THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

Secretary of Labor, Complainant, v. Brand Energy Solutions LLC, Respondent.	OSHRC Docket No. **09-1048**

Appearances:

Jennifer J. Johnson Esquire & Madeline Le, Esquire, Dallas, Texas
For Complainant

J. Albert Kroemer, Esquire & James T. Phillips, Esquire, Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Brand Energy Solutions LLC d/b/a Brand Scaffold Building, Inc., erects, dismantles, rents, and supplies scaffolds for commercial and industrial businesses. On December 18, 2008, Brand employee Cynthia Chavira fell to her death from a scaffold Brand was erecting at the Shell Deer Park Refinery in Deer Park, Texas. Occupational Safety and Health Administration (OSHA) compliance officer David Waters arrived at the worksite later that day and began an inspection. Based upon Waters's inspection, the Secretary issued a Citation to Brand on June 9, 2009.

The Citation consisted of six items alleging serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleges the serious violation of 29 C. F. R. § 1926.25(a), for failing to keep debris clear from work areas, passageways, and stairs, in and around buildings or other structures. The Secretary proposed a penalty of $ 3,500.00 for Item 1. Items 2 through 6 alleged violations of various subsections of 29 C. F. R. § 1926.451, the standard that provides general requirements for scaffolds. The Secretary proposed penalties totaling$ 18,500.00 for Items 2 through 6. Brand timely contested the Citation.

The court held a hearing in this matter on January 20 and 21, 2010, in Houston, Texas. Brand admitted jurisdiction and coverage. Prior to the hearing, the Secretary withdrew Item 5 of the Citation. The hearing proceeded on the remaining five items. On April 2, 2010, the parties filed a joint notice of withdrawal of Items 2, 3, 4, 5, and 6 of the Citation. The court issued an order approving this partial settlement on April 21, 2010.

Only Item 1 remains at issue. The parties have filed post-hearing briefs addressing Item 1. Brand contends the Secretary cited the company under an inapplicable standard, and thus Item 1 should be dismissed. If the cited standard is applicable, Brand argues it did not violate the terms of the standard. Brand also contends that, if the court affirms Item 1, the court should reclassify the violation from serious to de minimis.

For the reasons discussed below, the court rejects Brand's arguments. The court affirms Item 1 as a serious violation, and assesses a penalty of $ 3,500.00.

Background

In 2008, Shell Oil Company hired Brand to erect a systems scaffold around a crude distillation column (a large circular tower) at its refinery in Deer Park, Texas. The original purpose of the scaffold was to provide a platform for employees to remove and replace asbestos-containing insulation. The original design of the scaffold included an area for an asbestos decontamination enclosure.

On September 13, 2008, Hurricane Ike made landfall near Galveston, Texas. Hurricane Ike is currently the third most destructive hurricane to make landfall in the United States, after Hurricanes Katrina and Andrew, and it wreaked substantial damage to the Deer Park Refinery. Following the storm, Shell downsized the scope of the project, eliminating the insulation replacement part of it. The scaffold was redesigned to eliminate the area that was to be used for asbestos decontamination. The scaffold would no longer need a Visqueen plastic covering to contain the asbestos. Brand reconfigured the scaffold's design, size, weight-bearing capacity, and wind-bearing capacity.

At completion, the scaffold was to be approximately 220 feet high. Brand built the scaffold in two parts. One part was built around the crude distillation column. The other part was a stair tower, located on the east side of the column. The stair tower was the only means of access to the tower.

On November 26, 2008, Brand began erecting a cup-lock systems scaffold around the column. Brand transported materials, scaffold components, and equipment to the worksite and placed these items in designated staging areas.

Brand assigned eleven employees to erect the scaffold. On December 18, 2008, the scaffold was halfway completed, and stood approximately 110 feet high. Brand employee Cynthia Chavira was working on an unfinished level of the platform, approximately 100 feet above the ground. She was wearing a full body harness with a double lanyard, but she was not tied off. At approximately 11:00 a.m., Chavira fell from the platform to her death.

OSHA assigned compliance officer David Waters to inspect the worksite. He arrived the day of Chavira's death and held an opening conference with Brand. He took photographs and interviewed Brand employees, as well as employees of other companies on the site. Waters returned twice to the site to take more photographs and measurements, and to conduct a closing conference. Brand shut down the scaffold site the day Chavira fell, and it remained closed throughout Waters's inspection.

Discussion

The Secretary has the burden of proving the violation by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.25(a)

The standard at 29 C. F. R. § 1926.25(a) provides:

> During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from the work areas, passageways, and stairs, in and around buildings or other structures.

In Citation No. 1, Item 1, the Secretary alleges:

29 C. F. R. § 1926.25(a): Debris was not kept cleared: work areas, passageways, stairs and around the buildings or other structures.

(a) Level 8 at the bottom of the stairs on the stair tower scaffold where scaffold components were stored.

(a) Applicability of the Cited Standard

(i) Construction Standard v. General Industry Standard

Brand contends the Secretary failed to establish the first element of proof, that 29 C. F. R. § 1926.25(a) applies to the cited conditions. Brand argues the Secretary should have cited the company under a general industry standard, not a construction standard.

The Secretary has two separate sets of standards addressing scaffolds, depending upon whether they are used for workers engaged in construction or maintenance. Scaffolds used for construction activities are governed by standards found in Subpart L of the construction standards, in Part 1926 of Title 29 of the Code of Federal Regulations. Scaffolds used for maintenance activities are governed by standards found in Subpart D of the general industry standards, in Part 1910 of Title 29 of the Code of Federal Regulations.

"Maintenance" is not defined in the Act. The standards at 29 C. F. R. §§ 1910.12(b) and 1926.32(g) define "construction work" as "work for construction, alteration, and/or repair, including painting and decorating." Brand concedes the project, as originally conceived, for which it was erecting the scaffold "would have undoubtedly been classified as 'construction' inasmuch as it was proposed that all or substantially all of the insulating materials on this particular tower which contain asbestos would be removed, the area decontaminated and the insulation replaced with non-asbestos containing insulation" (Brand's brief, pp. 5-6). Brand argues, however, that once the project was downscaled to merely repairing certain sections of torn insulation, the work fell under the classification of maintenance.

In support of its position, Brand cites a Standard Interpretation letter issued by OSHA on August 14, 2000, in which OSHA sought to clarify the differences between construction work and maintenance work. The Standard Interpretation letter states, in pertinent part:

> The following principles and examples apply in distinguishing between construction and maintenance:
> (A) It is the activity to be performed, not the company's standard industrial classification (SIC) code, that determines whether the construction standard applies;

> (B) "Maintenance" means keeping equipment or a structure in proper condition through routine, scheduled or anticipated measures without having to significantly alter the structure or equipment in the process. For equipment, this generally means keeping the equipment working properly by taking steps to prevent its failure or degradation.
> (C) Whether repairs are maintenance or construction depends on the extent of the repair and whether the equipment is upgraded in the process.

Both Brand and the Secretary mistakenly focus on the classification of the future activity for which the scaffold was being built. On December 18, 2008, no insulation replacement or repair was being done. The only activity underway was the construction of the scaffold. Only employees of Brand, a scaffold constructor, were allowed access to the scaffold while it was being constructed. Brand posted a tag at the bottom of the scaffold stairway:

DANGER
DO NOT
USE
SCAFFOLD

SCAFFOLD
UNDER
CONSTRUCTION

As Brand acknowledged with its tag, the erecting of a scaffold is construction work; it is building a completely new component by assembling materials for a specific project. It is not routine maintenance on a pre-existing structure. It is undisputed that the scaffold was only halfway completed on December 18, 2008. Brand had not released the scaffold to Shell for use in repairing the insulation. Brand's scaffold expert David Glabe testified, "[T]he fact is until the scaffold company does a final inspection on it . . . the scaffold is considered to be under construction" (Tr. 268).

The Secretary correctly cited Brand under the construction standards found in Part 1926.

(ii) The Housekeeping Debris Standard v. The Scaffold Debris Standard

Brand also argues that, even if the Secretary correctly cited it under the construction standards, a more specific construction standard exists and, therefore, the court should vacate Item 1.

The standard at 29 C. F. R. § 1910.5(c)(1) provides:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Brand contends that because it was erecting a scaffold, the Secretary should have cited it using the specific debris provision found in Subpart L ("Scaffolds") of Part 1926. The standard Brand believes is more specific is 29 C. F. R. § 1926.451(f)(13), which provides:

> Debris shall not be allowed to accumulate on platforms.

Unlike the cited standard, the scaffold standard addressing debris is limited to platforms. "Platform" is defined at 29 C. F. R. § 1926.450(b) as "a work surface, elevated above lower levels. Platforms can be constructed using individual wood planks, fabricated decks, and fabricated platforms."

The Secretary does not allege Brand allowed debris to accumulate on platforms. Item 1 of the Citation expressly addresses a non-platform area of the scaffold as the site of the violative condition: "Level 8 at the bottom of the stairs on the stair tower scaffold where scaffold components were stored." The cited standard requires debris be "kept cleared from the work areas, passageways, and *stairs,* in and around buildings or other structures."

The standard at 29 C. F. R. §1910.5(c)(1), stating that a more specific standard preempts a general standard, has a corollary at 29 C. F. R. § 1910.5(c)(2):

> On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or subpart R of this part, to the extent that none of such particular standards applies.

Although Subpart L of the construction standards provides particular standards prescribed for scaffolds, none of those standards address the cited condition as specifically as the housekeeping standard does. The standard at 29 C. F. R. § 1926.25(a) applies according to its terms to the stairs on the stair tower scaffold constructed by Brand.

The Secretary has established 29 C. F. R. § 1926.25(a) applies to the conditions cited in Item 1 of the Citation.

(b) Compliance with the Terms of the Standard

Waters testified that when he conducted his inspection of the stair tower scaffold on December 18, 2008, he observed scaffold material scattered around the stairway, creating a tripping hazard. Waters took photographs of the area that corroborate his testimony. Exhibits C-6 and C-7 are copies of photographs of the area showing various scaffold parts strewn across the area employees used to access the upper levels of the scaffold. A water cooler and pieces of wood are also in the area. Mike Sharp, Brand's director of safety, and Gustavo Castillo, Brand's scaffolding expert, agreed Exhibits C-6 and C-7 depict scaffold parts at the bottom of the scaffold stairway.

Brand does not dispute that various scaffold components were at the bottom of the stairway on December 18, 2008. Brand argues, however, that the Secretary failed to prove it was in noncompliance with the cited standard because the scaffold components are not "debris" within the meaning of the standard. Brand contends the scaffold components shown in Exhibits C-6 and C-7 were either to be used that day in the construction of the scaffold, or removed to the staging area at the end of the day's shift. Brand cites *Webster's New Collegiate Dictionary* in defining "debris" as "the remains of something broken down or destroyed; ruins," or "an accumulation of rock" (Brand's brief, p. 12).

If this were a case of first impression, the court might be inclined to agree with Brand's interpretation of "debris." There is, however, case law that indicates otherwise. In *Gallo Mechanical Contractors, Inc.*, 9 BNA OSHC 1178 (No. 76-4371, 1980), the Review Commission reviewed the decision of an administrative law judge (ALJ) who had found a violation of 29 C. F. R. § 1926.25(a), but reclassified it from other than serious to de minimis. The ALJ determined that most of the matter cited as "debris" was not debris, but equipment and materials to be used by the employees. The small amount of matter that the ALJ concluded was "debris" amounted to a bit of trash he did not consider a tripping hazard.

The Commission found the ALJ had too narrowly defined "debris," and analyzed the standard in terms of the hazard it was designed to prevent:

> Section 1926.25(a) is concerned with housekeeping on construction worksites. It directs employers to keep lumber and debris cleared "from work areas, passageways, and stairs, in and around buildings and other structures." Hazards of tripping and falling, possibly resulting in sprains, fractures, and even concussions, can occur if matter is scattered about working and walking areas. . . . Accordingly, "debris" within the meaning of section 1926.25(a) includes material that is scattered about

> working or walking areas. Whether the material has been used in the past or can or will be used in the future is irrelevant.

Id. at 1180 (*citations omitted).*

The Commission went on to conclude that equipment, unlike materials (which the Commission listed in that case as wood, steel pieces, and pipes), cannot be considered "debris." The Commission found that materials did constitute a tripping hazard and modified the classification to other than serious.

When asked to reconsider its finding in *Gallo,* which the employer called "'clearly overbroad' and 'misguided,'" the Commission firmly upheld its earlier ruling:

> We find no basis for disturbing our decision in *Gallo.* There we considered the meaning of "debris" in light of the purpose of the standard (to prevent tripping accidents) and in relation to the only items specifically listed in the standard (form and scrap lumber with protruding nails). Capform's proposed meaning does not take into account this purpose, and Capform does not cite any precedent in support of its view. As for Capform's argument that to apply *Gallo*'s definition of "debris" would cripple construction contractors, the definition has been Commission precedent since 1980, and Capform presents no evidence that it has had that effect.

Capform Inc., 16 BNA OSHC 2040, 2044 (No. 91-1613, 1994).

Commission precedent on this issue is clear. The scaffold components scattered about the bottom of the stairway are materials. As such, they fall within the definition of "debris" as fashioned by the Commission. Exhibits C-6 and C-7 show the materials on the walking surface at the bottom of the stairway, creating numerous tripping hazards.

The Secretary has established Brand was in noncompliance with the terms of 29 C. F. R. § 1926.25(a).

(c) Employee Exposure

Eleven Brand employees had access to the scaffold the day of the accident. The stair tower was the only means of access the employees had to the upper level of the scaffold. They would have to pass through that level on their way to the highest level being built. The Secretary has established exposure to the tripping hazard for eleven employees.

(d) Employer Knowledge

The scaffold components at the bottom of the stairs were in plain view of Brand's eleven employees on site. Brand had two lead men working with its employees, as well as Edil Perez. Perez was Brand's foreman, lead carpenter, and designated competent person. Perez's knowledge that the scaffold components were scattered at the bottom of the stairway is imputed to Brand. *Dover Elevator Co., Inc*., 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program").

The Secretary has established Brand knew of the violative condition. She has proven Brand violated 29 C. F. R. § 1926.25(a).

Classification of the Violation

The Secretary classified Item 1 as a serious violation. Under §17(k) of the Act, a violation is serious if it creates a substantial probability of death or serious physical harm. Brand argues that if the court finds it violated the cited standard, the court should reclassify the violation as de minimis. A violation is de minimis when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.,* 13 BNA OSHC 1114 (No. 84-696, 1987).

Waters testified that employees tripping or falling over the scattered scaffold components could sustain injuries ranging from cuts and bruises to broken bones or death. An employee tripping over the components would likely suffer serious physical harm. In this instance, the tripping hazard does not bear a "negligible relationship to employee safety." The Secretary properly classified the violation as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required 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, generally, is the principal factor to be considered.

Brand is a large international organization, and employed at least 10,000 employees at the time of the inspection. The company had a history of OSHA citations. No evidence of bad faith was adduced.

The gravity of the violation is high. Employees were required to navigate through the scattered components, often while carrying materials or equipment. They were exposed to several tripping hazards each time they walked through the area. A penalty of $ 3,500.00 is appropriate.

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

The court previously issued an order approving settlement of Items 2 through 6 of the Citation on April 21, 2010. Based upon the foregoing decision, it is ORDERED that:

Item 1 of the Citation, alleging a serious violation of 29 C. F. R. § 1926.25(a), is affirmed, and a penalty of $ 3,500.00 is assessed.

_____

_____JUDGE STEPHEN J. SIMKO, JR.

Date: August 23, 2010