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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
v.	:	OSHRC DOCKET
	:	NO. 96-0237
T.L.T. CONSTRUCTION CO., INC.	:	
	:	
Respondent.	:	
	:	

Appearances:

Ralph R. Minichiello
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 Co., Inc. (“TLT”) was issued two citations stemming from a September 28, 1995, inspection of a worksite located at Gloucester High School in Gloucester Massachusetts. TLT served as general contractor for the project and at the time of the inspection, was engaged in masonry work in the construction of a new gymnasium adjacent to the high school (Tr. 18, 21-22; Exhibit C-1). Under the first citation, as amended, the Secretary alleges serious violation of 29 C.F.R. § 1926.501(b)(1) which requires that each employee on a walking/working surface with an unprotected side or edge that is 6 feet or more above a lower level be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems; a \$2,800 penalty is proposed.¹ Under the second citation, the Secretary alleges willful violations of two scaffolding standards dealing with safe access and the use of guardrails; a \$28,000 penalty is proposed for each violation.

¹ The citation initially alleged violation of § 1926.500(d)(1), but the Secretary amended the citation at the hearing to allege violation of § 1926.501(b)(1) (Tr. 5-6).

OPEN-SIDED FLOOR

The first citation charges that TLT violated § 1926.501(b)(1) by failing to provide fall protection for employees working and walking near an open-sided floor that measured at least six feet above ground level. John Yanovitch, the compliance officer who conducted the inspection, testified that a 25 to 30-foot-wide unguarded floor opening was located between the new gymnasium and the high school; he measured the opening as six feet deep at one end and nine feet deep at the other end (Tr. 78-80, 146-47; Exhibits C-9, C-10 & C-11). According to Yanovitch, the difference in height was due to the fact that the ground at the six-foot end had not yet been excavated for the placement of a new wall (Tr. 151-52).

In addition to debris strewn throughout the area, building materials and equipment, such as cinder blocks and welding machines, were located around the floor opening (Tr. 82-83; Exhibits C-9, C-10 & C-11). During the inspection, Yanovitch observed an employee adjust a welding machine located four feet from the edge of the open-sided floor, then walk along the floor about three to four feet from the edge (Tr. 82-83; Exhibit C-11).² Without guardrails around the floor opening, employees working in this area could have tripped over the debris and/or inadvertently fallen into the opening, sustaining serious injury (Tr. 83-84).

TLT does not dispute that the open-sided floor was not guarded, but contends, based upon the testimony of its masonry foreman, that Yanovitch's measurements of the floor opening's depth were inaccurate. The masonry foreman's testimony, however, was inconclusive on this point (Tr. 252-53). Although he admitted that he did not measure the depth of the floor opening himself and would defer to any actual measurement of the area, he maintained that "in his belief", the depth was less than six and nine feet (Tr. 280-81, 284; Exhibits C-9, C-10 & C-11). This testimony is inadequate to refute the actual measurements testified to by compliance officer Yanovitch.

The record also fails to support TLT's contention that the open-sided floor cannot be considered a walking or working surface. Section 1926.500(b) defines a walking/working surface

² Yanovitch testified that TLT's project superintendent informed him that all of the employees working on the Gloucester project at the time of the inspection were employed by TLT (Tr. 24, 144, 171). Although TLT's masonry foreman for the project maintained that there were fifty to sixty additional employees at the worksite who were not employed by TLT, they were apparently engaged in plumbing or electrical work in an area of the site that was not part of the inspection (Tr. 241-42, 261).

as any surface on which an employee walks or works, including, but not limited to, floors. Here, the presence of various building materials and equipment around the floor opening, as well as Yanovitch's un rebutted testimony regarding his observation of an employee working in this area, clearly establishes that employees both worked and walked on this surface.

As general contractor for the project, TLT had the authority to ensure that some type of fall protection was installed around the open-sided floor in order to protect its own employees, as well as any others working at the site. See *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1994 CCH OSHD 30, 621 (No. 92-0851, 1994), citing *Blount Intl. Ltd.*, 15 BNA OSHC 1897, 1899, 1991-93 CCH OSHD 29,854, p. 40,750 (No. 89-1394, 1992) (general contractor may be held responsible for hazards which it reasonably could have detected or prevented by virtue of its supervisory control over the worksite). Having failed to do so, employees were exposed to potentially serious falls of at least six feet (Tr. 84). Accordingly, a serious violation of § 1926.501(b)(1) is established.

The Secretary has proposed a penalty of \$2,800. Compliance officer Yanovitch observed an employee working in close proximity to the unprotected edge of the open-sided floor and the presence of building materials and equipment around the opening serves as additional evidence of employee exposure (Tr. 82-83, 86). A six- to nine-foot fall could have caused serious physical injury or even death (Tr. 84-86). Where the gravity of the violation is high, a penalty of \$2,800 is appropriate.

SAFE ACCESS

The first item of the second citation charges 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 Yanovitch testified that he observed TLT employees working on three separate sets of tubular welded walk-through scaffolding for which a safe means of access was not provided (Tr. 25). Upon entering the new gymnasium, Yanovitch first observed an employee descending the framework of a four-tier scaffold (Tr. 24, 27-28). The employee was climbing down from the scaffold's second tier at a height of over twelve feet from the ground (Tr.

27, 33; Exhibits C-2 & C-3).³ To the right of this scaffold, Yanovitch observed a second set of scaffolding, also four tiers high, on which he observed an employee performing masonry work from the top tier at a height of over 25 feet from the ground (Tr. 39-43; Exhibits C-4 & C-6). Finally, outside the new gymnasium, he observed a third employee descending from the second tier of a two-tier scaffold located on the roof of the high school at a height of over twelve feet from the roof floor (Tr. 45-49, 143-44; Exhibit C-5).⁴

According to Yanovitch, no ladder was provided at any one of these three sets of scaffolding (Tr. 27-28, 44, 49). Furthermore, the scaffolds were not specifically designed for climbing since the “rungs” of the scaffold frames were neither flat nor evenly spaced, and measured only about nine inches wide (Tr. 34-36, 45, 157). Yanovitch maintained that these conditions, as well as the presence of pins — used to attach the cross-bracing to the scaffold frame — protruding into the climbing area of the rungs, made it very difficult to safely climb the frame of this type of scaffold (Tr. 34-37, 122; Exhibit C-2).

Albert L. Loftin, a compliance officer who testified for the Secretary as an expert in scaffolding, concurred that it would be difficult not only for an employee to climb this type of scaffold in a predictable, even-paced rhythm due to the unevenly spaced rungs, but also to place and remove his feet from the narrow rungs (Tr. 37-38, 200). He stated that the rungs of the type of scaffold used by TLT at the worksite were spaced at distances ranging from 16 to 20 inches and varied in width up to nine inches (Tr. 194-95, 198; Exhibit C-15). Loftin noted that the American National Standards Institute (ANSI) standard dealing with scaffolding safety contains a section which requires safe access to be provided to any scaffold whose climbing surfaces are spaced over 16 inches apart and are less than ten inches in length (Tr. 199-200; Exhibit C-16 at § 4.18(2)). In addition to the ANSI standard,

³ The record establishes that each tier of a standard open-ended frame, walk-through type of scaffold measures six feet, four inches high (Tr. 32, 185, 193-94; Exhibits C-12 & C-15). Yanovitch confirmed this measurement by measuring the height of the first tier of each scaffold he observed inside the new gymnasium during his inspection (Tr. 31, 42, 60). In each case, the first tier of scaffolding was six feet, six inches high, the additional two inches was due to the presence of a screw jack at the base of the frame (Tr. 31, 42, 60, 194).

⁴ Yanovitch did not actually measure the height of the exterior scaffold’s first tier, but assumed that since it was of the same type as that used inside the building, it was the standard six-foot, four-inch-high scaffold, with an additional two inches because of the screw jack (Tr. 48).

he testified that literature from a well-known scaffolding manufacturer, including safety materials provided to the users of its equipment, also prohibit climbing the frames of this type of scaffold and require that a separate means of access be used (Tr. 183, 186-92; Exhibits C-12 at 6, C-13, & C-14 at 6, #28-29).

TLT makes several arguments. First, TLT argues that the two scaffolds inside the new gymnasium were being dismantled and therefore, ladder access was not required. The Secretary concedes that during the building or dismantling of scaffolds, employees are permitted to climb the scaffold frames (Tr. 92-93, 165, 202).⁵ According to TLT's masonry foreman, no work was being performed on either of the scaffolds in question and both were in the process of being dismantled in order to be used in another area of the work site (Tr. 243-44). As proof that dismantling had occurred, TLT noted that the first scaffold observed by Yanovitch was missing an upright on its fourth tier, and the second scaffold he observed had a stack of scaffolding sections tied to the end of its second tier (Tr. 114-17, 123-25; Exhibits C-2 through C-4 & C-6).

Yanovitch testified that he saw no evidence to suggest that either of these scaffolds was being dismantled (Tr. 29-30, 109-14). He indicated, and both compliance officer Loftin and TLT's masonry foreman confirmed, that it typically takes two employees to dismantle a scaffold, and both of the employees observed on these scaffolds were alone (Tr. 30, 54, 202, 244-45). Although TLT suggested that these men may have been assisted in dismantling their respective scaffolds by a large forklift-type machine known as a "lull", Yanovitch testified that he never saw a lull inside the new gymnasium while he was conducting his inspection (Tr. 218, 223, 264-65, 291-92; Exhibit C-5). TLT's masonry foreman, who testified that there were two lulls present at the worksite, could not confirm that one was actually being used inside the building at the time of the inspection (Tr. 264-65, 267-69).

Moreover, at least one of the employees observed by compliance officer Yanovitch was engaged in some type of masonry work. Yanovitch testified that he observed this employee, located

⁵ OSHA does not enforce the requirements 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 (Tr. 165, 202). *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).

on the planked top tier of a four-tier scaffold, bend over and use a trowel to remove mortar from a bucket (Tr. 40-41, 54, 119-21, 166; Exhibits C-4 & C-6). In response, TLT's masonry foreman maintained that the masonry work in this particular area was complete, and that the observed employee was a laborer and therefore, not trained to do masonry work (Tr. 244). However, photographs of the scaffold in question confirm the presence of planking and work materials on the tier where the observed employee was standing (Tr. 41-42; Exhibits C-4 & C-6). All of the witnesses at the hearing, including the masonry foreman, testified that removing work materials and planking are the first two steps, respectively, of any scaffold dismantling process (Tr. 118, 161-62, 164, 203-06, 272-74). Thus, their presence directly contradicts any claim that the scaffold was being dismantled. That a stack of scaffolding sections was secured to the second tier of the scaffold does not undermine this conclusion (Tr. 125, 164, 206, 277; Exhibits C-4 & C-6).

With regard to the first scaffold observed by compliance officer Yanovitch, TLT's masonry foreman again testified that the work in this area was complete and that the scaffold was being dismantled for use in another area of the site (Tr. 243). Although Yanovitch admitted that there were no visible tools on the scaffold and that he did not know exactly what the employee he observed was doing prior to climbing down the scaffold, the presence of planking on all four tiers suggests that the scaffold was still in use (Tr. 109-14; Exhibits C-2 & C-3). Indeed, with full planking in place on the upper tiers of the scaffold and only one employee in the area, neither the missing upright on the fourth tier nor the presence of two planks leaning against the bottom tier establish that the scaffold was being dismantled (Tr. 117-18; Exhibits C-2 & C-3). As both compliance officers testified, a single upright in the middle of the scaffold's fourth tier would not have been the starting point of any dismantling process (Tr. 118, 161-62, 204). Therefore, the record fails to support TLT's claim that either of the scaffolds in question was being dismantled.

Second, TLT argues that while a ladder may not have been directly provided at each of the scaffolds, a ladder was present and available inside the new gymnasium. Compliance officer Yanovitch testified that a ladder was located about fifty feet away from the second set of scaffolding he observed and was being used by employees engaged in masonry work on the top tier of another set of scaffolding (Tr. 44-45, 126, 157; Exhibit R-2). 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). TLT was obligated only to make a ladder available to employees, not to actually require its use.

That a ladder was present in the new gymnasium, however, does not mean it was readily “available”. Here, the ladder in question was being used by another group of employees working on a different set of scaffolding. Where work was being performed simultaneously from more than one scaffold located inside the new gymnasium, it would be unreasonable and unrealistic to expect employees to share one ladder for the purposes of safe access to all scaffolds. An employee using the ladder to access a scaffold could become “stranded” and constrained to climb the scaffold's framework should another employee remove the ladder to access a different scaffold. This does not constitute safe access under the terms of the standard.

Finally, with regard to the scaffold located on the exterior of the new gymnasium, TLT suggested that the employee observed by compliance officer Yanovitch was not employed by TLT (Tr. 143-44, 171; Exhibit C-5). But when questioned about the identity of this employee, TLT's masonry foreman was unable to state whether the employee worked for TLT because he could not clearly see the worker's face in a photograph of the scaffold in question (Tr. 242-43; Exhibit C-5). As previously observed, *supra* n. 2, Yanovitch was told by TLT's project superintendent that all of the employees onsite worked for TLT. TLT has failed to prove otherwise. Accordingly, the first item of citation 2 is sustained.

GUARDRAILS

The second item of citation 2 charges 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 Yanovitch testified that he observed two sets of scaffolds inside the new gymnasium on which employees were working without the protection of guardrails. The first was one of the scaffolds he observed in connection with the safe access violation; on this unprotected scaffold, an employee was

performing masonry work over 25 feet from the ground on the top tier of a four-tier scaffold (Tr. 52-54; Exhibits C-4 & C-6). The second scaffold Yanovitch observed was located to the left of the gymnasium entrance and had four employees working on its top tier (Tr. 55-56; Exhibits C-7 & R-2).⁶ Although a guardrail system was properly installed along the front of the scaffold's top tier, an extended portion at the rear of the scaffold known as an "outrigger" was not adequately guarded at the side, exposing an employee working on the outrigger to a fall of over 19 feet (Tr. 58, 126-29, 132-33, 138-39; Exhibits C-7 & R-2).

As with the previous violation, TLT argues that the first scaffold observed by Yanovitch was being dismantled at the time of the inspection and therefore, did not require a guardrail. However, as we have noted, the record fails to support TLT's claim. Yanovitch credibly testified that he saw no evidence to suggest that any of the scaffolds he observed were being dismantled. On this particular scaffold, both planking and work materials were still present, and the only employee on the scaffold was engaged in masonry work, not dismantling. These facts establish conclusively that the scaffold was still in use and not being dismantled.

With regard to the second scaffold, TLT contends that various components located at the end of the scaffold served as substitute fall protection for the employee working on the outrigger. A photograph of the area shows three potential candidates for this alternative protection: a ceiling girder; a support brace known as a "tie-in"; and the top rail of a guardrail system (Tr. 129-30, 135-38; Exhibit C-7). However, none of these components, alone or together, satisfy the requirements of the cited standard. According to § 1926.451(d)(10), a standard guardrail is approximately 42 inches high and consists of a top rail, a midrail, and a toeboard (Tr. 52, 128, 140). Here, the single guardrail installed at the end of the scaffold did not extend all the way to the wall, leaving the outrigger portion of the scaffold unprotected (Tr. 132-33, 138; Exhibit C-7). The ceiling girder was estimated by compliance officer Yanovitch to be located at the employee's shoulder, at least four feet above the bottom of the outrigger (Tr. 136; Exhibit C-7).⁷ Even TLT's masonry foreman estimated the height

⁶ As indicated, *supra*, this was the same scaffold on which employees were using the only ladder available inside the new gymnasium (Tr. 126-27; Exhibit R-2).

⁷ Yanovitch's four-foot estimate was measured from the ceiling girder to the top of a wooden plank
(continued...)

of the ceiling girder to be at about head or neck level on the employee working on the outrigger (Tr. 245-50, 277-78). Similarly, the “tie-in” brace, located below the ceiling girder, ran from the scaffold to the wall at an upward angle and therefore, was approximately the same height as the girder (Tr. 59, 136-38; Exhibit C-7).⁸ At this height, both the ceiling girder and the tie-in brace were much too high to constitute adequate fall protection under the terms of the cited standard (Tr. 247-48, 250).⁹ Finally, there was no midrail or toeboard installed on the outrigger (Tr. 129, 133, 141-42).

Without proper guardrails on either of the scaffolds observed by Yanovitch, the employees working on them were exposed to falls ranging from 19 to 25 feet. Accordingly, the second item of citation 2 is sustained.

WILLFULNESS

The Secretary contends that both scaffolding violations under citation 2 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, 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 argues that TLT had a heightened awareness of both the safe access and guardrail requirements because it had been informed by OSHA about compliance with these standards five times in the two years prior to the current inspection, three instances occurring in the month previous to the current inspection (Tr. 61-62, 71-72). In April of 1994, one of TLT’s superintendents was informed by a compliance officer conducting an inspection of a TLT worksite about compliance

⁷(...continued)
laying on some cement blocks piled at the end of the outrigger (Tr. 136).

⁸ Because of its close proximity to the ceiling girder in the area above the outrigger, the tie-in brace could not serve as a midrail should the girder be considered the top-rail of any guardrail system (Tr. 142-43).

⁹ TLT attempted to refute Yanovitch’s testimony regarding the height of the ceiling girder and the tie-in brace by referencing a pile of cement blocks located at the front edge of the scaffold (Tr. 140-42, 247-48; Exhibits R-2 & C-7). TLT was unable, however, to definitively establish the height of these blocks (Tr. 140-41).

with the safe access and guardrail requirements (Tr. 63, 65-66, 68-69). The citations issued pursuant to this inspection were settled and in the settlement agreement, TLT specifically agreed to comply with the guardrail requirements for scaffolds at all future worksites (Tr. 66-70; Exhibit C-8). In April of 1995, another TLT superintendent was informed by a compliance officer again about the same scaffolding safety requirements (Tr. 70-71, 159). No citations were issued in connection with this inspection (Tr. 71).

In August of 1995, one month before the current inspection in Gloucester, Massachusetts, compliance officer Loftin visited a TLT worksite located in Salem, Massachusetts, on three separate occasions and informed the project superintendent at all three visits that TLT was in violation of both the safe access and guardrail requirements (Tr. 72-73, 207-14).¹⁰ Loftin testified that he had observed employees at the Salem worksite climbing scaffold frames and working on scaffolds without guardrail protection (Tr. 72-73, 211-14). The citation issued in connection with this inspection was contested by TLT and is addressed in a companion case also decided on this date (Docket No. 96-0238) (Tr. 73).

TLT is an experienced contractor and according to the record, was well aware of the fundamental safety requirements associated with scaffolding work (Tr. 75-76, 235, 237-38). Indeed, TLT's masonry foreman characterized the use of guardrails on scaffolds as "[t]he most important thing", and TLT's project superintendent admitted to Yanovitch during the inspection that he was familiar with the requirements (Tr. 63, 237-38). TLT's failure to employ these safety measures constitutes not only a conscious disregard of the requirements of the cited standards, but also an 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. Under the circumstances, these penalties are appropriate. Four TLT employees were observed on scaffolds ranging in height from 12 to 25 feet; without safe access and/or adequate guardrail protection, they were exposed to falls that could have resulted in serious physical injury or even death (Tr. 43, 49-50, 55, 60). TLT's history with OSHA over the two years prior to the occurrence of these violations

¹⁰ Official notice is taken that the two Massachusetts cities are located approximately 15 miles apart.

appears as a pattern of obstinate noncompliance with the scaffolding standards.

Based upon the foregoing findings and conclusions, it is

ORDERED that citation 1, item 1, as amended, alleging serious violation of § 1926.501(b)(1), is affirmed and a penalty of \$2,800 is assessed. It is further

ORDERED that citation 2, 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 2, 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