UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
NOVINGERS, INC.
Respondent.

OSHRC DOCKET
NO. 93-0788

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 December 15, 1993. The decision of the Judge will become a final order of the Commission on January 14, 1994 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 January 4, 1994 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: December 15, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0788

NOTICE IS GIVEN TO THE FOLLOWING:

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

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

James F. Sassaman, Director of
Safety
GBCA
P.O. Box 15959
36 South 18th Street
Philadelphia, PA 19103

John H. Frye, III
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00123176703:03

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant, v. NOVINGER'S INC., Respondent.	OSHRC Docket No. 93-0788

Appearances:

Pedro Forment, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

James F. Sassaman
General Building Contractor's
Association
Philadelphia, Pennsylvania
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Novinger's Inc. ("Respondent") was engaged as a subcontractor specializing in walls, ceilings and interior finishes at a workplace located at Route 322, Hershey, Pennsylvania ("worksite"). Respondent had approximately 2 employees at the worksite (Complaint and answer ¶ 3). As a result of an inspection conducted on December 4, 1992, a two item serious citation was issued together with a Notice of Proposed Penalty totalling $4,250.00

pursuant the Act. Respondent timely contested. Following the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on August 26, 1993. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in construction. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

Both items of the citation relate to Respondent's use of a tube and coupler scaffold erected within the confines of an air shaft of a building under construction. The operative facts are not in dispute.

Respondent's employees were working inside the shaft at the third floor of the building (Tr.20-22). The employees gained access to the scaffold located inside the third floor air shaft by stepping over a two-inch lip (Tr. 21-22) and across a nine and a half inch separation between the edge of the scaffold and the edge of the poured concrete floor (Tr. 24-30). There was a vertical two-inch lip and a horizontal nine and a half (9 1/2) inch separation between the third floor level and the scaffold (Tr. 24-30). The tube and coupler scaffold located inside the third floor air shaft was more than 10 feet above the ground or floor on December 4, 1992 (Tr. 40) Employees were standing on the scaffold inside the

[1] Title 29 U.S.C. § 652(5).

shaft and reaching over to work on the exposed walls in the interior of the shaft (Tr. 37). The space between the scaffold and the walls was between nineteen and one-half (19½") and sixteen and one half inches (16½").

Respondent was cited for alleged serious violations of 29 C.F.R. § § 1926.451(a)(13) (Item 1), and 1926.451(c)(13) (Item 2). The former item for failing to have safe access onto the scaffold and the latter item for failure to provide standard guardrails or equivalent protection on the "open" sides of the scaffold. Penalties of $2,125.00 were proposed for each alleged violation.

As to item 1, Respondent first argues (as an "affirmative defense") that the cited standard is not applicable.[2] Respondent reads the opinion of Commissioner Cleary in *H.E. Weise, Inc. and Industrial Electrical Construction Co.*, 10 BNA OSHC 1499, 1502 (Nos. 78-204 and 78-205, 1982) as interpreting the term "access" in the cited standard as being applicable only to hazards which might exist "while ascending or descending from a scaffold." Respondent maintains that inasmuch as the scaffold was at the same horizontal level as the nearby floor level from which employees stepped on to the scaffold there was no movement up or down thus there the employees were not "ascending or descending." Respondent's literalness is pure sophistry. The standard simply seeks to assure that employees do not face hazardous conditions in the process of getting on or off scaffolds. The same is true whether they have to travel up, down, sideways or in any other direction. Respondent's argument is rejected. The standard is applicable.

Respondent does not challenge and I find that the above testimony establishes that the violative condition existed, that employees were exposed thereto and that Respondent knew or should have known of the condition. The Secretary has thus made a *prima facie* case.

---

[2] The cited standard, 29 C.F.R. § 1926.451(a)(13), provides;

> § *1926.451 Scaffolding.*
>
> *(a) General Requirements.*
>
> (13) An access ladder or equivalent safe access shall be provided.

Respondent maintains that the condition should be "down-graded" and a *de minimis* notice issued in lieu of finding a violation. A *de minimis* violation is one having no direct or immediate relationship to employee safety or health, where "the hazard is so trifling that an abatement order would not significantly promote the objectives of the Act." *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991). Respondent argues that if the Secretary has announced that a 12" gap between a scaffold and a wall is not an open side to a platform, then the 9½" gap between the building floor and the scaffold should not be a violation. The analogy is inapposite. When working on a scaffold nearly abutting a wall an employee would find it hard indeed to step into the gap. Even if he did, reaching an arm out to contact the wall would prevent or at least, cushion such a fall. The logic of the situations are not analogous.

Respondent further argues that if it is in violation, the violation must be other than serious. Complainant, who has the burden of proving that an alleged violation is serious has simply reiterated such a claim in its post-hearing brief (Pp. 12-13). The Compliance Officer envisioned an employee tripping in such a manner as to end up with his leg extending down through the 9½" gap or with a knee striking the scaffold or an ankle breaking (Tr. 31). If the Commission can conclude that evidence of a fall of ten to fifteen feet was sufficient to find a hazard serious as it did in *Brown-McKee, Inc.*, 8 BNA OSHC 1247 (No. 76-982, 1980) and *P.P.G. Industries, Inc.*, 6 BNA OSHC 1050 (No. 15426, 1977), then it can find that tripping over a 2" lip in an area where there is a 9½" gap is other than serious. The scenario created by the Compliance Officer is so unlikely to result in serious injury or death as to require the finding that the hazard was not serious. See, *Brown & Root, Inc., Power Plant Div.*, 8 BNA OSHC 1055, 1060 (No. 76-3942, 1980) (it is sufficient for a violation to be found serious if an accident is only possible but its probable result would be serious injury or death)("*Brown & Root*"). The item is affirmed as an other than serious violation of the Act. A penalty of $100 is appropriate therefor.

The second of the items under which Respondent has been cited deals with the fact that the scaffold erected in the air shaft did not extend the full width or length of the shaft thus leaving a space between the ends or sides of the scaffold and the walls on all four sides.

It is undisputed that the gap between the edge of the scaffold and the wall varied in size from 16½" to 19½". Respondent agrees that a person could fall through an opening 19½" wide as existed in the air shaft Tr. 69).

Respondent does not claim or argue that the condition did not exist or that its employees were not exposed to it or that it did not know of the conditions. Respondent claims, however, that there was no violation "on the basis that a temporary removal of a guardrail to receive materials does not constitute a violation." In view of the facts that there was no guardrail there to begin with and that the sides or edges were not being used to receive materials, such an argument is rejected as specious. Respondent comes closer to the mark by arguing that "no guardrails were installed because it makes the work difficult" (Tr. 63).

The Commission, in *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1219 (No 88-821, 1991) (*"Seibel"*) reviewed the history of the infeasibility defense including *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553, 1986), *rev'd in part, sub nom, Secretary v. Dun-Par Engineered Form Co.*, 843 F.2d 1135 (8th Cir. 1988), (*"Dun-Par I"*) and *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-0928, 1986) (*"Dun-Par II"*). In order to prevail on this defense, a Respondent must demonstrate that 1) compliance with the standard's requirements would "not be practical or reasonable in the circumstances." *Dun-Par II, supra, 12 BNA OSHC at p. 1966*, and 2) "that an alternative protective measure was used or that there was no feasible alternative measure." *Seibel*, supra, 15 BNA OSHC at 1228. *See also, Kunz Construction Co.*, 15 BNA OSHC 1331, 1333 (No. 90-2369-S, 1991) (ALJ). Infeasibility, said the Commission, in *Dun-Par II*, 12 BNA OSHC at p. 1996, includes "considerations of reasonableness, common sense, and practicality." *Id.* Moreover, where an employer cannot fully comply with the literal requirements of a standard, it must nevertheless comply to the extent that compliance is feasible. *Bratton Furniture Manufacturing Co.*, 11 BNA OSHC 1433, 1434 (No. 81-799-S, 1983). Respondent attempted affirmative defense fails if for no other reason than Respondent's president conceded that safety belts could have provided fall protection where, as here, the scaffold faced a wall (Tr. 67-8).

Respondent's failure to assure the use of safety belts which could have been used negates the asserted defense. The violation has been established.

Respondent's argument that the Secretary has exempted from the guardrail requirement scaffolds 12" away from the wall (Exhibit R-1) misses the mark (by about 4½" to 7½") since the gaps here were greater than that. In addition, Respondent's President specifically agreed with the Compliance Officer that an employee could fall through the 19½" gap to the floor below (over 10'). A 10' fall on a construction site is reasonably likely to produce broken bones or other serious injuries. *Brown & Root*, Id.. Accordingly, I find that the alleged violation is serious within the meaning of § 17(k) of the Act. In the absence of any argument that the proposed penalty is unreasonable and upon consideration of the statutory factors under § 17)j) of the Act, I find that the proposed penalty of $1125.00 is reasonable.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1926.451(a)(13) as alleged in Citation 1, Item 1. The violation was other than serious. A civil penalty of $100 is appropriate therefor.

4. Respondent was in violation of § 5(a)2) of the Act in that it failed to comply with the standard at 29 C.F.R. 1926.451(c)(13) as alleged in Citation 1, Item 2. The violation was serious. A civil penalty of $1125 is appropriate therefor.

ORDER

IT IS ORDERED THAT the citation issued to Respondent on or about January 19, 1993 is affirmed, modified or vacated as indicated above.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: DEC 14 1993
Washington, D.C.