

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD
OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA**

**COMMISSIONER OF LABOR FOR
THE STATE OF NORTH CAROLINA,**

COMPLAINANT,

**DOCKET NO. OSHANC 98-3733
OSHA INSPECTION NO. 125249862
CSHO ID NO. J1002**

v.

BAKER DRYWALL COMPANY, INC.,

ORDER

RESPONDENT.

THIS CAUSE came on for hearing and was heard before the undersigned R. Joyce Garrett, Hearing Examiner for the Safety and Health Review Board of North Carolina, on June 23, 1999 in the Courthouse, Greensboro, North Carolina.

The Complainant was represented by Ann Kirby, Associate Attorney General, North Carolina Department of Justice.

The Respondent was represented by Daniel Fouts, Attorney At Law, Adams Kleemeier Hagan Hannah & Fouts PLLC, 701 Green Valley Road, Suite 100, Greensboro, North Carolina.

At the time of the Hearing Complainant moved to withdraw Citation 1 Item 1d, and there being no objection such Motion is GRANTED.

The issues to be heard are as follows:

Whether there was a serious violation of 29 CFR 1926.451(c)(1) which requires that supported scaffolds with a height to base width (including outrigger supports, if used) ratio of more than 4 to 1 shall be restrained from tipping by guying, tying, bracing, or equivalent means; the specific alleged violation being that at the jobsite, 1st deck, east wall there was a mobile narrow span scaffold 18 foot above ground with 29 inch base width which was not secured. This citation is referred to herein as "Item 1a".

Whether there was a serious violation of 29 CFR 1926.451(c)(2)(i) which requires that footings shall be level, sound, rigid and capable of supporting the loaded scaffold without settling or displacement; the specific alleged violation being that at the jobsite, 1st deck, east wall area there was a narrow span mobile scaffold with legs on wheels attached sitting on insulated chilled water pipes. This citation is referred to herein as "Item 1b".

Whether there was a serious violation of 29 CFR 1926.451(c)(2)(ii) which requires unstable objects to not be used to support scaffolds or platform units; the specific alleged violation being that at the jobsite, 1st deck, east wall area, there was a narrow span mobile scaffold with metal channel irons used under outriggers to support scaffold. This citation is referred to herein as "Item 1c".

Whether, if the alleged violations are sustained, the penalty of \$4,900.00 is proper for the violations considered as a group.

FINDINGS OF FACT

Based upon the stipulations at the time of the Hearing, the record and the evidence presented at the Hearing, the Undersigned makes the following Findings of Fact:

1. Complainant, the North Carolina Department of Labor, by and through its Commissioner, is an agency of the State of North Carolina charged with inspection for compliance and with enforcement of the Occupational Safety and Health Act of North Carolina (the "Act"). Complainant brings this action pursuant to North Carolina General Statute 95-133.
2. Respondent is an entity duly organized and existing under the laws of the State of North Carolina. Respondent is engaged in the business of installation of drywall.
3. Respondent is an "employer" within the meaning of NCGS §95-127(10) . Respondent's employees relative to the Citation are "employees" within the meaning of NCGS §95-127(9).
4. All parties are properly named in the Citation as amended.
5. This Court has jurisdiction over the parties and the subject matter of this Hearing.
6. All notices required by the Act and by any applicable procedural and substantive rules have been given.
7. Neither party has any procedural objection to this Hearing.
8. On or about August 27, 1998 Officer Bruce Jaworoski (herein referred to as "Safety Officer"), a Safety Compliance Officer employed by the North Carolina Department of Labor, inspected Respondent's worksite located at 6680 Silas Creek Parkway, Winston-Salem, North Carolina (the "Site").

9. The Safety Officer properly entered onto the Site and conducted an inspection ("Inspection").

10. Respondent was a subcontractor on the jobsite. At the time of the Inspection Respondent was installing drywall. The facility was multilevel. Respondent was working on the lower concrete deck. There was a lot of construction activity in the area where Respondent was working. The project was about 60% completed.

11. Respondent's foreman was Rick Lair ("Lair") and he was present at the Inspection. Lair was responsible for overseeing the work related to dry wall construction being performed by Respondent's employees. There were approximately 23 employees of Respondent on Site and Respondent employed approximately 250 employees.

12. During the Inspection the Safety Officer observed one or more of Respondent's employees using a scaffold and he observed the scaffold "wobble". The Safety Officer testified that had he not observed the wobble he would probably have not inspected the scaffold.

13. Respondent was cooperative during the Inspection.

14. Lair had been employed by Respondent for approximately 5 years and had been project superintendent for about 4 years. His duties included safety. Respondent ensured safety by training, safety meetings and conducting inspections. Lair had training in scaffolds and a scaffold certification. Lair testified that he had never had a scaffold fall over and that he had never had a man fall from a scaffold.

15. Other contractors/subcontractors on the job site were inspected at the same time Respondent was inspected and 'quite a few' citations were issued. The penalties for the other citations were less than \$500.00. The penalty (and severity of incident) proposed for Respondent was higher than the penalties (and severity) proposed for citations issued to other contractors/subcontractors on the job site.

16. The relevant evidence with respect to Item 1a is as follows:

a. The Safety Officer measured the height of the scaffold and determined it to be 18 feet (216 inches) high. There was no evidence that there was an impediment to measuring the length of the outriggers at the same time the height was measured.

b. The scaffold was manufactured by Perry.

c. Outriggers were used on one side of the scaffold and the scaffold was next to a wall which was higher than the scaffold.

d. The Safety Officer did not measure the outriggers and relied entirely on documentation from the manufacturer in asserting that he believed that the outriggers were 20 inches long.

e. The scaffold was 29 to 30 inches wide.

f. Lair testified that the scaffold width without outriggers was 30 inches and that the width with outriggers was 4 feet 6 inches (ie. 54 inches).

g. If the outriggers were 20 inches in length the scaffold would not comply with the required 4 to 1 ratio; however, if the outriggers were 24 inches in length the scaffold would comply with the required 4 to 1 ratio.

h. There was a possibility of an accident in that a worker could fall more than 6 feet from the scaffold, and if a fall should occur a serious injury could result.

i. Respondent had knowledge of the scaffold and its method of construction and condition.

j. The penalty was calculated in accordance with the operations manual applied to employers in North Carolina. The recommended penalty as group with the other alleged items was \$7,000 based on a classification of high severity, high probability; giving credit for size the adjusted penalty would be \$4,900.00.

17. The scaffold referred to in Finding of Fact #16 above is referred to herein as the "Scaffold" The relevant evidence with respect to Item 1c is as follows:

a. The dry wall activity was being conducted in an area where the subfloor was complete but the floor was not completed and large water pipes had been installed above the subfloor. The floor would be installed over the water pipes.

b. The legs of the Scaffold were positioned on pieces of plywood which were supported by water pipes.

c. Two outriggers were being used; there was no caster at the end of either outrigger.

d. At the instruction of Lair a base (the "Base") to support the Scaffold was built out of plywood and 4X4 and 2X4 boards which were about 6 feet long. A piece of plywood was 36 inches by 8 feet.

e. Each outrigger was resting on a metal block which rested on the Base which was supported by the water pipes. The metal block was not secured to the Base or to the outriggers.

f. The metal outrigger could have slipped on the metal block.

g. The Safety Officer observed a man working on the Scaffold and also observed the Scaffold 'wobble' when the man climbed the Scaffold.

h. The Scaffold was dependent on its outriggers for support, the Scaffold not being attached or fixed to the wall or secured to any other structure.

i. There was a possibility of an accident in that a worker could fall more than 6 feet from the scaffold, and if a fall should occur a serious injury could result.

j. Respondent had knowledge of the scaffold and its method of construction and condition, specifically that the metal outrigger was resting on a metal support block.

k. The penalty was calculated in accordance with the operations manual applied to employers in North Carolina. The recommended penalty as grouped with the other alleged items was \$7,000 based on a classification of high severity, high probability; giving credit for size the adjusted penalty would be \$4,900.00; however on a stand alone basis the classification would be high severity, medium probability; giving credit for size (20%), good faith (25%), history (10%) and cooperation (10%) the adjusted penalty would be \$3,500.

18. The relevant evidence with respect to Item 1b is as follows:

a. The Safety Officer testified that he observed the Scaffold leg sitting on the chilled water pipe and felt that it was unstable, and that there was a possibility of an accident the result of which could be serious injury.

b. The Safety Officer did not testify that there were workers on the Scaffold at the time he observed the Scaffold leg sitting on the water pipe.

c. At the time the Safety Officer told Lair that the Safety Officer was concerned about the Scaffold Lair had the workers start disassembling the Scaffold.

d. Lair testified that at the time the Safety Officer took the picture and observed the Scaffold legs sitting on water pipes the Scaffold was in the process of being disassembled.

e. The penalty was calculated in accordance with the operations manual applied to employers in North Carolina. The recommended penalty as grouped with the other alleged items was \$7,000 based on a classification of high severity, high probability; giving credit for size the adjusted penalty would be \$4,900.00; however on a stand alone basis the classification would be high severity, medium probability; giving credit for size (20%), good faith (25%), history (10%) and cooperation (10%) the adjusted penalty would be \$3,500.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Undersigned concludes as a matter of law the following:

1. This Court has jurisdiction of this cause and the parties are properly before the Court.
2. With respect to the alleged serious violation of 29 CFR 1926.451(c)(1) in this matter, Complainant, in relying solely on publications with respect to length of outriggers rather than measuring the actual outriggers, which measurement could have been done at the same time the height of the scaffold was measured, did not carry its burden of proof in establishing that the width of the scaffold was less than 54 inches, and, therefore, did not carry its burden of proof to establish that the height to width was more than 4 to 1 and, therefore, a violation of the cited standard.
3. With respect to the alleged serious violation of 29 CFR 1926.451(c)(2)(i) in this matter, Complainant did not carry its burden of proof in establishing that the scaffold was in use at the time the legs were positioned directly on water pipes, and, therefore, did not carry its burden of proof to establish a violation of the cited standard.
4. Respondent is responsible for a serious violation of 29 CFR 1926.451(c)(2) (ii), the evidence at the Hearing being sufficient to support Complainant's burden of proof to establish a serious violation of the standard.
5. A proper penalty for a serious violation of 29 CFR 1926.451(c)(2)(ii) is \$3,500.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED as follows:

Citation 1 Item 1a for serious violation of 29 CFR 1926.451(c)(1) and Citation 1 Item 1b for a serious violation of 29 CFR 1926.451(c)(2)(i) be and the same are hereby **DISMISSED**.

Citation 1 Item 1c for a serious violation of 29 CFR 1926.451(c)(2)(ii) be and the same is hereby **AFFIRMED** and Respondent is directed to pay the penalty of \$3,500.00.

This the 1st day of September 2000

R. Joyce Garrett, Hearing Examiner