OSHRC Docket No. 96-1239
THE EDWARD R. HART CO.

Appearances:

Kenneth Walton, Esquire
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Mr. Cameron H. Speck
Safety Consultant
Builders Exchange
Canton, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

## *DECISION AND ORDER*

The Edward R. Hart Co. (E. R. Hart) contests the three-item serious citation issued to it on August 7, 1996, under the Occupational Safety and Health Act of 1970 (Act). The citation followed the July 18, 1996, complaint inspection by Occupational Safety and Health Administration (OSHA) compliance officer Richard Burns.[1] Specifically, the Secretary asserts that E. R. Hart failed to instruct employees in recognizing and avoiding unsafe conditions at the worksite in violation of § 1926.21(b)(2); that it did not have a competent person to supervise the erection and dismantling of the scaffold in violation of § 1926.451(a)(3); and that employees worked from a scaffold without guardrails in violation of § 1926.451(d)(10). E. R. Hart denies the violations or asserts that employees were protected from the hazards by other means.

This case was heard on November 7, 1996, pursuant to "E-Z" trial procedures set out in Commission Rules §§ 2200.200-211. The parties stipulated to jurisdiction and coverage.

### Background

E. R. Hart has a long-term working relationship with Dover Chemical, a large chemical manufacturer in Dover, Ohio. E. R. Hart, which was Dover Chemical's insulation subcontractor, had been on-site for at least four years (Tr. 137). The initiating complaint alleged that individuals on Dover Chemical's property were seen on unguarded scaffolds at a 40-foot level. When Burns arrived on the property to investigate the complaint, he observed a 40-foot high, tubular-welded frame scaffold set up around the last of three large tanks sitting in a row on the property. The tank was 35 feet high. The scaffold belonged to E. R. Hart. It lacked guardrails, planks, and

[1] The complaint was investigated as part of the OSHA area office's fall hazard "local emphasis program" (Tr. 12).

cross-bracing at various levels. No employees were on the scaffold (Exh. C-1; Tr. 12, 16, 19-25, 42).

E. R. Hart recently insulated these three tanks, completing the last tank a week before OSHA's inspection. Employees had erected scaffolding for each of the three tanks in turn. It is the third tank's scaffold which is at issue here. Working from the scaffold, employees insulated the tank by first applying an insulating material to the outside of the tank and then banding the insulation to the tank (Tr. 75-76, 80-81). Although E. R. Hart had not yet dismantled the scaffold, its foreman, Timothy White, placed a sign on the scaffold which read, "In the Process of Being Taken Down. Stay Off " (Tr. 131).

Employees from other crafts borrowed parts from the scaffold for their own uses (Tr. 25, 30). The Secretary does not claim that employees were on the scaffold while it was without proper cross-bracing or while it was less than fully-planked. He does contend that employees worked on the scaffold at points where it was without guardrails at the 20-foot and 40-foot levels.

*The Scaffolding*

At the "corners" of the last tank, employees erected tubular welded frame scaffold "towers" (Exh. C-1). The towers supported a work deck (variously called a walkboard, work platform or plank). The work deck spanned the approximate 20 to 25 foot horizontal distance between two scaffold towers at opposite corners of the tank (Exh. C-1).[2] Although the work deck had receptacles for guardrail posts, no guardrails were installed across it. One side of the work deck faced the tank and the other was open. Before going onto the work deck, employee Jimmy White ran a steel cable across its open end from one scaffold tower to the other, stringing the cable over and around the cross bracing (Exh. C-1; Tr. 102). Jimmy White knew that the cable was not a substitute for guardrails but wanted "an extra hand line" in back of him when he worked from the deck (Tr. 103).

*Initial Disputes*

The parties initially dispute whether the scaffold had guardrails for exposed locations; and if it did not, whether employees tied off while at those locations. To answer the first question in the negative, the Secretary relies on its videotaped interviews of employees, which were consistent and direct. In spite of the speculation by E. R. Hart's consultant that guardrails could

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[2] The distance was estimated by counting the bottom rungs of the walkboard (Exh. C-1).

have been removed by other crafts after the work was completed, the employees candidly admitted that portions of the scaffold work deck lacked guardrails while they worked from it (Exh C-1; Tr. 23, 30, 33, 93).

As to the second question, employee witnesses were also credible as to the fact they tied off while on the scaffold. Even though two of the three employees interviewed by Burns did not mention being tied off, each testified at hearing that had they been asked, they would have explained that they were tied off with harnesses and lanyards (Tr. 96, 124, 138). The third interviewed employee, foreman Timothy White,[3] referred to the employees' use of harnesses in his jobsite interview, as follows (Exh. C-1; Tr. 33):

> Q. Why didn't you put guardrails on it?
>
> A. I didn't really have them. I had full scaffolding . . . I mean, I just though I had a safety harness.

Dover Chemical had a workrule which E. R. Hart's employees interpreted as requiring them to use harnesses with lanyards whenever they were 10 feet or more above ground, regardless of whether guardrails were installed (Tr. 100, 130). In sum, employees worked at locations without guardrails but were tied off to something while there.[4]

**Item 1: § 1926.21(b)(2)--Safety training**

The Secretary alleges that E. R. Hart failed to provide its employees with necessary training in violation of § 1926.21(b)(2), so that they could recognize and avoid fall hazards from scaffolds. The standard provides:

> (b) Employer responsibility. (2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

E. R. Hart did not have its own fall protection training program (Tr. 71). Although E. R. Hart allegedly had a written safety program, the contents of that program are unknown. Nor was

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[3] Timothy and Jimmy White are brothers.

[4] As discussed *infra*, the mere fact that employees tied off at a location that should have been protected by guardrails does not end the inquiry.

the program distributed all employees. As E. R. Hart's vice-president, Michael Mann, explained (Tr. 72):

> Q: When? When is [the written safety program] given to employees?
>
> A: I mean, off and on, we hire guys, get rid of guys. So, I mean, all of them don't get them. If I know they're not going to be there very long, they won't get them.

Even the testimony of foreman Timothy White that he periodically conducted limited safety meetings "on ladders, drills, extension cords," is given little weight (Tr. 131). In Timothy White's jobsite interview, he indicated that he "did not have any job safety meetings or anything like that" (Tr. 34). The other interviewed employees confirmed the lack of safety meetings or training. Doan had "no idea" if E. R. Hart even had a policy on scaffold erection (Tr. 24, 26, 28).

E. R. Hart's employees were hired out of the union hall (Tr. 55). It contends, therefore, that it properly relied on a union-sponsored apprenticeship program to train its employees in fall protection. The facts of this case amply demonstrate the fallacy of such reliance. The White brothers received their apprenticeship training so long ago that they did not recall that they had it. Timothy White had to be reminded by his apprenticeship teacher that the subject was even covered (Tr. 87, 137). Jimmy White did not know why there were no guardrails but strung the wire cable for something to hold on to. Both Whites emphasized that the insulation work at each level lasted a short time--only 15 minutes or so (Tr. 30, 102, 129). Brevity of exposure does not justify dispensing with requirements put in place for employee safety. Presumably, more recent safety instruction would have kept this fact in the forefront of the employees' awareness.

Employee Doan, on the other hand, was in the second year of his apprenticeship training. The apprenticeship program did not address the subject of scaffolding, fall hazards or fall protection until some time later in the four-year program. E. R. Hart did not seek information about the extent of a particular employee's union training when each was hired. It did not consider that to be an appropriate area of inquiry. In Doan's case, however, E. R. Hart knew that Doan's apprenticeship training had not yet covered scaffolding and fall protection (Tr. 91, 143).

E. R. Hart's work often entailed rigging and working at heights from scaffolding. The standard is written as "*Employer* responsibility." It does not address the responsibility of the collective bargaining representative or of anyone else. An employer must provide satisfactory training even if the employees are experienced. *Ford Development*, 15 BNA OSHC 2003, 2009-10 (No. 90-1505, 1992). Just as E. R. Hart seeks to train employees to apply insulation to meets its contractual duties to other companies, it must also fulfill a duty to train them in safety procedures consistent with use of the materials, equipment, and procedures of its business. E. R. Hart could not rely on union training.

E. R. Hart failed to comply with the standard. Since employees worked at heights of up to 40 feet, the lack of information and training could result in a fall causing serious bodily injury or death. The violation is affirmed as serious.

*Penalty*

Section 11(j) of the Act requires the Commission to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *J. A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. The gravity of the violation is the primary element in the penalty assessment. *Trinity Indus.,* 15 BNA OSHC 1481, 1483 (No. 88-691, 1992).

At the time of the inspection E. R. Hart employed 37 individuals in its three divisions; the insulation division employed 15. The Secretary considered E. R. Hart to be a small employer and gave a 60 percent credit for size. Weighing against a finding of good faith is the fact that E. R. Hart provided no formal or informal safety and health instruction for its employees. It cooperated with OSHA's inspection, however, which is a positive factor in an evaluation of good faith. E. R. Hart had not been previously inspected and had no history of serious violations.

Considerations of gravity include the precautions taken against injury and the likelihood that any injury would result. Although employees were inadequately trained in fall hazard recognition, the fact that they tied off when higher than 10 feet was an attempt to lessen the hazard (a factor which the Secretary did not consider). When an employee fails to recognize danger signals, he or she is less able to avoid hazards inherent in working from heights. A penalty of $1,000 is assessed.

**Item 2: 1926.451(a)(3) -- competent person**

The Secretary charges that there was no competent person to supervise the erection and dismantling of the scaffold in violation of § 1926.451(a)(3). E. R. Hart asserts that a competent person properly supervised the activity. The standard requires:

> (a) "General requirements . . .." (3) No scaffold shall be erected, moved, dismantled, or altered except under the supervision of competent persons.

The scaffold was erected by three employees under the supervision of foreman Timothy White (Tr. 106). Was White a "competent person" within the meaning of the standard? Section 1926.32(f) defines competent person as:

> one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

The Secretary asserts that Timothy White was not trained in the erection or dismantling of scaffolds. He also argues that if the union trained White in he past, White did not recall it. In any event, Burns testified that the apprenticeship training provided by the union, as set forth in union's "Insulator's Safety Manual" (Exh. R-4), lacked the level of sophistication necessary to train a competent person (Tr. 146).

The scaffold Timothy White and his crew erected was missing guardrails from an important portion of the scaffold. Timothy White explained this by noting that he "didn't have them" and that he "d[id]n't know" why he had not put them up (Tr. 33, 35). According to the Secretary, White either failed to recognize the danger; or, if he did, he did not have the authority to secure guardrails before employees were placed on the work deck. The Secretary is correct.

White was not familiar with many of the specific safety requirements for tubular welded frame scaffolds (Tr. 33). Although White attempted to lessen the impact of exposure by requiring employees to tie off to the scaffold or "anything [they] could," he demonstrated a lack of understanding of basic fall protection appropriate for scaffold erection. Further, when supervisory employees endanger themselves, as well as their subordinates, it is strong evidence of an incapacity to identify hazardous conditions. *See Ed Taylor Constr.,* 15 BNA OSHC 1711, 1717 n.8 (No. 88-2463, 1992). When defective scaffolding is erected, it is predictable that falls causing severe physical consequences will result. The violation is affirmed as serious.

*Penalty*

Four employees regularly worked at heights of up to 40 feet from a scaffold which was not erected under the supervision of a competent person (Tr.10). Because of the way the scaffold was erected, employees were in close proximity to a hazardous condition for a combined period of three days (Tr. 31). Many of the same penalty factors previously discussed for item 1 apply here. A penalty of $1,000 is assessed.

**Item 3: 1926.451(d)(10) -- guardrails**

The Secretary alleges that employees worked from a scaffold work deck without guardrails, subjecting employees to falls of between 20 to 40 feet in violation of § 1926.451(d)(10). The standard requires:

> (d) "Tubular welded frame scaffolds . . . ." (10) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. . . .

As discussed, E. R. Hart's contention that the scaffold had guardrails while employees worked from it is rejected.

*Use of harness and lanyard in lieu of guardrails*

E. R. Hart suggests that because employees tied off, they were not exposed to the hazard anticipated by the standard. E. R. Hart is incorrect for two reasons.

First, tying off does not offer the same level of protection as does installation of guardrails. While being tied off would prevent falling all the way to the ground, it would not prevent the fall in the first instance. Depending on where the lanyard was tied, an employee who fell might well be seriously injured by hitting either the tank wall or a lower portion of the scaffold. If the lanyard was tied where there was insufficient support to withstand the force of a fall, being tied off would offer only a false sense of security. Employees, here, tied to different portions of "scaffolding or pipes or anything you could, wherever you had to be" (Tr. 112). Scaffold parts need not be designed to withhold the amount of force required of anchorage points for a harness and lanyard system (*Compare* §§ 1926.104(b); 1926.502(d)(15) *with* § 1926.451(d)(1)). Personal protective equipment might lessen the probability of serious injury,

which reduces the gravity of the violation for penalty purposes. The reduction is less in this case because E. R. Hart did not show that employees tied off at appropriate places.[5]

Secondly, as *Martin v. Trinity Industries, Inc.,* 16 F.3d 1149 (11th Cir. 1994), instructs, an employer is not free to substitute its judgment for the wisdom of the standard. Even if it considers compliance infeasible or useless to protect its employees (which is not the case here), an employer may not disregard the regulation and create an alternative program in an attempt to accomplish what the OSHA standard aimed to do.

The violation is affirmed as serious.

*Penalty*

Based on the penalty factors discussed, a penalty of $1,200 is assessed.

## 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), Fed. R. Civ. P.

## ORDER

Based on the foregoing decision, it is ORDERED:

| Item | Standard | Disposition | Penalty |
|---|---|---|---|
| 1 | § 1926.21(b)(2) | Affirmed | $1,000 |
| 2 | § 1926.451(a)(3) | Affirmed | $1,000 |
| 3 | § 1926.451(d)(10) | Affirmed | $1,200 |

NANCY J. SPIES
Judge

Date: December 17, 1996

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[5] E. R. Hart's argument that literal compliance should be excused is in the nature of an affirmative defense for which the employer traditionally bears burden of proof. *Dun Par Engd. Form Co.,* 13 BNA OSHC 2147 (1st Cir. 1989).