United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
TRI-CITY ELECTRICAL CONTRACTORS, INC
Respondent.

OSHRC DOCKET
NO. 94-2421

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 June 22, 1995. The decision of the Judge will become a final order of the Commission on July 24, 1995 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 12, 1995 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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: June 22, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-2421

NOTICE IS GIVEN TO THE FOLLOWING:

Jaylynn Fortney
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Mr. Michael J. Powers
Tri-City Electrical Contractors,
Inc.
430 West Drive
Altamonte Springs, FL 32714

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
1365 Peachtree St., N. E.
Suite 240
Atlanta, GA 30309 3119

00109609545:04

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197 Fax: (404) 347-0113

SECRETARY OF LABOR, Complainant, v. TRI-CITY ELECTRICAL CONTRACTORS, INC., Respondent.	OSHRC Docket No.: 94-2421

Appearances:

Michael Hagan, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Michael J. Powers, and
James M. Powers Safety Director
Tri-City Electrical Contractors, Inc.
Altamonte Springs, Florida
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Tri-City Electrical Contractors, Inc., was the electrical subcontractor for construction of a large Toys "R" Us distribution warehouse in Orlando, Florida. Occupational Safety and Health Administration (OSHA) compliance officer Ronald Anderson inspected its worksite on May 10 through 13, 1994. Following that inspection, Tri-City was issued a serious citation alleging that it failed to properly brace a mobile scaffold (§ 1926.451(e)(3)); that it failed to fully plank the scaffold platform (§ 1926.451(e)(4)); that the scaffold had no midrails or toeboards (§ 1926.451(e)(10)); and that employees worked over exposed rebar (§ 1926.701(b)). Tri-City asserts that OSHA misinterprets the scaffolding requirements and that the last asserted violation was a result of employee misconduct. If the violations are found, Tri-City does not dispute the reasonableness of the Secretary's proposed penalty (Joint Response to Prehearing Order).

Item 1: § 1926.451(e)(3)

Tri-City rented a mobile scaffold from Safety Green, a scaffolding rental company, so that Tri-City could install lighting fixtures along the warehouse ceiling. Safety Green delivered the unassembled scaffold pieces, and Tri-City erected the scaffold under the direction of its superintendent, Mark Wight (Tr. 187). When assembled, the scaffold was 15 feet high. The casters, which allowed the scaffold to be rolled manually from location to location, added another 8 to 10 inches (Tr. 14).

The parties dispute whether the assembled scaffold was adequately braced at its base. The Secretary agrees that the rest of the scaffold was properly assembled. Among the scaffolding pieces delivered by Safety Green were two smaller metal rods which Tri-City installed horizontally at the bottom of the scaffold.[1] These pieces were connected paralleling each other at the base of the scaffold so that the northeast width end was connected to the northwest width end and the southeast width end was connected to the southwest width end (Exh. C-1).

The Secretary contends that the two parallel braces should have been replaced with one "horizontal/diagonal" brace. A horizontal/diagonal brace would have connected the northeast with the southwest width end or the northwest with the southeast.

Whether Tri-city violated the standard depends upon the interplay of §§ 1926.451(e)(3) and (d)(3). These standards provide:

> Section 1926.451(e) *Manually propelled mobile scaffolds.* (3) Scaffolds shall be properly braced by cross bracing and *horizontal* bracing conforming with paragraph (d)(3) of this section (emphasis added).

> Section 1926.451(d)(3). Scaffolds shall be properly braced by cross bracing or *diagonal* braces, or both, for securing vertical members together laterally, and the cross braces shall be of such length as will automatically square and aline vertical members so that the erected scaffold is always plumb, square, and rigid. All brace connections shall be made secure (emphasis added).

The Secretary introduced three industry publications, one of which speaks of a required "horizontal" brace for mobile scaffolds but illustrates the requirement with a

---

[1] From the photographs of the scaffold (Exh. C-1, C-2, C-3) it appears that these paralleling pieces may have been intended as part of the guardrail assembly.

"horizontal/diagonal" diagram (Exh.C-4). The other two publications specify that the required bracing for a mobile scaffold is "horizontal/diagonal" (Exh C-5, C-6). These documents support an inference that the industry understands the term "horizontal" brace (in reference to mobile scaffolds) as a term of art meaning a "horizontal/diagonal" bracing. Nevertheless, it is the standard itself which establishes an employer's duties under the Act, not some ancillary source.[2]

Section 1926.451(d)(3) specifies that scaffolds are "properly" braced by either cross bracing (not at issue here) or diagonal braces. The Secretary argues that for § 1926.451(e)(3) to "conform" to § 1926 .451(d)(3), "horizontal" bracing must also be "diagonal" (or as the parties would describe it, "horizontal/diagonal"). Construing the standard as a whole, so that every part of the standard is considered in determining the meaning of any part of its parts, supports the Secretary's conclusion. The purpose of § 1926.451(d)(3) is to ensure that scaffolds are "plumb, square and rigid" with proper "brace connections." Since it is evident that the force of pushing against scaffolding is more readily equalized by a diagonal brace, diagonal bracing on the horizontal protects against racking (coming out of square) and a loss of rigidity in a way that parallel horizontal bracing could not. The intent of the standard, thus, supports giving controlling force to the literal limitation in § 1926.451(d)(3), so that horizontal bracing, which connects mobile scaffolds laterally, will also be diagonal. Tri-City's use of paralleling braces violated the standard.

Classification. In addition to Tri-City's two horizontal braces, the scaffold had three walkplanks installed horizontally at various heights running from width end to width end along the scaffold (Exh. C-2). These walkplanks fit snugly, even if one of the planks did not span the full width of the scaffold and they were not fully locked into place (see item 2). The walkplanks added substantially to the stability and rigidity to the scaffold and protected against its racking (coming out of plumb) (Tr. 169-170). The possibility of a serious injury from the anticipated hazard was speculative and remote under such circumstances. The violation is properly classified as nonserious.

---

[2] "The test for the applicability of any statutory or regulatory provision looks first to the text and structure of the statute or regulations whose applicability is questioned." *Kiewit Western Co.*, 16 BNA OSHC 1689, 1693 (No. 91-2578, 1994).

Penalty. The parties stipulated that if a violation was shown, the Secretary's proposed penalty was appropriate. A reduction in the classification, however, was not addressed by the stipulation. Under these circumstances an appropriate penalty should reflect the proper classification of the violation. Two employees were on the scaffold. The gravity of this nonserious violation was low. A penalty of $200.00 is appropriate and is assessed.

Item 2: § 1926.451(e)(4)

The Secretary alleges a violation of § 1926.451(e)(4) contending that the top scaffold walkplank on which two employees worked was not planked to the full width of the scaffold. Tri-City admits the fact but counters that the planking was removed to permit access, something which the standard allows. Alternatively, Tri-City asserts that there was no exposure because employees on the scaffold were tied off. Section 1926.451(e)(4) provides:

> Platforms shall be tightly planked for the full width of the scaffold except for necessary entrance opening. Platforms shall be secured in place.

Tri-City's scaffold had a ladder formed on the width ends which afforded employees access to the top work platform. Leadman Donnie Jackson, who was working on a scaffold for the first time, was nervous about climbing on the outside of the scaffold using the built-in ladder. Instead, he climbed up on the inward-facing side of the scaffold ladder. To access the top walkplank about 15 feet above the concrete floor from the inside, he removed a portion of the plank and climbed up through the opening. He then "centered" the remaining planks, so that there was a small space in the middle of the plank and a larger space at the front side (Tr. 27, 134, 142, 152-154).

The standard permits an exception from the requirement that the platform be fully planked, *i.e.*, if the space is "necessary" for an entrance opening. Simply because an untrained employee created spaces to access the platform in an unconventional way, however, does not mean that the spaces were "necessary" for access. Jackson had little experience and even less guidance in performing this job. Superintendent Mark Wight's instructed Jackson (Tr. 196):

> So this activity, I didn't concentrate on it, to stand there and say, "hey, look, these guys have been in the field for a couple of years. It's a light fixture, dude. Stick it up in the air and get it done." That was my instruction to my leadman. And then he went from there to actually get the production out of these guys that he had under him.

The most common-sense way to access the work platform was by climbing on the outside of the scaffold ladder. Employees should have been able to reach the platform without creating spaces in the walkplank. The spaces were not "necessary" for an entrance opening.

Jackson and his co-worker wore safety belts while on the platform. Tri-City argues that because employees were tied off they were not exposed to the hazard. Tri-City misapplies the principle. Employees worked on a platform with openings which presented a fall or tripping hazard. Injuries can occur from falls into or onto a scaffold even when employees wear safety belts (Tr. 24). The standard's requirements address preventing the fall in the first instance. Safety belts may lessen the probability of serious injury, but employees were still exposed to the hazard addressed by the standard. Any other conclusion would permit an employer to substitute its judgment for that of the standard. *See Trinity Industries, Inc.,* 167 F.3d 1149, 1153 (11th Cir. 1994). The standard here requires full planking; the standard was not met; employees were exposed to the hazard; and superintendent Wight knew the platform was not fully planked.

Classification. The parties initially disagree on the significance of the fact that employees were tied off because they dispute where the lanyards were attached. Resolving the question relates to the seriousness of a potential injury. If a lanyard was tied to the guardrail of a mobile scaffold, the safety belt would offer less protection since the scaffold could be pulled in the direction of an employee's fall. If employees were tied to an overhead truss, on the other hand, their safety would have been notably enhanced. Donnie Jackson and others testified that they always tied to an overhead truss while on the scaffold, although they believed tying to the scaffold's guardrails provided equal protection (Tr. 110-112). Anderson, on the other hand, specifically recalled that the employees were tied to the top railing of the guardrails. The photographs (Exh. C-2, C-3) demonstrate that, whatever the employees' usual practice, at the time of the inspection at least one employee

was tied to the guardrail.[3] An employee who fell while being tied to the guardrail of a mobile scaffold would still be subjected to serious injury (Tr. 24). The violation is classified as serious. Since the parties stipulated that the penalty originally set by the Secretary was reasonable, a penalty of $1,500 is assessed.

Item 3: § 1926.451(e)(10)

The Secretary alleges that Tri-City violated § 1926.451(e)(10) by failing to have midrails and toeboards on this mobile scaffold. Although admitting that the railings were removed, Tri-City maintains that its employees received equivalent protection from wearing safety belts and lanyards. Section 1926.451(e)(10) provides:

> Guardrails made of lumber, . . . approximately 42 inches high, with a midrail...and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height.

Donnie Jackson had limited experience on scaffolding, and had not been in charge of a crew before. Jackson became the "leadman" when Tri-City's more experienced supervisory worker was unavailable (Tr. 134, 197). Jackson decided to remove the midrails so that eight-foot fluorescent light fixtures could be hoisted up and brought through the railings. For unexplained reasons, he removed the midrails from all four sides. The platform never had toeboards (Tr. 143, 190).[4] Superintendent Mark Wight observed the missing midrails and tacitly approved their removal.

> Q. Did you try or direct your employees to try another method of installing those light fixtures, other than by removing the midrail and hauling it up and pulling it under?

---

[3] A close comparison of the photographs Exhs. C-2 and C-3 reveals that the lanyard clamp is visible in both photographs. It must be presumed that if the lanyard was attached to a truss, the clamp would not be visible. Of greater import, Exh. C-3 shows how the trusses were aligned along the warehouse ceiling and demonstrates that there were no trusses above the scaffold.

[4] The Secretary asserts that the missing toeboards constitute a separate basis for the violation. However, there was an insufficient showing that there was anything on the platform which could have been kept from falling by a toeboard.

A. No, sir. As a mater of fact, the system they had going at that particular time was effective. They were making time with those particular type[s] of fixtures . . .
* * *
-- actually they did real good. I was real proud of them (Tr. 193-194).

Noting that the men were tied off, and that it was easier to bring up the fixture that way, Wight explained, "And again, they were cranking with production and I said, 'Man, go for it.' And that was my call" (Tr. 202).

The violation is established.

Classification. For the reasons stated, employees who were tied to the guardrails of the mobile scaffold were still subjected to the probability of serious injury (lessened by the presence of the safety belt) (Tr. 28). The violation of § 1926.451(e)(10) is affirmed as serious and the stipulated penalty of $1,500 is assessed.

Item 4: § 1926.701(b)

The Secretary cites a violation of § 1926.701(b) because employees were working where there was a possibility of impalement from reinforcing rods (Exhs. C-7 and C-8). Section 1926.701(b) provides:

> *Reinforcing steel.* All protruding reinforcing steel, onto and into which employees could fall, shall be guarded to eliminate the hazard of impalement.

Tri-City admits the existence of the serious violation but contends that it occurred because of employee misconduct, primarily on the part of its leadman, Wesley Hamlin. The Commission and courts have recognized a so-called "unpreventable employee misconduct" defense under which the employer must demonstrate that: (1) it had established work rules designed to prevent the violation; (2) the work rules had been adequately communicated to the employees; and (3) it had taken steps to discover violations, and had effectively enforced the rules when violations had been discovered. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1193 (No. 89-3444, 1993).

(1) Established Work Rule

Tri-City developed a two-page questionnaire, the "Weekly Safety Report," which listed safety topics. The Report explained the procedure for using the questionnaire as follows (Exh. R-1):

> The following is a list of hazards that may or may not be present on your jobsite. Safety is an everyday job that required an awareness of your surroundings. This list is the safety tool you need to protect yourself and all employees on the jobsite from injury. Prompt reporting of any hazards or potential hazards to your superintendent is one of the legs that holds up Tri-City's Safety Program. This form is to be turned in when you receive your next paycheck. You are required to give an O.K. or comment on each item. Discuss this form with your fellow employees and superintendent, make safety awareness part of your workday as well as your home life. Fill this out properly as a condition of employment.

Included among the safety topics was, "Rebar ends covered to prevent injury from accidental contact." The work rule is specific and meets the first requirement of the defense.

(2) Adequate Communication and (3) Effective Enforcement

The primary method for communicating the safety work rule was through the questionnaire (Exh. R-1). Tri-City did, in fact, follow-up and respond to written comments (or a failure to make any notations) on Exh. R-1 (Tr. 208). However, employees did not consistently use the form as intended, considering it more of a *pro forma* exercise (Tr. 80-82, 92, 130). Use of this method to communicate the work rule is understood from the perspective of the strict time limitations imposed by the job. Tri-City emphasized production. Employees worked 10-hour days, six days a week. Leadman Wesley Hamlin viewed the weekly Report (Exh. R-1) as something which needed to be filled out to get his paycheck. He considered making a comment identifying a safety problem as a negative thing because (Tr. 84):

> We were told that somebody would come to the job site and talk to us. And I didn't think my foreman would like the time taken away from working.

Under Tri-City's scheme of safety enforcement, leadmen had an important responsibility for safety. As superintendent Wight explained, the six leadman on the project

enforced the company's safety rules, "[a]s a matter of fact, they caught me a couple of times in precarious situations and told me to stop what I was doing."

The night before, Wight assigned Hamlin and his crew to work in the area, before the reinforcing rods were in place. Work progressed rapidly and the rods were installed by the time the crew started the next morning. The existence of the rods did not affect the actions of Hamlin or his crew. The simply continued installing the conduit above the protruding reinforcing rods until observed by OSHA and Tri-City's safety specialist, James Powers. Superintendent Wight understood how the violation could happened (Tr. 178):

> Q. Do you have any idea why [employees were working over the reinforcing rods]?
>
> A: Well, yes. I can relate to their position right here. The job was a hurry-up job. And with me, at certain times during the job, I would blow up at them for production as a tactic. And the next thing I know, I'm sure that morning when we started up, I said, "Get over there and hurry up." And they just went over there, probably blindly and didn't realize what they were doing . . . .

This attitude filtered down to the employees. Joseph Pinto explained that he worked around the rebar "[b]ecause we were on a tight schedule" (Tr. 92). Hamlin's actions in violating the safety rule and Wight's attitude make Tri-City's defense a difficult one to prove.

> Where a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision....A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax.

Archer-Western Contractors Ltd., 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991).

Tri-City has not overcome that "strong evidence" of a lax safety program, and has failed to meet its burden of establishing the defense. The violation is affirmed. As agreed, the penalty of $1,500.00 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

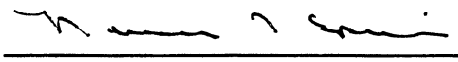
Based on the foregoing decision, it is ORDERED:

(1) Item 1, alleging a violation of § 1926.451(e)(3) is affirmed as nonserious and a penalty of $200.00 is assessed;

(2) Item 2, alleging a violation of § 1926.451(e)(4), is affirmed as serious and a penalty of $ 1,500.00 is assessed;

(3) Item 3, alleging a violation of § 1926.451(e)(10), is affirmed as serious and a penalty of $ 1,500.00 is assessed; and

(4) Item 4, alleging a violation of § 1926.701(b) is affirmed as serious and a penalty of $1,500.00 is assessed.



NANCY J. SPIES
Judge

Date: June 15, 1995