

Know Your Policy
Contractor's All Risks Policies: An Additional Source of Revenue on Construction Projects

Systems Studied
International Government Procurement of Major Construction Projects: Issues in Risk Analysis and Cost Containment

Appeal Denied
Failure to Provide Fall Protection Held to Be Willful OSHA Violation

Stadium Seating Issue
Under ADA, Movie Theaters Must Provide a Variety of Seating Locations for Wheelchair Patrons

Settlement Urged
6% Limitation on Design Services Upheld, and Failure to Estimate Construction Costs Results in U.S. Contract Being Found Void

With Case Study
The Documentation Contractors Need to Support International Claims

Defense To Indemnity
Contractor Not Required to Indemnify Surety for Bad Faith Settlement with Subcontractor

Actual Notice Not Enough
Contract's Claim Procedures Strictly Enforced, Recovery Denied by Washington Supreme Court

Previous Issues

Construction Industry News

Failure to Provide Fall Protection Held to Be Willful OSHA Violation

June 13, 2005

By Jeffrey Wilcox

Thelen Reid & Priest LLP

AJP Construction, Inc. was the concrete subcontractor for a high-rise construction project in Hoboken, New Jersey. In response to a call reporting fall-related accidents and other safety hazards on the project, the Occupational Safety and Health Administration began an investigation of AJP's safety practices. While the investigation was pending, an AJP employee, James Sherengo, fell to his death.

Mr. Sherengo and two other employees were working on a outrigger scaffold on the seventh floor. Such scaffolds consist of a platform that extends beyond the wall of the building. The platform is supported by two outrigger beams, which are secured inside the building. A crane hit construction materials hanging over the edge of the 12th floor, and they fell onto the scaffold, causing Mr. Sherengo to fall.

In response, OSHA issued several citations to AJP for violations of regulations promulgated under the Occupational Safety and Health Act, 29 USC §651, *et seq.* OSHA found that AJP willfully violated safety regulations by allowing Mr. Sherengo to work without fall protection equipment and by allowing a scaffold without guardrails to be used. It found other safety regulations were violated because the construction materials on the 12th floor were neither properly secured nor placed away from the edge of the building. OSHA also cited AJP for: failing to have a properly qualified supervisor present during erection of the scaffold; failing to construct the scaffold in accordance with a professional engineer's design; allowing employees untrained in recognizing the hazards associated with this type of scaffolding to work on it; and failing to protect employees against the unguarded edge of the building.

OSHA citations are classified as not serious, serious or willful, with the penalties increasing with the severity of the violation. OSHA characterized AJP's violations as willful, thus subjecting the subcontractor to substantial penalties.

AJP contested the citations before the Occupational Safety and Health Review Commission, which appointed an administrative law judge (ALJ) to conduct an evidentiary hearing. AJP did not dispute that the scaffold lacked guardrails or that the employees wore insufficient fall protection equipment. Rather, AJP argued that it lacked the level of knowledge required for a violation.

The citations were affirmed by the Administrative Law Judge. AJP filed a petition for review with the Commission, which declined to review the decision. AJP then appealed to the U.S. Circuit Court of Appeals for the District of Columbia.

In its appeal, AJP challenged the ALJ's decision with two arguments:

- Substantial evidence did not support the ALJ's finding that the violations were willful; and
- The safety regulations at issue failed to give AJP fair notice of impermissible worksite conditions, thus violating AJP's Fifth Amendment due process rights.

The Court of Appeals affirmed. *AJP Construction, Inc. v. Secretary of Labor*, 357 F.3d 70 (D.C. Cir. 2004).

In challenging the willfulness determination, AJP argued that it lacked the level of knowledge necessary to sustain a violation and a finding of willfulness. It pointed to testimony by its employees that the workers on the platform had been issued fall protection equipment, had been told to use it and had followed these instructions except for the day of the accident. However, the court noted, an employee of the general contractor testified that he had warned AJP in writing and orally that its employees were working on scaffolds without adequate protection. Also, the two surviving employees from the scaffold told an OSHA inspector that when they asked their foreman about using fall protection equipment, he simply told that not to "go out too far" and to be careful. The Court of Appeals found AJP knew of the violations.

The court acknowledged that evidence of AJP's knowledge was disputed but concluded that when such inconsistencies are resolved by an ALJ based on credibility determinations formed during administrative proceedings, those determinations must be respected unless patently unsupportable.

Regarding willfulness, the court noted that prior cases held that willfulness could be established by showing actual awareness or by showing that "if [the violator] were informed of the rule, he would not care." *Brock v. Morello Bros. Construction, Inc.*, 809 F. 2d 161, 164 (1st Cir. 1987).

In finding the requisite indifference, the court pointed to prior fall protection citations issued to AJP on this and another project and warnings issued to AJP on this project. The court rejected AJP's claim that it had a stringent fall protection plan, noting that the four-page, handwritten plan was incomplete, ineffective and unenforced. Reviewing the record from the proceedings below, the court found the ALJ's decision to be amply supported. It sustained the finding of willfulness, finding that AJP had the necessary state of mind for a willful violation.

AJP also argued that OSHA's scaffolding regulations were broad and exceedingly vague and that they thus violated Fifth Amendment due process protections. The court found that the challenged regulations were sufficiently clear and even included an illustration of an outrigger scaffold, putting AJP on notice that the OSHA regulations applied to AJP's scaffold. Due process guarantees are satisfied if a regulated party can identify with reasonable certainty the standards with which the agency expects it to conform, court held. It found that the illustration gave AJP fair notice of the regulations.

If you would like to receive legal reports and updates more quickly, by e-mail, click [here](#) and fill out the mailing list form.

For more information about the issues covered in this report, please contact Jeffrey Wilcox in our San Francisco office at 415-369-7760 or at jwilcox@thelenreid.com or contact your Thelen Reid & Priest LLP attorney. For more information about Thelen Reid & Priest's Construction and Government Contracts Department, [click here](#).

 [Send This Report to a Colleague](#)

©2005 Thelen Reid & Priest LLP



Organizations	Industry Topics	Resources	BUSINESS BULLETINS		
© 2005 Thelen Reid & Priest LLP All rights reserved. Legal notices, and terms and conditions.			Site Search	Site Map	Home
			Registration	About Thelen	Contact Us