
SECRETARY OF LABOR,	:	
	:	
	:	
Complainant,	:	
v.	:	OSHRC DOCKET
	:	NO. 96-0238
T.L.T. CONSTRUCTION CO., INC.	:	
	:	
Respondent.	:	

Appearances:

Karin J. Froom
Office of the Solicitor
U.S. Department of Labor
For Complainant

Barrett A. Metzler
Northeast Safety Management, Inc.
Columbia, Connecticut
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

On January 30, 1996, T.L.T. Construction Corporation, Inc. (“TLT”) was issued a willful citation containing two charges stemming from the inspection of a worksite located at Salem State College in Salem, Massachusetts. TLT was performing masonry renovation work on the college’s auditorium (Tr. 10, 37-38). On August 4, 1995, a TLT employee at the worksite sustained serious injuries when he slipped and fell from a scaffold forty feet from the ground (Tr. 14-15). Upon referral from the Salem Fire Department, compliance officer Albert L. Loftin conducted an inspection of the worksite, visiting the site on three separate occasions including the day of the accident (Tr. 10, 16). Based upon his observations during two of these visits, the Secretary alleges willful violations of two scaffolding standards relating to safe access and the use of guardrails.¹ A \$28,000 penalty is proposed for each willful violation.

SAFE ACCESS

Under the first item of the citation, the Secretary alleges that TLT violated § 1926.451(a)(13) by failing to provide an access ladder or equivalent safe access to employees working on scaffolds measuring more than ten feet high. Compliance officer Loftin testified that on two separate visits to

¹ Loftin observed no violations during his August 4th visit to the worksite (Tr. 12-14, 37, 125-26, 133).

the worksite, he observed employees working on tubular welded, open-frame, walk-through scaffolds erected along the south and west sides of the building without safe access (Tr. 13, 19).² According to Loftin, each tier of scaffolding was the standard six-foot, four-inch height, plus an additional ten inches due to the presence of a screw jack at the base of the scaffold frame (Tr. 15-16, 19).

On August 10, 1995, Loftin observed four employees on the second tier of the south side scaffolding; one of the employees, designated employee number 2 in photographs of the area taken by Loftin, was carrying a grinding tool and in the process of climbing up the scaffold's frame to the second tier located over thirteen feet from the street level (Tr. 16-21, 41, 43, 62, 111, 113-15, 117, 165-66, 170, 255; Exhibits C-1 through C-5, C-8, V-1, V-2, V-3 & V-4).³ Loftin testified, and TLT's masonry foreman for the project confirmed, that there was no ladder present at the south side of the building (Tr. 20-21, 115, 215). On the same date, Loftin also observed three employees working on the west side scaffolding at heights of over ten feet; there was no ladder present in this area either (Tr. 49, 62). Upon his return to the worksite on August 28, 1995, Loftin observed three employees working on the south side scaffolding; one employee was climbing up the scaffold's frame to the second tier at a height of over 12 feet from the ground, and a second employee was observed climbing down from the fifth tier to the fourth tier of the scaffold at a height of 25 feet from the ground (Tr. 31-33, 35, 55, 57, 62, 134; Exhibits C-6 & C-7). Again, there was no ladder present in this area (Tr. 32, 36).

According to Loftin, the type of scaffolds used by TLT at the Salem worksite were not designed for climbing (Tr. 22, 111, 117). As he testified in the companion case also issued on this date, it would be difficult not only for an employee to safely climb the frame of a walk-through type of scaffold in a predictable, even-paced rhythm due to the unevenly spaced "rungs", but also to

² Loftin testified that TLT's project superintendent at the Salem worksite informed him during the inspection that all of the employees working on the south and west sides of the building were employed by TLT (Tr. 20, 65, 138, 141-42).

³ In addition to their post-hearing briefs, the parties have jointly submitted video stills from a videotape of the worksite taken by an OSHA intern who accompanied Loftin on his August 10, 1995 visit. Upon agreement by the parties, the video stills are designated as Exhibits V-1 through V-11.

smoothly place and remove his feet from the narrow rungs (Tr. 156).⁴ See *T.L.T. Constr. Co.*, No. 96-0237, slip op. at 4. The American National Standards Institute (ANSI) standard dealing with scaffolding safety requires that safe access be provided to any scaffold whose climbing surfaces are spaced over 16 inches apart and are less than ten inches in length (Exhibit C-16 at § 4.18(2)). *Id.* at 5. According to Loftin, the rungs of a walk-through type of scaffold are spaced at distances ranging from 16 to 20 inches and vary in width up to nine inches (Exhibit C-15). *Id.* at 4-5. In addition to the ANSI standard, literature from a well-known scaffolding manufacturer, including safety materials provided to the users of its equipment, also prohibits climbing the frames of this type of scaffold and requires that a separate means of access be used (Exhibits C-12 at 6, C-13, & C-14 at 6, #28-29). *Id.* at 5.

In response to these allegations, TLT makes essentially three arguments. First, TLT argues that on August 10, 1995, the scaffolding observed by Loftin on the south side of the building was in the final stages of erection and therefore, ladder access was not required. Specifically, TLT maintains that employee number 2 was engaged in the installation of safety guard rails at the time of the inspection (Tr. 202-03, 215-16).⁵ The Secretary concedes that during the building or dismantling of scaffolds, employees are permitted to climb the scaffold frames (Tr. 156).⁶ The record, however, fails to support TLT's claim that the south side scaffolding was not fully erected at the time of Loftin's August 10th visit. According to Loftin, the scaffolding in this area was complete at the time of both his August 4th and August 10th visits to the worksite (Tr. 72; Exhibits R-3 & R-4). In fact, he indicated that the TLT employee who fell from the south side scaffolding on August 4th was installing

⁴ Loftin testified as an expert in scaffolding in the companion case (No. 96-0237) and his testimony in this capacity, as well as the corresponding exhibits, is incorporated by reference upon agreement by the parties (Tr. 4-5; Exhibits C-12 through C-16).

⁵ Although not apparent in the photographs taken by Loftin of this area, TLT's masonry foreman maintained that another employee was standing on the street below employee number 2 and handing him the guard rails (Tr. 196-202, 216; Exhibits C-1 through C-4).

⁶ As discussed in *T.L.T. Constr. Co.*, No. 96-0237, slip op., n.5, OSHA does not enforce the requirements of either of the cited standards during the building or dismantling of scaffolds because it would be infeasible to provide guardrails and/or ladders during such a rapid process. See, e.g., *Baker Concrete Constr. Co.*, 17 BNA OSHC 1236, 1237, 1995 CCH OSHD ¶ 30,768 (No. 93-606, 1995) (discussion of OSHA's interpretation of § 1926.431(a)(13) regarding ladder use during erection and dismantling operations).

the final brace on the uppermost portion of the scaffold at the time of the accident (Tr. 14; Exhibits R-3 & R-4). In addition, photographs taken of the area by Loftin on August 10th show what appears to be a complete set of scaffolding (Tr. 227-29; Exhibits C-1 through C-5). When questioned as to where the south side scaffolding was incomplete, TLT's masonry foreman indicated only that work platforms or planking were not fully erected; he made no mention of safety guard rails (Tr. 229). Moreover, the masonry foreman testified that employee number 2 was not only installing guard rails, but also "tending" to a mason working at the end of the scaffold by delivering him tools, such as the grinder the employee was observed carrying during his climb up the scaffold's frame (Tr. 203-04, 214, 219, 255-56). TLT cannot have it both ways; where work was being performed on the scaffold, safe access was required and could have easily been provided (Tr. 214-17, 256).

Second, TLT argues that while a ladder may not have been directly provided on either the south or west side of the building, a ladder was present and available at the worksite (Tr. 258-60). Loftin testified that on August 10, 1995, he was told, and subsequently observed, that a ladder was located at the north side of the building and being used to provide access to the roof area (Tr. 23, 148-29). Section 1926.451(a)(13) specifically states that a ladder or equivalent safe access shall be "provided". The Review Commission has held that the term "provide" is not ambiguous and is commonly understood to mean "furnish" or "make available". *Pratt & Whitney Aircraft Group*, 12 BNA OSHC 1770, 1775, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986), *aff'd*, 805 F.2d 391 (2d Cir. 1986). *See also Borton, Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984) (plain meaning of phrase "shall be provided" under § 1926.451(a)(13) is that employer must furnish or make available, not require the use of, an access ladder). Accordingly, under § 1926.431(a)(13), TLT was obligated only to make a ladder available to employees, not to actually require its use.

That a ladder was present at the worksite, however, does not mean that it was readily "available". Here, the ladder in question was being used in a completely different area of the worksite. Where work was being performed simultaneously on several sides of the building, it would be unrealistic to expect employees to share one ladder for the purposes of safe access to all scaffolds. Indeed, an employee using the ladder to access the scaffold on the south side of the building could become "stranded" should another employee remove the ladder to access the scaffold on the west side of the building. This does not constitute safe access under the terms of the cited standard.

Finally, based upon the testimony of its masonry foreman, TLT argues that the three employees observed by Loftin on August 28, 1995, on the south side scaffolding were not employed by TLT (Tr. 195-96; Exhibits C-6 & C-7). According to the masonry foreman, these men were employees of another contractor engaged in masonry work on a wall of the college's cafeteria (Tr. 249-50, 261, 265-67). His testimony on this point, however, was simply not credible. When questioned about the presence of other masonry contractors at the site, the foreman did not initially identify this second contractor, and then claimed not to know the scope of this contractor's work (Tr. 249). After further questioning, he maintained that these employees were performing masonry work on the "columns" located along this wall, but no such columns are apparent in the photographs taken of this area (Tr. 265-67; Exhibits C-6 & C-7). The masonry foreman was also unable to definitively state whether TLT's work on the south side of the building was complete by August 28th, or whether the scaffolding shown in the photographs belonged to TLT or the other masonry contractor (Tr. 263-69). As indicated *supra* n.2, Loftin credibly testified that TLT's project superintendent specifically identified these employees as belonging to TLT (Tr. 65-67, 138, 141-42). TLT has failed to prove otherwise. Accordingly, the violation is affirmed.

GUARDRAILS

Under the second item of the citation, the Secretary alleges that TLT violated § 1926.451(d)(10) by failing to install standard guardrails on tubular welded scaffolds measuring more than ten feet high. Compliance officer Loftin testified that on two separate visits to the worksite, he observed employees working on the scaffolds erected along the south and west sides of the building without adequate guardrail protection. Of the four employees Loftin observed working on the south side scaffolding on August 10, 1995, he testified that only one was fully protected by an adequate guardrail system (Tr. 110-11, 115, 117, 119; Exhibit C-8). According to Loftin, employee number 2 climbed the scaffold frame to an area of the second tier which was 13 feet from the ground with no guardrail system in place (Tr. 42-46, 104, 113, 117; Exhibits C-1, C-4, V-3 & V-4). Loftin testified that he observed another employee, designated employee number 3, working first in an area of the scaffold's second tier with only a midrail and then in an area with no guardrail system at all (Tr. 43-44, 111, 115, 172; Exhibits C-8, V-1, V-2, & V-5). Lastly, Loftin testified that the

mason working at the end of the scaffold's second tier on an outrigger, designated employee number 4, was not adequately protected from a fall of 13 feet by an adequate guardrail system (Tr. 45-49; Exhibits V-6a, V-6b, & V-7). At the west side of the building on the same date, Loftin observed three employees working at a height of over 10 feet from the ground without the protection of a complete guardrail system (Tr. 47, 49-53; Exhibits C-8, V-8, V-9 & V-11).

On August 28, 1995, Loftin again observed three employees working on the south side scaffolding without the protection of an adequate guardrail system: one employee climbed down from a protected area of the fifth tier of the scaffold to an unprotected area of the fourth tier, about 25 feet from the ground; a second employee was working in an unprotected area of the third tier of the scaffold about 13 feet from the ground; and a third employee climbed up the scaffold frame from the street to an unprotected area of the second tier over 12 feet from the ground (Tr. 35-36, 54, 57-58, 134; Exhibits R-1, R-2, C-6 & C-7).⁷

TLT contends that substitute fall protection was actually provided in some of the areas observed by the compliance officer. TLT argues that an outrigger bracket on the south side scaffolding adequately protected employee number 4 from a fall (Tr. 206-08; Exhibits C-12 at 9 & R-5). Although TLT's masonry foreman claimed that the bracket was locked into place and could not move, Loftin testified that TLT's project superintendent told him the bracket would pivot or swing out if leaned upon (Tr. 48-49, 51, 75-76, 161, 206-11; Exhibits C-8, C-12 at 9, & R-5). According to Loftin, the bracket is designed to function in this manner and is not secure enough to serve as any type of fall protection (Tr. 75-76, 80-81, 157-58, 172). Even if the bracket were secured in the manner indicated by the masonry foreman, it would not have satisfied the requirements of the cited standard without the presence of a midrail or toeboard (Tr. 52, 75, 80, 118, 130, 159, 163-64, 172, 174-76). Under at § 1926.451(d)(10), a standard guardrail consists of a top rail, a midrail, and

⁷ One of the employees observed by Loftin on the south side scaffolding was apparently sitting on the midrail of a complete guardrail system (Tr. 31-32; Exhibits C-6, C-7, R-1 & R-2). Although the employee may not have been actually protected by the guardrail at the time he was observed by Loftin, a complete system was in place; therefore, no violation occurred in that particular instance (Tr. 31-32, 54; Exhibits C-6, C-7, R-1 & R-2).

a toeboard.⁸

TLT also failed to establish that other components such as crossbracing and two-by-fours provided adequate fall protection in lieu of a complete guardrail system. According to TLT's masonry foreman, crossbracing which allegedly protected employee number 4 on the south side scaffolding "should" have been secured with heavy gauge wire, but the record fails to establish that this was the case (Tr. 45-47, 178-81, 231-32; Exhibits C-8, V-6a, V-6b, & V-7). Although the videotape of this area indicates the presence of some type of wire, it is not clear whether the wire was actually tied off or secured in a manner that would have provided adequate fall protection (Tr. 241; Exhibit C-8). Similarly, two-by-fours laid across the west side scaffold's frame do not appear to have been secured such that adequate fall protection existed in these areas (Tr. 50-51, 152-56, 234-36, 240-42; Exhibits C-8, V-8 & V-9). Even if these components were secured in the manner alleged, the requisite elements of a complete guardrail system were lacking in both instances.

Finally, as with the safe access violation, TLT argues that the south side scaffolding observed by Loftin on August 28, 1995, was being built at the time of the inspection (Post-Hearing Brief at 14). However, for the reasons discussed *supra*, TLT has failed to establish this claim. TLT also repeats its contention that the employees observed by Loftin on August 28th were not employed by TLT (Post-Hearing Brief at 14). Again, for the reasons discussed *supra*, this argument must also fail. Accordingly, the violation is affirmed.

WILLFULNESS

The Secretary contends that both violations should be characterized as willful. A violation is willful if committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterp., Inc.*, 13 BNA OSHC 1249,

⁸Section 1926.452(31) defines toeboard as "[a] barrier secured along the sides and ends of a platform to guard against the falling of material." Thus, toeboards are required whenever people must work or pass under or around the scaffold platform (Tr. 82, 92; Exhibit C-12 at 19). TLT suggested that toeboards were not required in this particular area of the scaffold because caution tape placed around the bottom of the scaffold after the August 4th accident prevented anyone from walking into the area underneath (Tr. 92-95; Exhibits C-2, R-3 & R-4). There is no ground in logic or law for believing that caution tape is equivalent to toeboards.

1256, 1986-87 CCH OSHD ¶ 27,893 (No. 85-355, 1987). A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *Id.* at 1256-57.

The Secretary contends that TLT had a heightened awareness of both the safe access and guardrail requirements because it was repeatedly informed by OSHA about compliance with the cited standards. The Secretary notes that in February of 1995, TLT signed a settlement agreement resolving citations issued in connection with a previous inspection in which it agreed to comply with the scaffolding standards at all future worksites (Tr. 59-60; Exhibit C-9). Then, during the August 1995 inspection, TLT was informed on three separate occasions by compliance officer Loftin of the requirements of the cited standards.⁹ On August 4, 1995, Loftin reminded TLT's project superintendent that employees working on scaffolding over ten feet high must be provided with a means of safe access and be protected by an adequate guardrail system (Tr. 12-14, 37, 61). At that time, the project superintendent told Loftin that he was aware of these requirements (Tr. 14, 61). Upon his return to the site on August 10, 1995, Loftin observed conditions which, as established *supra*, constituted violations of the cited scaffolding standards. At that time, he spoke with TLT's project superintendent, and also TLT's masonry foreman, about the violative conditions he observed and the need to provide the required protections (Tr. 21-23, 47, 58, 61). Again, the project superintendent acknowledged that he was aware of the scaffolding requirements (Tr. 61). On August 28, 1995, Loftin once again observed conditions which, as noted *supra*, constituted violations of the cited scaffolding standards. For the third time, he spoke with TLT's project superintendent about the violative conditions he observed and the requirements of the cited standards (Tr. 36, 137-38, 140).

TLT is not an inexperienced contractor and according to the record, was well aware of the fundamental safety requirements associated with scaffolding work. Despite Loftin's frequent "reminders" regarding compliance with the cited standards, TLT continued to perform work at the Salem worksite without the proper scaffolding protections in place for its employees. During the

⁹ According to the record in the companion case, TLT was also informed about the requirements of the cited standards during an inspection conducted in April of 1995; no citations were issued in connection with this inspection. *See T.L.T. Constr. Co.*, No. 96-0237, slip. op. at 10.

course of the inspection, Loftin observed at least nine employees working on scaffolds without adequate guardrail protection and a means of safe access. More than half of these employees were working on the same set of scaffolding involved in the August 4th accident. Such persistent noncompliance constitutes more than mere carelessness. TLT's failure to employ basic scaffolding safety practices represents not only a conscious disregard of the requirements of the fall protection standards, but also plain indifference towards the safety of its employees. Accordingly, the scaffolding violations are affirmed as willful.

The Secretary has proposed a \$28,000 penalty for each willful violation. Without proper guardrail protection and/or a safe means of access, at least nine TLT employees at the Salem worksite were exposed to falls ranging from 12 to 25 feet and as a result, could have sustained serious physical injury or even death (Tr. 54). These are routine scaffolding protections of which TLT was clearly aware, and as discussed above, TLT's history with OSHA suggests a pattern of noncompliance with these requirements. Under the circumstances, the proposed penalties are appropriate.

Based upon the foregoing findings and conclusions, it is

ORDERED that citation 1, item 1, alleging willful violation of § 1926.451(a)(13), is affirmed and a penalty of \$28,000 is assessed. It is further

ORDERED that citation 1, item 2, alleging willful violation of § 1926.451(d)(10), is affirmed and a penalty of \$28,000 is assessed.

Richard DeBenedetto, OSHRC Judge

Dated: _____
Boston, Massachusetts