did require a scaffold, respondent would train the employees regarding the construction and maintenance of scaffolds at the safety meeting prior to the job. However, the managers told Cove that it was respondent's practice for Mr. Eaton to erect the scaffolds at the job sites.

52. Eaton told Cove that he had erected a proper and complete scaffold on the second floor of the building in the presence of Luis Lagos. He told Cove that he had demonstrated to Lagos how to construct the scaffold in the event Lagos had to move it or change anything. Eaton told Cove that he then partially constructed the scaffold on the first floor - not completing it because he did not have the components for two complete scaffolds at the site and it would save time to use some of the components from the second floor scaffold instead of building two separate units. Eaton told Cove that he then left the site for approximately one hour. His intention when he returned was to take some of the components from the second floor scaffold to complete the first floor scaffold for Lagos to paint the first floor windows. Before Eaton left the site, he neither directed Lagos to use or not to use the first floor scaffold after he finished painting the windows on the second floor.

53. Cove had problems communicating with Lagos due to his broken English. John Lambert, Jr. acted as interpreter during the interview between Cove and Lagos. Lagos told Cove, through Lambert, Jr., that when the HCO and HCS asked him about his training, he tried to give his training history going back to the previous employer, but

then did not understand what they were asking him and so he referred them to his supervisor, Eaton.

54. Respondent's managers showed Cove their safety and health policies and represented to Cove that the policies were effectively communicated to their employees. Respondent produced no evidence at the hearing as to how its policies were effectively communicated to its employees -- and in particular, its Spanish speaking employees, including Lagos.

55. Charles Cove was respondent's only witness.

56. John Lambert, Sr. was present at the hearing but did not testify.

57. Luis Lagos was present at the hearing but did not testify.

58. John Lambert, Jr. was not present at the hearing and did not testify.

59. Carl Eaton was not present at the hearing and did not testify.

60. Respondent produced no evidence or documentation that they held a safety meeting to discuss scaffold erection and maintenance prior to the Morehead Street job and that Lagos was present for the meeting, heard the instructions or understood the instructions.

61. Respondent produced no evidence or documentation that they provided a copy of its written scaffolding instructions, its Human Resources Guide or its disciplinary policies (hereafter jointly referred to as "written instructions") to any of its employees, including Lagos, or that its employees or Lagos had read the instructions or understood them.

62. Respondent produced no evidence or documentation that it provided a Spanish version of the written instructions to any of its Spanish speaking employees, including Lagos.

63. Other than Cove's testimony of what respondent's managers told him after the citations had been issued, respondent produced no evidence of any verbal communication from respondent to its employees, including Lagos, regarding the content of the written instructions.

64. Eaton told Cove that, prior to leaving the work site on the day of inspection, Eaton had demonstrated to Lagos the proper method of erecting scaffolding and told Lagos where, when and how to work that day. Cove did not obtain the details of how

thorough Eaton's training of Lagos was or how detailed the instructions were that Eaton gave Lagos on the day of the inspection. Eaton showed Cove how he demonstrated the erection of scaffolding to employees. Eaton included in his demonstration to Cove how to properly construct the guard rails and the cross bracing, how to fully plank the top platform and how to lock the wheels. However, Cove could not say whether Eaton had demonstrated to him the same way Eaton had demonstrated to Lagos. Cove could not say what Eaton actually told Lagos. Cove could not say what Eaton actually told Lagos about using the first floor scaffold on the day of the inspection. Cove could not say whether Lagos understood any of the information Eaton had given him.

65. Respondent produced no documentation of what training Eaton gave Lagos on or before the day of the inspection or what he told Lagos about using the first floor scaffold.

66. After the citations were issued, Eaton and Lagos advised Cove that Eaton had given Lagos a verbal warning for working on the defective scaffolding instead of completing it as Eaton had shown him earlier in the day.

67. At the informal conference, respondent raised the affirmative defense of "isolated incident of employee misconduct."

68. Respondent did not assert its defense of "isolated incident of employee misconduct" on its "Statement of Employer's/Respondent's Position," which it filed with the Safety and Health Review Board on October 10, 2000.

69. Complainant did not request a continuance of the hearing in order to investigate or more fully prepare a response to respondent's assertion of an affirmative defense.

DISCUSSION

Respondent's Defense of Isolated Incident of Misconduct

The defense of "isolated incident of employee misconduct" is an affirmative defense. If a respondent avails itself of the formal pleadings procedure as set forth in .0304 of the Rules of Procedure for the Safety and Health Review Board of North Carolina (ROP), then it must assert all affirmative defenses in its Answer. However, "if formal pleadings are not elected, the [r]espondent shall not be deemed to waive affirmative defenses and such defenses may be used at the hearing." ROP .0304 (2)(b). The Rules of Procedure further provide as follows:

Failure to set out the reasons for objecting to the citation on the back of the Statement of Employer's/Respondent's Position shall not be grounds for dismissing the notice of contest, but may be grounds for a continuance in the discretion of the hearing examiner.

ROP .0303(h).

Respondent argued at the hearing that Lagos' presence on the defective scaffold was an isolated incident of employee misconduct and, thus, respondent should not be held responsible for the unsafe scaffolding used by Lagos. Respondent argued that it gave notice to complainant of its affirmative defense at the informal conference. Complainant, by and through counsel, argued that it had no notice of respondent's defense, but did not request a continuance. Thus, respondent's affirmative defense was properly raised at the hearing and considered by the undersigned.

The North Carolina Operations Manual, Chapter V, Section E, provides that an employer may be excused from a violation which has otherwise been proved by the HCO if it can prove at the hearing "unpreventable employee misconduct" or "isolated event." The elements of this affirmative defense are as follows:

- a) The violation resulted exclusively from employee misconduct;
- b) The violation was not participated in, observed by, or performed with the knowledge and/or consent of any supervisory personnel;
- c) The employee conduct was in conflict with well-established company policy or work-rule which was in effect at the time, and was actively enforced through disciplinary action or other appropriate procedures. In addition, in determining whether the employer has pertinent and effective company policy or work-rule, the Inspector must find that the employer has a specific program for instructing employees in safe work places.

In interpreting the employer misconduct defense, the North Carolina Court of Appeals held that in order to establish the defense of isolated employee misconduct, the employer must show "that it had taken all feasible steps to prevent an accident from occurring; that the employee's action was contrary to an effectively communicated and enforced work rule; and that the employer had neither actual nor constructive knowledge of the violation." O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 635, 353 S.E.2d 869, 873 (1987). Some degree of employee negligence or carelessness must be expected. Brooks v. Budd Piper Roofing Co., Inc. OSHANC 80 1039 (RB 1985). Only when an employee's conduct is so extraordinary that it cannot be conceivably considered ordinary conduct on the job and must be considered

intentionally dangerous can the defense succeed. Brooks v. Rebarco, Inc., OSHANC 83-1039 (RB 1985)

Generally, the rules prohibiting hearsay are relaxed at administrative hearings. ROP .0513 (the ALJ may "at all times ...receive and give due regard to hearsay evidence if the interests of justice so require."). The relaxed rule allows for hearings to be held within a reasonable time after the citations are issued, reduces the number of witnesses required at hearings and helps protect employees from having to testify directly against their employer at a formal hearing. Thus, it is acceptable, and fairly typical, for the OSHA inspectors to interview the employees and then testify to their responses. It is for the ALJ to determine whether the circumstances of the inspector's interview and the other evidence gathered at the site support giving probative weight to the employee's alleged statements to the inspector. In fairness, the ALJ may also consider - on the same basis - hearsay statements of employees submitted by respondents.

Respondent alleges an isolated incident of employee misconduct. The first element is that the employee engaged in misconduct. In order to prove this element, respondent has the difficult burden of proving that: (1) Eaton effectively demonstrated to Lagos the proper method of scaffold erection and maintenance ; (2) Eaton effectively communicated to Lagos that he would be disciplined if he used the defective scaffold on the first floor; and (3) Lagos intentionally disregarded respondent's clearly communicated rules and procedures and subjected himself to disciplinary action.

The only evidence respondent presented on the first two questions was Cove's testimony of what Eaton had told him. Eaton had some motivation to try to excuse respondent from the violations at that time because the citations had already been issued. In addition, Eaton told Cove that he did not have enough components on site to complete the first scaffold. The photographs taken by the HCO and HCS show that there were three planks on the scaffold framework. One was at the level where Lagos was working. One was at a rung below Lagos, but directly underneath the plank on which he was standing. The third plank was four rungs down from where Lagos was standing and was fitted into the middle of the level. Thus, Eaton was not truthful when he told Cove that there were sufficient boards to fully plank the top platform. The existence of the three planks in the photographs lends credibility to the testimony of the HCS and HCO that there were also sufficient tubular components on the first floor with which to make the scaffold safe. Thus, the statements Eaton made to Cove regarding the lack of other components necessary to complete the first floor platform is insufficient for respondent to meet its burden of proof on the first element of the affirmative defense.

However, even if everything Eaton told Cove is accepted as credible, the evidence is still insufficient for respondent to meet its burden on the first element. The element requires that the employee deliberately violated a known work rule, for which he knew he would be subjected to discipline if caught. But Cove did not ask Eaton whether Eaton had told Lagos not to use the defective scaffold. Cove did not ask Eaton if Eaton had told Lagos that Lagos would be disciplined if he used the defective scaffold. Eaton did not volunteer the information to Cove. Respondent had Lagos present at the trial, but chose not to call him. Respondents did not produce any other evidence that Lagos recognized from Eaton's demonstration in the morning that the first floor scaffold was defective, that he deliberately violated a known work rule by using the scaffold or that he knew he would be punished if caught working on it. Thus, there is no evidence in the record upon which the undersigned could conclude that Lagos deliberately violated a work rule for which he knew respondent routinely enforced punishment.

Based upon the credible evidence in the record, it appears that Eaton constructed a scaffold in the presence of Lagos and put Lagos to work painting the windows on the scaffold on the second floor. Eaton then partially constructed a scaffold on the first floor. Eaton left the premises for an hour. Before leaving, Eaton did not instruct Lagos to properly complete the first floor scaffold or that if he used the defective scaffold, he would be punished. Lagos finished his work on the second floor. Then, Lagos dutifully went to the first floor to start painting the windows, using the scaffold that his supervisor had constructed.

Respondent also failed to prove the second element of isolated employee misconduct, that "the violation was not participated in, observed by, or performed with the knowledge and/or consent of any supervisory personnel." To the contrary, the evidence established that it was respondent's own foreman, Carl Eaton, who had constructed the incomplete scaffold on the first floor even though there were sufficient components on the first floor with which to finish the job. The evidence established that it was respondent's own foreman who had left Lagos alone at the site without effectively communicating to him not to use defective scaffold. Lagos' conduct was not so extraordinary or intentionally dangerous that Eaton could not have foreseen it and guarded against it by ensuring that it was properly constructed before he left the job site, by warning Lagos not to use it or by instructing Lagos to finish completing the scaffold before he did use it.

Finally, respondent has failed to prove the third element, that Lagos' conduct was "in conflict with well-established company policy or work-rule which was in effect at the time, and was actively enforced through disciplinary action or other appropriate procedures." Respondent's policies were in their developmental stages. Although the written materials contained sufficient information regarding the proper construction of

mobile scaffolds, respondent did not have an effective and documented program in place to train its employees on the construction and use of the scaffolds. Respondent produced no evidence or documentation that it effectively communicated its disciplinary procedure to its employees, including Lagos, and that it regularly enforced its disciplinary rules.

Respondent failed to meet its burden of proving that prior to the HCO's and HCS's inspection in this case, it took all feasible steps to avoid the occurrence of the hazard and that Lagos departed from an effectively communicated and enforced safety rule without respondent's actual or constructive knowledge. Thus, respondent has failed to establish the defense of isolated employee misconduct.

CONCLUSIONS OF LAW

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.451(b)(1), in that its employee was working upon a mobile scaffolding platform 10 feet or higher above the ground, without proper planking, thus creating the possibility of a fall, the substantial probability of which would be abrasions, contusions, sprains, strains and possibly bone fractures. Citation 1, Item 1a with a penalty of \$100.00 should be affirmed.
4. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.451(g)(1)(vii), in that its employee was working upon a mobile scaffolding platform 10 feet or higher above the ground without guard rails or an alternative personal fall arrest system, thus creating the possibility of a fall, the substantial probability of which would be abrasions, contusions, sprains, strains and possibly bone fractures. Citation 1, Item 1b, grouped with Citation 1, Item 1a for purposes of establishing the penalty, should be affirmed.
5. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.452 (w)(1) in that its employee was working upon a mobile scaffolding platform 10 feet or higher above the ground without the scaffold being properly braced by cross, horizontal, or diagonal braces, or a combination thereof, thus creating the possibility of a fall, the substantial probability of which would be abrasions, contusions, sprains, strains and possibly bone fractures. Citation 1, Item 1c, grouped with Citation 1, Item 1a for purposes of establishing the penalty, should be affirmed.

6. Complainant proved by a preponderance of the evidence that respondent violated 29 C.F.R. 1926.451(w)(2), in that its employee was working upon a mobile scaffolding platform 10 feet or higher above the ground without the wheels being locked thus creating the possibility of a fall, the substantial probability of which would be abrasions, contusions, sprains, strains and possibly bone fractures. Citation 1, Item 1d, grouped with Citation 1, Item 1a for purposes of establishing the penalty, should be affirmed.

7. Citation 1, Item 1(e), 29 C.F.R. 1926.454(b) should be dismissed.

8. Respondent failed to carry its burden of proof on the defense of isolated incident of employee misconduct.

Based upon the foregoing Findings of Fact and Conclusions of Law, **IT IS ORDERED** as follows:

1. Citation 1, Item 1a is hereby affirmed and the penalty is hereby imposed in the amount of \$100.00;

2. Citation 1, Item 1b is hereby affirmed.

3. Citation 1, Item 1c is hereby affirmed.

4. Citation 1, Item 1d is hereby affirmed.

5. Citation 1, Item 1e is hereby dismissed.

6. The penalty of \$100.00 shall be paid within ten (10) days of the filing date of this Order.

This the 21 day of March, 2001

Ellen R. Gelbin
Administrative Law Judge

1. Respondent's Exhibit #2 had not been provided to complainant prior the hearing.