

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,  
Complainant

v.

Thomas Industrial Coatings, Inc.,  
Respondent.

OSHRC Docket Nos. **06-1974 & 06-1975**

Consolidated

Appearances:

Oscar L. Hampton, III, Esquire and Aaron J. Rittmaster, Esquire, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri  
For Complainant

Julie O'Keefe, Esquire and John F. Cowling, Esquire, Armstrong Teasdale, LLP, St. Louis, Missouri  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER**

Thomas Industrial Coatings, Inc. (TIC), is an industrial painting company. In May of 2006, one of TIC's crews was painting a bridge in Kansas City, Missouri. TIC had installed a suspended scaffold beneath the bridge from which to work. On May 10, 2006, TIC painter Daniel Denzer fell from the scaffold to the ground approximately 40 feet below. He was killed instantly. That same day, compliance officers from the Occupational Safety and Health Administration (OSHA) began an inspection of the worksite.

TIC brought in a different crew to fix various unsafe conditions found on the suspended scaffold, and to finish painting the bridge. After completing the bridge painting, the crew began dismantling the scaffold. On July 5, 2006, eight weeks after Denzer's death, TIC painter Andrew Wilson fell to his death as he was helping dismantle the scaffold. OSHA again inspected the worksite.

On November 9, 2006, the Secretary issued citations to TIC under two separate docket numbers. Docket No. 06-1975 addresses alleged violative conditions occurring on and around May 10 and May 22, 2006. Docket No. 06-1974 addresses alleged violative conditions occurring

on and around July 5, 2006. TIC timely contested the citations in both cases. The two cases were consolidated for the hearing.

**Docket No. 06-1975**

Under Docket No. 06-1975, the Secretary issued one citation for serious violations of the Occupational Safety and Health Act of 1970 (Act), and one for willful violations. All of the items cited involve standards located in “Subpart L–Scaffolds” of the 29 C. F. R. § 1926 construction standards.

Citation No. 1 (Alleged Serious Violations)

<u>Item</u>	<u>Standard</u>	<u>Proposed Penalty</u>
1	§ 1926.451(d)(9)	\$ 7,000.00
2a	§ 1926.451(d)(19)	\$ 7,000.00
2b	§ 1926.451(e)(1)	(with item 2a)
3	§ 1926.451(f)(13)	\$ 7,000.00
4	§ 1926.451(h)(2)(ii)	<u>\$ 7,000.00</u>
		\$ 28,000.00

Citation No. 2 (Alleged Willful Violations)

<u>Item</u>	<u>Standard</u>	<u>Proposed Penalty</u>
1	§ 1926.451(a)(6)	\$ 70,000.00
2a	§ 1926.451(d)(12)(i)	\$ 70,000.0
2b	§ 1926.451(d)(12)(iv)	(with item 2a)
3	§ 1926.451(f)(3)	\$ 70,000.00
4-23	§ 1926.451(g)(1)(vii)	\$ 70,000.00 x 20 items \$ 1,400,000.00
24	§ 1926.454(a)	\$ 70,000.00
25	§ 1926.454(a)	\$ 70,000.00
26	§ 1926.454(a)	<u>\$ 70,000.00</u>
		\$ 1,820,000.00

The proposed penalties for both Citation No. 1 and Citation No. 2 total \$ 1,848,000.00.

**Docket No. 06-1974**

Under Docket No. 06-1974, the Secretary issued one citation for serious violations of the Act, and one for willful violations.

Citation No. 1 (Alleged Serious Violations)

<u>Item</u>	<u>Standard</u>	<u>Proposed Penalty</u>
1	§ 1926.100(a)	\$ 3,500.00
2	§ 1926.453(b)(2)(iv)	\$ 7,000.00
3	§ 1926.453(b)(2)(vi)	\$ 7,000.00
4	§ 1926.453(b)(2)(ix)	<u>\$ 7,000.00</u>
		\$ 24,500.00

Citation No. 2 (Alleged Willful Violations)

<u>Item</u>	<u>Standard</u>	<u>Proposed Penalty</u>
1	§ 1926.451(e)(1)	\$ 70,000.00
2	§ 1926.451(f)(3)	\$ 70,000.00
3	§ 1926.451(f)(7)	\$ 70,000.00
4	§ 1926.451(g)(1)(vii)	\$ 70,000.00
5	§ 1926.454(b)	\$ 70,000.00
6	§ 1926.454(b)	\$ 70,000.00
7	§ 1926.454(b)	<u>\$ 70,000.00</u>
		\$ 490,000.00

The proposed penalties for both Citation No. 1 and Citation No. 2 total \$ 514,500.00.

The court held a 17-day hearing in this matter between June 1 and July 22, 2009, in St. Louis, Missouri, and Kansas City, Missouri. TIC stipulated jurisdiction and coverage (Tr. 4). The parties have filed post-hearing briefs.

Under Docket No. 06-1975, the court affirms Items 1 and 4 of Citation No. 1, and vacates Items 2a, 2b, and 3. The court affirms Items 1 through 11 of Citation No. 2, and vacates Items 12 through 26. A total penalty assessed is \$714,000.000.

Under Docket No. 06-1974, the court affirms Items 1, 3, and 4 of Citation No. 1, and vacates Item 2. The court affirms Items 2 and 4 of Citation No. 2, and vacates Items 1, 3, 5, 6, and 7. A

total penalty of \$157,500.00 is assessed.

## **BACKGROUND**

Donald (Don) Thomas started Thomas Industrial Coatings, Inc., in 1991<sup>1</sup> (Tr. 3780). He is the president and sole owner of the company. TIC specializes in painting industrial steel structures and vessels, including barges, bridges, water towers, locks, dams, tugboats, and maintenance plants (Tr. 3781). Most of TIC's projects are located in the Midwest (Tr. 3796).

### Safespan Scaffolding System

TIC's painters routinely use scaffolding when working on industrial structures. Since 1997, TIC has used a suspended scaffolding system known as Safespan, developed by Lambros Apostolopoulos (Exh. C-63A; Tr. 3804-3805).

Apostolopoulos developed the Safespan system during the 1990s, when he wanted to improve upon scaffolding used for painting bridges. He was aware of a method where sections of chain-link fencing are placed flat on horizontal cables to create a work platform. Apostolopoulos sought to improve upon this method. He strung cables between trees in his backyard and experimented with different platform materials. Eventually, Apostolopoulos settled on corrugated steel sheets because they can support the most weight proportionate to the weight of the sheets. Corrugated sheets also provide a solid work floor, unlike the chain-link fencing. Apostolopoulos patented his system and incorporated under the name "Safespan Systems, Inc." (Exh. 63A, pp.18-19).

Contractors buy or rent the Safespan components from Safespan. TIC is one of Safespan's largest customers. The Safespan system consists of individual sheets of corrugated metal configured on 4 inch main cables and supported with load bearing vertical tie-ups. The main cables are anchored to concrete abutments or piers beneath the bridge, and extend the entire length of the bridge. The cables are located 5 feet apart across the width of the bridge.

After stringing the main cables, the sheets of corrugated metal (referred to as "pans") are placed on top of them. The pans are approximately 10 feet long and 4 feet wide. The pans also come

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<sup>1</sup>For tax purposes, Don Thomas also created Thomas Equipment and Management (TEM). TEM owns the equipment used by TIC, and pays the salaried management employees. TIC pays the union workers and is the entity that enters into contracts for industrial painting projects (Tr. 3781).

in half-sheets that are 5 feet long. The pans are secured to the main cables by attaching a J-clip through a slot at each corner of the pans. Vertical tie-ups are hung from the undercarriage of the bridge. Each row has a single tie-up for each main cable, and is anchored to the scaffold. Vertical tie-ups are strung in rows running the width of the scaffold. Once a row of tie-ups is in place, more pans are laid, and the process is repeated until the scaffold is fully decked.

Guardrails are installed on the completed platform by affixing a series of 42-inch metal uprights on each side. A metal cable is strung through eyelets in the metal uprights. Metal kickplates and toeboards are installed at the perimeter of the scaffold. Once the platform is completed with guardrails, personal fall protection is not required for painters on the Safespan scaffold.

After completing a project, the scaffold is dismantled. The process is reversed: the toeboards, guardrails, and tie-up rows are removed, and the pans are taken up (Exh. C-63A).

#### TIC's Recent History with OSHA: Death of James Belfield

On February 17, 2006, TIC was in the process of installing a Safespan scaffold beneath the Jefferson Barracks Bridge, near St. Louis, Missouri. A portion of the platform collapsed, and TIC painter James Belfield plunged to his death in the Mississippi River. Belfield was wearing a harness but was not tied off when the scaffold collapsed. The Secretary issued citations to TIC under Docket No. 06-1542 for two serious violations and one willful violation of the Act, which TIC contested. This court presided over a hearing in that matter in September 2008, and subsequently issued a decision vacating one of the alleged serious items, and affirming the remaining alleged serious and willful items as serious.<sup>2</sup>

#### The Lexington Avenue Bridge Project

The Lexington Avenue (L. A.) Bridge carries eastbound and westbound traffic over the Chestnut Avenue Trafficway, which runs northbound and southbound in Kansas City, Missouri (Tr. 73). The L. A. Bridge was built in 1910 by the Central Electric Railroad Company as a railroad trestle bridge (Tr. 100). The L. A. Bridge is supported by twelve vertical metal piers reinforced with latticed cross-bracing attached to the metal piers at 45 degree angles. Two vertical piers support each end of the bridge. The other eight piers are configured east and west of the center of the bridge.

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<sup>2</sup>At the time of this writing, the decision in *Thomas Industrial Coatings, Inc.*, (No. 06-1542, 2009), is pending review by the Commission.

Two perimeter I-beams extend east/west over the Chestnut Avenue Trafficway, with sixteen interior I-beams running north/south. The bridge is 368 feet long and 65 feet wide (Tr. 96, 319).

The City of Kansas City, Missouri, opened the bidding process for repairs and maintenance on the L. A. Bridge in 2005. Repairs included removing and replacing the parapet walls, replacing a decaying sidewalk, replacing the bridge deck, and reinforcing the bottom of the piers. Minor structural steel repairs underneath the bridge were also required. Comanche Construction was the general contractor on the project. TIC won the bid to water-blast and repaint the bridge (Tr. 3867-3868).

Doug Rothweiler was TIC's project manager on the L.A. Bridge (Tr. 90). TIC began installing the Safespan scaffolding on the L. A. Bridge in mid-April, 2006. The angled cross-bracing was an unusual feature of the L. A. Bridge. TIC's crew left gaps in the Safespan platform where the angled cross-bracing jutted through. Leaving gaps around the latticed cross-bracing made it easier to water-blast and paint it. There were a total of twenty gaps, or holes, in the platform. The largest holes were approximately 4 feet wide and 11 feet long. The platform was approximately 40 feet above the Chestnut Avenue Trafficway (Tr. 88, 178, 305, 1528, 1777).

After the scaffolding was completed, painters hung two sets of tarps from bridge. One set was hung from the bottom of the bridge to the Safespan platform. The other set was hung from the bottom of the Safespan platform to the ground around the support legs of the bridge (Tr. 1309-1310). The crew wrapped the ends of the containment tarps around 2x4s, then attached the 2x4s to the bridge deck and the Safespan deck with tap screws (Tr. 1845-1846, 3961).

#### May 10, 2006, Fatality

On May 10, 2006, TIC's crew on the L. A. Bridge site consisted of foreman Scott Cawvey, Dan Denzer, Bruce Neal, Humberto Soto, Indelfonso Vasquez, and Brian Moser. Bruce Neal was the "land operator," who mixed paint on the ground and also operated the forklift (Tr. 82). James Tyner, a field engineer hired by the City, was also on site (Tr. 3134). After lunch, Denzer and Moser were standing on the Safespan scaffold. Denzer was working near a hole located between pier 3 and pier 4 on the north side of the bridge,<sup>3</sup> designated as 3-4NS (Exh. C-15).

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<sup>3</sup>Each of the 20 holes at issue was given an identification number for purposes of the hearing.

Denzer and Moser were “striping” the bridge. After the painters in front of them spray-painted the vertical bridge structures, Denzer and Moser would follow behind with paint brushes “to beat the paint into the cracks” (Tr. 1686). Denzer had tied a paint brush to a broom handle in order to reach high parts of the bridge structure. Denzer was facing Moser, approximately 2 feet away, and talking to him as he painted. Denzer reached up with the broom handle and took a step backward. He stepped through hole 3-4NS (Tr. 1686, 1688). Moser shouted down to Bruce Neal and James Tyner, who were standing below the bridge. Moser told them to look for Denzer in the containment area. Tyner called 911. Moser used the aerial lift to descend from the scaffold. By the time he got to the containment area, Neal was standing over Denzer’s body, checking for signs of life. Denzer had sustained fatal injuries in the fall (Tr. 1689).

#### First OSHA Inspection

Area director Barbara Theriot assigned compliance officer William Alpert to inspect TIC’s worksite. Alpert arrived at the site on May 10, 2006, and held an opening conference with TIC, and videotaped the site (Exh. C-7; Tr. 785). The next day, May 11, Alpert returned to the site with compliance officer Melvin McCrary. McCrary took additional video footage of the site. OSHA later obtained photographs taken of the site on May 10, 2006, by the Kansas City Police Department (Tr. 77). McCrary met with TIC’s safety director Wayne Long. Long acknowledged the Safespan scaffold was inadequate (Tr. 785-786).

#### Second TIC Crew

Long created a checklist of repairs that TIC needed to make to the scaffold before he would allow painting to resume. Because of the emotional upset caused by Denzer’s death, Long reassigned the TIC crew working on the bridge on May 10 to other TIC projects, and brought in a new crew. TIC foreman Jason Runyon supervised the new crew, which consisted of Mike Holloway, Roger Davis, Chris Warren, Sam Harris, Andy Wilson, and a painter referred to in this decision as “John Doe.”<sup>4</sup> The crew repaired the Safespan scaffold, including closing the gaps around the vertical cross-

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<sup>4</sup>The painter referred to in this decision as “John Doe” gave damaging testimony against TIC. TIC fired Doe after he spoke with OSHA officials in late July of 2006. As part of its defense strategy to undermine Doe’s credibility, TIC accused Doe of various illegal and unsavory acts. The court has given the painter a pseudonym in this decision so as not to contribute further to injuring his reputation and perhaps jeopardizing his future employment.

bracing, on May 22, 2006. TIC resumed painting the bridge during the week of May 26, 2006 (Tr. 206).

#### July 5, 2006, Fatality

At the end of June, Runyon's crew began dismantling the scaffold. On the morning of July 5, John Doe was working in the manlift. Roger Davis worked on the ground while the rest of the crew worked on the Safespan platform. (Tr. 3542). Harris, Holloway, Warren, and Wilson were removing pans from the platform. Doe left the site during the lunch break and did not return to work at the site. After their lunch break, the crew continued dismantling the scaffold. Runyon was not at the site during this time (Tr. 3543). With 25 to 30 pans remaining to be removed, Holloway and Warren went back towards the bridge abutment and began removing Safespan components. Wilson and Harris continued removing pans from the edge of the scaffold. Wilson was not tied off. Wilson fell from the scaffold, sustaining fatal injuries.

#### Second OSHA Inspection

When OSHA received notice of Wilson's death, compliance officers Scott Maloney and McCrary went out to the site on July 5, 2006. Eventually, area director Theriot assigned compliance officer Jay Vicory to take over the L. A. Bridge inspection, replacing Alpert and McCrary (Tr. 414). Vicory arrived at the site on July 10, 2006, accompanied by compliance officer Maloney. No TIC employees were present. Approximately one-third of the Safespan scaffold remained to be dismantled (Tr. 74). On July 11, Vicory interviewed several emergency workers who responded to the July 5, 2006, call to 911. On July 13, 2006, Vicory interviewed several TIC employees (Tr. 76). Vicory and Maloney returned to the L. A. Bridge site on July 14, 2006, and observed foreman Jason Runyon and John Doe removing the remaining Safespan pans (Tr. 886).

On November 9, 2006, the Secretary issued citations to TIC arising from the inspections following Denzer's death on May 10, 2006 (Docket No. 06-1975) and Wilson's death on July 5, 2006 (Docket No. 06-1974).

### **DISCUSSION**

The Secretary has the burden of proving a violation by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable

diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Section 1926.451 provides general requirements for all scaffolds used in the workplace. Subsection (d) of the standard provides criteria for suspension scaffolds. A suspension scaffold, as defined by § 1926.450(b), is “one or more platforms suspended by ropes or other non-rigid means from an overhead structure(s).” The Safespan system used by TIC was a platform suspended by cables from the L. A. Bridge. The parties agree that the Safespan system is a suspension scaffold. TIC does not dispute the applicability of the scaffold standards found in § 1926.451 to the Safespan scaffold used on the L. A. Bridge.

### **Docket No. 06-1975**

#### **Citation No. 1**

##### **Item 1: Alleged Serious Violation of § 1926.451(d)(9)**

The citation alleges TIC failed “to assure that the load ends of suspension ropes [were] equipped with proper size thimbles.” Thimbles are pieces of hardware shaped like horseshoes. Employees assembling the Safespan scaffold are supposed to place a thimble between the suspension cables (referred to as “tie-up cables”) and the J-clip loop to prevent crimping (Exh. C-4; Tr. 186-187). Crimping compromises the strength of the tie-up cables, increasing the risk of the scaffold collapsing. The record indicates TIC did not use thimbles on over 200 tie up cables (Exhs. C-8, C-9, C-10; Tr. 187).

Section 1926.451(d)(9) provides:

The load end of wire suspension ropes shall be equipped with proper size thimbles and secured by eyesplicing or equivalent means.

TIC does not dispute it violated § 1926.451.451(d)(9). TIC admits its crew failed to equip the tie-up cables with thimbles. Foreman Scott Cawvey testified he decided the thimbles were not needed (Tr. 1280-1281): “Well, the thimbles are put in place so the cables don’t get cut or pinched under heavy load. And, this particular platform was not under heavy load to support itself. So, the thimbles, I didn’t feel, was a necessity because there was not the load there that needed support.”

Cawvey's rationale does not excuse TIC from complying with the terms of the standard. Section 1926.451(d)(4) requires the use of thimbles regardless of the scaffold load.

TIC employees Brian Moser, Indelfonso Vasquez, Humberto Soto, Dan Denzer, and Cawvey himself were all exposed to the unsafe condition created by the failure to install thimbles.

Cawvey made a conscious decision to not use the required thimbles. As foreman, Cawvey's actual knowledge of his decision is imputed to TIC. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) (“[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.”)<sup>5</sup>

The Secretary has established all four elements of the violation of § 1926.451(d)(9). The Secretary classified this item as serious. Under § 17(k) of the Act, a violation is serious “if there is a substantial probability that death or serious physical harm could result from” the violative condition. TIC’s violation increased the risk the Safespan scaffold could collapse. Denzer and Wilson’s deaths demonstrate such a collapse would be fatal to any employee working on the scaffold without fall protection. The Secretary properly classified the violation as serious.

### **Employee Misconduct Defense**

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<sup>5</sup>TIC does not argue Item 1 presents a *Yates* situation. In *W. G. Yates & Sons Construction Co., Inc., Hvy. Div. v. OSHRC*, 459 F.3d 604, 608-609 (5<sup>th</sup> Cir. 2006), the court concludes:

[A] supervisor’s knowledge of his own malfeasance is *not* imputable to the employer where the employer’s safety policy, training, and discipline are sufficient to make the supervisor’s conduct in violation of the policy unforeseeable.

A *Yates* situation occurs when a supervisor has knowledge of *his own misconduct*. The court in *Yates* emphasizes it requires a foreseeability analysis for “only the situation in which it is the supervisor himself who engages in unsafe conduct . . . Thus, a supervisor’s knowledge of *his own rogue conduct* cannot be imputed to the employer.” *Id.*, footnote 8 (emphasis added). Here, the cited conduct is failure to use the required thimbles. While it was Cawvey’s decision not to use the thimbles (TIC claims Cawvey and Denzer made this decision together), all of the employees who helped install the scaffold participated in the violative conduct.

TIC argues Cawvey and Denzer<sup>6</sup> engaged in employee misconduct when Cawvey decided not to use the required thimbles. “To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.” *Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006). Where, as here, the purported employee misconduct includes the actions of a supervisory employee (Cawvey), the employer faces a higher standard of proof. “[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor’s duty to protect the safety of employees under his supervision . . . . A supervisor’s involvement in the misconduct is strong evidence that the employer’s safety program was lax.” *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

#### Established Work Rule

In its post-hearing brief, TIC states, “It is undisputed that TIC had a rule requiring the use of thimbles” (TIC’s brief, p. 21), and cites the testimony of TIC president Donald Thomas. The cited testimony does not, however, establish such a work rule exists. On cross-examination, Thomas is asked, “And, your rules, the Thomas Industrial Coatings rules require that thimbles be placed or protected to protect the cables, correct?” Thomas responds, “Correct” (Tr. 4063-4064). Despite the assumption made by the Secretary and assented to by Thomas, no such rule exists.

Neither TIC nor the Secretary cite a specific work rule addressing the violation of § 126.451(d)(9). A review of TIC’s Employee Handbook (Exh. R-17) and its General Safety and Health Provisions (Exh. R-18) does not reveal such a rule. The Employee Handbook generally addresses scaffolding at pages 26 through 30, with the only specific rule regarding tie-up cables being, “Wire rope suspending the platform must conform to manufacturers requirements” (Exh. R-17, p.

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<sup>6</sup>Although Cawvey was the only supervisory employee for TIC on the site, TIC treats Denzer as equally responsible for supervisory decisions made in constructing the scaffold. (TIC also grants Denzer equal status with Cawvey as a competent person and a person qualified to design a scaffold). In its employee misconduct defense, TIC asserts Cawvey and Denzer share the blame for the violative conditions. The record establishes Denzer did not have a supervisory role at the L. A. Bridge site.

29). Thimbles are not mentioned.

TIC has failed to establish it had a work rule requiring employees to place thimbles on the load end of suspension ropes.

Adequate Communication of Work Rule

Even if TIC had an established work rule, its foreman and his crew were unaware of it. At the time of the hearing, Cawvey had worked for TIC for 17 years. He became a foreman for TIC in 1997 or 1998 (Tr. 1180, 1190). When asked if he was aware, prior to the day Denzer fell to his death, that thimbles were required on vertical tie-ups, Cawvey replied, "I was not" (Tr. 1618). At the hearing, approximately three years after Denzer's death and the ensuing OSHA inspections, Cawvey continued to deny he had done anything wrong when assembling the Safespan scaffold. The court quotes the following cross-examination at length to illustrate Cawvey's seeming incomprehension of the requirements of the scaffolding standards regarding the use of thimbles:

Q. What about doing [the scaffold] right?

Cawvey: Well, sure, I've done it right.

Q. Well, no, you had holes in it, right?

Cawvey: You say I did, yes.

Q. So, that was wrong. You violated the OSHA regs and the Company policies, right?

Cawvey: That one does, yes.

Q. No thimbles?

Cawvey: I told you what that—

Q. But, they weren't one there, and the Company policy required them. So, that's not right either, right?

Cawvey: For weight load, I skipped those, right.

Q. Sir, do the OSHA regs require thimbles or not; do you know?

Cawvey: I'm sure if you're asking me, I'm sure it does. That's kind of a loaded question, but go ahead.

Q. So, you didn't do that either. You didn't put thimbles on there, right?

Cawvey: Because of the load, yes.

Q. You didn't put them on, right, Mr. Cawvey? For whatever reason, you didn't put them on, right?

Cawvey: Yes. I didn't think it needed it because of the load.

Q. Mr. Denzer didn't put them on either, right?

Cawvey: That's correct.

Q. All right, no sheathing on the areas where the wire cables met metal. You didn't do that either, right?

Cawvey: Sheathing is for weight load.

Q. But, you didn't do it right?

Cawvey: We didn't have the weight load. We didn't need to.

Q. Answer my question, Mr. Cawvey. You didn't do it, did you?

Cawvey: I didn't, no.

Q. So, if the OSHA regs required, that's another place where you did it wrong, right?

Cawvey: I don't feel I did it wrong.

(Tr. 1514-1515).

Three years after Denzer's death, TIC still had failed to adequately communicate to its foreman (who was working for TIC at the time of the hearing) that thimbles were required. TIC has failed to establish the second element of its employee misconduct defense.

#### Steps to Discover Violations

TIC also failed to prove it took reasonable steps to discover violations. TIC finished installing the Safespan scaffold on April 12 or 13, 2006 (Tr. 1490). Cawvey's crew used the scaffold as their platform for 12 work days, until Denzer fell on May 10 (Tr. 1491). Cawvey testified that during those 12 days, he went up twice to inspect the scaffold. On the other days, he relied on Denzer to

inspect it (Tr. 1492). Cawvey and Denzer were the same employees who supervised the unsafe installation of the Safespan scaffold in the first place. It was not reasonable for TIC to rely on them to discover violations. There is no evidence that Long or Rothweiler ever inspected the scaffold. At no time did anyone from TIC notice the scaffold was in obvious and continuing violation of a number of OSHA scaffolding standards.

#### Effective Enforcement of Rule

Finally, TIC took no steps to enforce a work rule requiring the use of thimbles. Neither Cawvey nor any members of his crew were disciplined for his failure to use the required thimbles (Tr. 1331, 1556).

TIC has failed to prove a single element of its employee misconduct defense. Item 1 is affirmed.

#### **Item 2a: Alleged Serious Violation of § 1926.451(d)(19)**

The citation alleges TIC “provided a single Snorkel Aerial Lift for employee access and egress from the scaffold platform, exposing employees to falls and other hazards from the lack of emergency escape.” TIC does not dispute § 1926.451(d)(19) applies to its worksite. Nor is employee exposure and employer knowledge disputed. The sole element at issue is whether TIC’s use of the aerial lift was in noncompliance with the terms of the standard.

Section 1926.451(d)(19) provides:

Devices whose sole function is to provide emergency escape and rescue shall not be used as working platforms. This provision does not preclude the use of systems which are designed to function both as suspension scaffolds and emergency systems.

Compliance officer Jay Vicory testified he recommended the Secretary cite TIC for the violation of § 1926.541(d)(19) because the “manlift device was used for employees to access and egress the platform as well as its being used for material handling” (Tr. 202). Vicory went on to state TIC “did not provide a device whose sole function was for emergency purposes for escape” (Tr. 203).

In the Secretary’s interpretation, § 1926.451(d)(19) requires an employer to provide a device whose sole function is to provide emergency escape and rescue. She states:

Respondent’s employees sometimes used a manlift to access the scaffold. . . . The same manlift was used as a work station and material lift. . . . When the employees

used the manlift as a material hoist it was not immediately available for egress in the event of an emergency. Respondent did not provide a second lift, ladders or other devices to ensure that its employees could escape the danger zone (the scaffold) or be safely rescued. Mr. Thomas, project manager, had the responsibility of providing a second device or ladder for egress and failed to do so.

(Secretary's brief, pp. 44-45, citations to transcript omitted).

The Secretary argues its interpretation of § 1926.451(d)(19) is consistent with the standard's language and is reasonable, and is thus entitled to deference. The court disagrees that the Secretary's interpretation is consistent with the standard's language. The Secretary is attempting to impose an additional requirement on the employer that is not found in the standard. The plain language of § 1926.451(d)(19) prohibits the employer from using its designated emergency and escape device as a work platform. In order for a device to be covered by the standard, the employer must initially designate its usage only for emergency escape and rescue operations. The standard does not require, as the Secretary argues, that the employer must have a dedicated emergency device on site.

TIC used the Snorkel Aerial Lift for two purposes: (1) it was the primary means of daily access to and egress from the Safespan scaffold, and (2) it was the means for transporting scaffolding materials and equipment to the scaffold level (Tr. 204-206, 1267, 1283). Nothing in the record indicates TIC intended the "sole function" of the aerial lift as being the means for providing "emergency escape and rescue."

A review of Commission decisions failed to yield any addressing § 1926.451(d)(19); thus, support for the Secretary's interpretation is not found in Commission precedent. The preamble to the final rule for § 1926.451(d)(19) (proposed as § 1926.451(b)(3)) also fails to support the

Secretary's interpretation:

Proposed paragraph (b)(3) simply prohibited the use of emergency descent devices as working platforms because such devices are not normally designed for repeated in-place use. However, as stated in the preamble to the NPRM (51 FR 42685), the proposed provision was not intended to preclude the use of scaffold systems which have as an additional feature the capacity to function as an emergency descent device.

The proposed provision generated a number of comments (Exs. 2-8, 2-27, 2-29, 2-87 and 2-312) which recommended that OSHA define

"emergency descent device." Most of these commenters interpreted the regulatory language as prohibiting all emergency descent devices from being used as work platforms despite the clarification provided in the preamble. Therefore, OSHA has revised the final rule to indicate clearly that only devices whose sole function is to provide emergency escape and rescue are not to be used as working platforms.

61 Fed. Reg. 59,831 (1996).

The preamble clarifies that § 1926.451(d)(19) applies to devices specifically designed for emergency escape and rescue. The Snorkel Aerial Lift at issue is not such a device. The aerial lift is, in fact, "designed for repeated in-place use," unlike the emergency descent devices which were specified in the original proposed standard.

The Secretary's interpretation of § 1926.451(d)(19) is contrary to the language of the standard and is unreasonable. The court finds TIC's use of the Snorkel Aerial Lift did not violate the terms of the standard. Item 2a is vacated.

**Item 2b: Alleged Serious Violation of § 1926.451(e)(1)**

The citation alleges TIC failed "to provide employees with a means of safe access to the scaffold. This violation was observed at the Lexington Avenue Bridge . . . where employees were required to access the scaffold platform by scaling a steep, rocky bridge abutment, due to lack of safe access." Applicability of the standard, employee exposure, and employer knowledge are again not at issue. The only question to be answered is whether TIC failed to provide the safe access required by § 1926.451(e)(1).

Section 1926.451(e)(1) provides:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

At the hearing and in her brief, the Secretary argued TIC's noncompliance with this standard was due to its failure to provide a ladder for access to and from the scaffold. The record indicates that employees sometimes walked up or down the rocky bridge abutment. The Secretary argues this

area “spilled the employee on to an incline littered with concrete slabs and other hazardous obstructions (C-7). The employee would then have to choose whether he would expose himself to the hazards of climbing up or down the hill” (Secretary’s brief, p. 46).

Employees were not, however, “required to access the scaffold platform by scaling a steep, rocky bridge abutment.” Employees usually accessed the scaffold platform by using the personnel hoist on site. If an employee walked up or down the abutment, it was due to his personal choice and not force of necessity.

At the hearing, Vicory conceded that the standard lists a “personnel hoist” as an acceptable means of access (Tr. 472). Vicory attempted to argue that, if a personnel hoist is used, the employer must have two personnel hoists on site, in case one hoist breaks down. When confronted with the language of the standard, however, Vicory agreed the presence of one personnel hoist satisfies the requirements of § 1926.451(e)(1) (Tr. 473).

It is undisputed that TIC had a Snorkel Aerial Lift on site, and that its employees used the lift for access to and from the scaffold platform. The Secretary has failed to establish TIC violated § 1926.451(e). Item 2b is vacated.

### **Item 3: Alleged Serious Violation of § 1926.451(f)(13)**

The citation alleges TIC allowed “the build-up of construction debris on scaffold platforms, exposing employees to the hazard of slips, trips, and falls. . . . [E]mployees were required to work on and around wet, black plastic sheeting, paint debris, and near floor holes partially concealed by the plastic.”<sup>7</sup> Applicability of the standard, employee exposure, and employer knowledge are not in dispute. The sole element at issue is whether TIC violated the terms of the standard.

Section 1926.451(f)(13) provides:

Debris shall not be allowed to accumulate on platforms.

Vicory testified the Safespan platform was covered by black plastic sheeting that had been

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<sup>7</sup>The citation alleges the violation occurred “on May 26, 2006,” instead of May 10, 2006. This is a typographical error that caused no prejudice toward TIC. The citation is amended to reflect the correct date (Tr. 214-215, 224).

used during the water-blasting operation. Even though TIC had completed the water-blasting process, TIC failed to remove the black plastic sheeting from the platform. Vicory stated the plastic sheeting created a tripping hazard where it was bunched up, a slipping hazard in areas where the plastic was wet, and a falling hazard around the latticework, where the plastic sheeting covered the holes left for the cross-bracing (Exhs. C-9, C-11, C-12, C-13; Tr. 212-214).

TIC contends the plastic sheeting was still in use on May 10, 2006. The paint TIC was using contained calcium sulfonate, which causes the paint to remain wet. Don Thomas stated;

The reason for calcium sulfonate is it's an encapsulation. It's to encapsulate lead paint that's on the project, so when the steel gets hot, it expands, and when it gets cold it shrinks down. So they don't want calcium to dry because they don't want it to pull the lead off the substrate. So you have to put tarps or plastic on the Safespan to catch the over-spray, the fallout from the calcium. And then you roll it up and you get rid of it.

(Tr. 3944).

Foreman Cawvey testified the plastic sheeting had two purposes: to catch the water during the water-blasting process, and to prevent the over-spray from the paint from getting on the Safespan pans. When asked about the over-spray, Cawvey stated:

Well, we were using calcium sulfonate which, I don't know if it has a specific dry time. I don't think it does. It stays wet for five or six years. It's a paint that doesn't dry. It's an asphaltic base. It's a derivative from the material that they spray on the undercoating of a car. It never gets hard. It's a soft base material, and so it doesn't dry. So, if you get it on your pans, then you're dealing with wet paint over them. So, we let that down to keep the paint from getting on the pans and creating another hazard.

(Tr. 1316).

Moser, Holloway, and Neal agreed that the plastic sheeting was necessary to keep the pans (which TIC reuses on subsequent projects) free of the calcium sulfonate. Moser stated the calcium sulfonate "stays wet" (Tr. 1691). Holloway said the paint "never really dries. It's really sticky, messy paint" (Tr. 3537). Neal explained the continued use of the plastic sheeting after the water-blasting operation was completed: "[W]e had a product that stays sticky. It doesn't completely dry and it's

a nasty product to use, and it requires drop cloths or some type of floor covering that can be rolled up later and disposed of” (Tr. 3693).

At the time of the alleged violation, the plastic sheeting placed on the Safespan platform was in use, protecting the Safespan pans from being splattered with the calcium sulfonate paint. The plastic sheeting was not debris. TIC was not in violation of the terms of § 1926.451(f)(13).

Item 3 is vacated.

**Item 4: Alleged Serious Violation of § 1926.451(h)(2)(ii)**

The citation alleges TIC failed “to provide standard toeboards to protect employees working below from overhead hazards. . . . [E]mployees working beneath the suspended scaffold structure were exposed to being struck by falling tools, materials and debris, due to the absence of toeboards along the outer edges of the scaffold platform.”

Section 1926.451(h)(2)(ii) provides:

A toeboard shall be erected along the edge of platforms more than 10 feet (3.1 m) above lower levels for a distance sufficient to protect employees below, except on float (ship) scaffolds where an edging of ¾ x 1½ inch (2 x 4 cm) wood or equivalent may be used in lieu of toeboards.

In its brief, TIC states, “The Secretary has failed to establish that the regulation even applies to the TIC jobsite, as it was used by TIC or, if it does, that the terms of the standard were not met” (TIC’s brief, p. 25). TIC does not elaborate on its claim that the Secretary failed to prove the applicability of the cited standard. The Safespan platform was more than 10 feet above the ground and was not a float scaffold. As such, § 1926.451(h)(2)(ii) applies to it.

Cawvey and his crew did not install conventional toeboards along the edges of the Safespan platform. Instead, the TIC crew installed containment tarps extending from the bottom of the bridge deck to the ground in areas where water-blasting and painting were done. The crew attached the tarps to the bridge deck and scaffold platform by wrapping the tarp around a 2 x 4 and screwing the 2 x 4 to the decking and platform (Exh. C-14; Tr. 1371-1375). TIC contends the tarps were the equivalent of toeboards and that no employees were allowed inside the containment tarps on the ground while work was being done on the platform.

The toeboards mandated by § 1926.451(h)(2)(ii) must meet specific requirements, set out in § 1926.451(h)(4), which provides:

Where used, toeboards shall be:

(i) Capable of withstanding, without failure, a force of at least 50 pounds (222 n) applied in any downward or horizontal direction at any point along the toeboard (toeboards built in accordance with Appendix A to this subpart will be deemed to meet this requirement); and

(ii) At least three and one-half inches (9 cm) high from the top edge of the toeboard to the level of the walking/Toeboards shall be securely fastened in place at the outermost edge of the platform and have not more than 1/4 inch (0.7 cm) clearance above the walking/working surface. Toeboards shall be solid or with openings not over one inch (2.5 cm) in the greatest dimension. working surface.

The installment of tarps for containment cannot secondarily be considered adequate as toeboards. Plastic tarp does not function in the same way and was not installed for the same purpose. Despite Cawvey's *ad hoc* assertions (Q. "Did you test the tarp to see that it would not puncture if it was hit with a force of at least 50 pounds?" Cawvey: "I would say yes. I've stepped on it, and I would say yes, I've personally tested it." (Tr. 1456-1457)), there is no evidence it could withstand a force of at least 50 pounds. The Secretary has established TIC failed to meet the terms of the standard.

TIC argues no employees were exposed to hazards from falling objects while working beneath the scaffold. Moser testified, however, that the crew ran hoses up through the holes left around the cross-bracing. This required employees to enter the containment area to hand the hoses up to the employees on the platform (Tr. 1753-1754). James Tyner testified that he and TIC's employees sometimes gained access to the scaffold by entering the containment area and climbing through one of the holes left around the cross-bracing (Tr. 3109-3110). Bruce Neal was mixing paint underneath the containment area the day Denzer fell (Tr. 233-234). When Denzer fell, he fell through a hole in the platform and landed inside the containment area. Moser and Neal both entered the containment area to assist him. TIC's employees were exposed to the hazard of falling objects inside the containment area.

Cawvey knew his crew did not install toeboards on the scaffold platform. As supervisor, his knowledge is imputed to TIC.

The Secretary has established TIC committed a serious violation of § 1926.451(h)(2)(ii). The court examined and rejected TIC's claim that its violation of the standard cited in Item 1, *supra*, resulted from supervisory employee misconduct by Cawvey. The same reasoning applies here. Item 4 is affirmed.

## **Citation No. 2**

### **Item 1: Alleged Willful Violation of § 1926.451(a)(6)**

The citation alleges TIC allowed "employees to work from scaffolds that are not designed by a qualified person, exposing employees to the hazard of scaffold collapse. . . . [E]mployees worked from a suspended scaffold that had not been designed by a qualified person." Applicability of the standard, employee exposure, and employer knowledge are not in dispute. The sole element at issue is whether TIC violated the terms of the standard.

Section 1926.451(a)(6) provides:

Scaffolds shall be designed by a qualified person and shall be constructed and loaded in accordance with that design. Non-mandatory Appendix A to this subpart contains examples of criteria that will enable an employer to comply with paragraph (a) of this section.

Under § 1926.450(b), a qualified person is defined as "one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the product."

Cawvey stated he and Denzer discussed how to install the Safespan scaffold and decided together on the procedure. Cawvey testified he made a sketch of the plan, perhaps on the back of an envelope or a receipt (Tr. 1237, 1279). Vicory testified he asked TIC for design drawings of the Safespan scaffold. TIC failed to produce any (Tr. 241). The Secretary contends Cawvey was not qualified to design the scaffold. She points out that TIC produced no certificates showing any of its employees were qualified in Safespan scaffold design. The Secretary also asserts the numerous

defects apparent in the scaffold on May 10, 2006 are proof Cawvey was not a qualified designer.

TIC argues Cawvey and Denzer were qualified persons with the knowledge, training, and experience to safely design the Safespan scaffold. The company contends that, by its nature, the Safespan system “is very robust and over-engineered in the sense that it is designed to withstand hundreds of pounds per square foot of loading” (TIC’s brief, p. 27). TIC also states, “In the same way that a defect in a platform installation does not, by itself, prove that it was not inspected by a competent person, the defects in the platform at Lexington Avenue do not prove that Cawvey and Denzer were not qualified to design a Safespan platform” (TIC’s brief, p.28).

While TIC is correct that defects in the platform at the L. A. Bridge do not, by themselves, prove Cawvey was not qualified to design a Safespan platform, the company is wrong in its assertion that there was “ample evidence of each of their qualifications to design a Safespan platform” (TIC’s brief, p. 28). Rather, the evidence is overwhelming that Cawvey was out of his depth when required to design a safe scaffold. The record also shows owner Don Thomas encouraged a lax approach to scaffold design.

Don Thomas testified that prior to starting the L. A. Bridge project, he visited the site at least three times and decided to use a Safespan scaffold for the job (Tr. 3863). Thomas informed Cawvey of this decision, and Cawvey asked him where the design drawings for the scaffold were:

Thomas: I said, “Scott, I looked at it.” It’s pretty typical of me. “It’s not required in the [bid] specification.” In my mind, I laid it out, “This is how I want to do it. You look at it.” And, that’s exactly what he said. He said, “I’ll lay it out and see what I think with Danny and I’ll get back with you.” And then he called me back and said, “Here’s how we’re going to do it and you’re right.” Then, he went back through and they calculated their pans and their tie-ups.

...

Q. Did you ever discuss with Mr. Cawvey leaving any openings around any of the lattice work?

Thomas: No.

Q. Did you ever discuss with Mr. Cawvey how many vertical tie-up clamps would be used on the job?

Thomas: No.

Q. Did you ever discuss with Mr. Cawvey whether kick plates were required or not?

Thomas: No.

Q. Did you ever discuss with Mr. Cawvey whether softeners were required for the vertical tie-up cables if they were going over steel?

Thomas: No.

(Tr. 3881-3882).

The scaffold platform had twenty holes in it, some of them 4 feet wide and 11 feet long. Cawvey was unconcerned the holes were there because, he testified, “I didn’t think anybody could fit through them”(Tr. 1500). At the hearing, Cawvey freely admitted he was not well-versed in scaffold safety at the time of Denzer’s death. He stated, “I know a lot more now than I did then, (Tr. 1509) and “There’s a lot of rules that I’m not aware of” (Tr. 1498).

Cawvey testified he received only on-the-job training in Safespan scaffolding (Tr. 1408). Cawvey believed his 17 years of work experience and his formal training in standard scaffolding qualified him to design a Safespan scaffold:

I did use my prior training. That’s why I evaluated that we could get by with two cable clamps and that’s how I evaluated that we didn’t need the thimbles because the weight load was not there, and that’s how I evaluated that my toe boards were sufficient and went by the standards and performed perfectly.

(Tr. 1603).

In testimony quoted previously in this decision, Cawvey repeatedly denied there were any defects in the Safespan scaffold from which Denzer fell to his death. When asked if he should have been disciplined for the condition of the scaffold at the time of Denzer’s death, Cawvey replied:

I would say for lack of knowledge, no, I wasn’t aware. . . .I wasn’t aware that that was a problem. . . . In this situation, I wouldn’t think so. If it was a blatant thing and I knew I was supposed to do and I did the opposite, yes, I would say I probably should be disciplined. But, if you didn’t know it. I didn’t know.

(Tr. 1558-1559).

By his own words, Cawvey establishes he was not qualified to design a safe scaffold on May 10, 2006. Rather than demonstrating his “ability to solve or resolve problems related to the subject matter, the work, or the product,” Cawvey demonstrated he was unable to recognize obvious problems related to the Safespan scaffold. Relying on his training, Cawvey decided not to comply with selected OSHA standards, and then failed to realistically assess the possibility that his employees

could fit through a 4 foot by 11 foot hole. TIC failed to show Cawvey had “extensive knowledge” of scaffold design; indeed, when confronted with his mistakes, Cawvey used his lack of knowledge of the relevant safety rules as an excuse for why he should not be disciplined.

Cawvey did not possess a recognized degree or certificate, he did not have the professional standing, and he did not have extensive knowledge, training, and experience to recognize, solve, or resolve problems related to the Safespan scaffold. Wayne Long acknowledged the scaffold was obviously defective: “What they did was wrong; not acceptable. I would not have allowed that situation to exist” (Tr. 2300). The Secretary has established the Safespan scaffold was not designed by a qualified person. TIC’s failure to entrust the Safespan scaffold design to a qualified person resulted in exposure of six employees (Cawvey, Denzer, Moser, Vasquez, Soto, and field engineer James Tyner) to the hazard of falling from the defective scaffold. As the employer, TIC is charged with knowing the capabilities and shortcomings of its supervisors. Item 1 is affirmed.

### **Willful Classification**

The Secretary classifies this violation as willful.

A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff’d* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

*A.E. Staley Manufacturing Co.*, 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

TIC claims Denzer and Cawvey each had the “extensive knowledge, training, and experience” to meet the requirements of a qualified person in scaffold design. This claim is belied by Cawvey’s testimony, and by the numerous deficiencies found in the scaffold. Cawvey testified he considered

himself a qualified person, and then went on to prove he was not by enumerating the ways in which he substituted his own evaluations for the requirements of the standards (Tr. 1603). Cawvey argued he should not be disciplined for violating OSHA's standards because he was not aware of their requirements (Tr. 1558-1559). Cawvey stated he and Denzer designed the scaffold together and agreed on the method by which it was constructed. Denzer was thus implicated along with Cawvey in ignoring OSHA standards and condoning the continuing presence of obvious safety hazards.

Both Don Thomas and Wayne Long expressed surprise that Cawvey and Denzer would erect such an unsafe scaffold. Thomas stated he was "stunned" when Long informed him of the scaffold's condition (Tr. 3924). It is incumbent upon Thomas and Long to make certain their foremen are conversant with OSHA's standards and capable of recognizing and abating hazardous conditions. As Cawvey's testimony makes clear, this was not a situation where a foreman inexplicably went rogue after years of impeccable adherence to OSHA's safety standards. At the time of the hearing, Cawvey had worked for TIC for 17 years. Thomas testified Cawvey had "been with me since he's been a kid, you know, 18 years old, 17 or 18 years" (Tr. 3871). Despite these years spent with TIC, Cawvey stated repeatedly at the hearing that he was unfamiliar with OSHA's standards. In addition to not knowing OSHA's requirements regarding thimbles, wire clips, and toeboards, and not recognizing an employee could fit through a 4 by 11 foot hole, Cawvey was also unaware that a competent person was required to make daily inspections of the scaffold (Tr. 1498).

Given Cawvey's many lapses in knowledge of basic scaffold safety, it is difficult to comprehend how Thomas and Long could regard him as qualified to oversee the construction of a scaffold. The record indicates TIC's management did not hold foremen to a rigorous safety standard. Thomas told Cawvey that design drawings were not needed for the project. Neither Thomas nor Long visited the site between the time installation of the scaffold began and May 10, 2006, when Denzer fell to his death. Long did not require Cawvey to inspect the scaffold or to complete the site safety checklists (Tr. 2250-2251). Long did not review paperwork submitted by TIC's foremen (Tr. 2166-2167). And, despite the many safety hazards built into the L. A. Bridge scaffold, one of which directly caused Denzer's death, TIC subsequently failed to impose any form of discipline on Cawvey. This failure signals to TIC employees that safety infractions are not taken seriously, and undermines TIC's claim that it is committed to safety.

The court determines TIC's violation of § 1926.451(a)(6) was properly classified as willful. TIC entrusted supervision over the construction of a scaffold to a foreman who demonstrated a minimal knowledge of OSHA's scaffold standards, rendering him unqualified in scaffold design. The court concludes that such an action demonstrates an intentional disregard for the requirements of the Act.

**Item 2a: Alleged Willful Violation of § 1926.451(d)(12)(i)**

The citation alleges TIC failed "to install the required number of rope clips on suspension ropes exposing employees to the hazard of scaffold collapse. . . . [O]nly two wire rope clips were provided and installed on a majority of suspension ropes."

Section 1926.451(d)(12)(i) provides:

When wire rope clips are used on suspension scaffolds:

(i) There shall be a minimum of 3 wire rope clips installed, with the clips a minimum of 6 rope diameters apart.

The tie-ups used in the Safespan system are C" metal cables that are either looped around or hung from clamps attached to I-beams running the width of the bridge. One end of the looped cable is extended down and threaded through the eyelet of a J-clip previously secured to the main cable. The loose end of the cable is then secured to the section stretched between the J-clip and the I-beam with three Crosby clips. Safespan's installation manual specifies three wire rope clips are required for each vertical tie-up. TIC had correctly installed three wire rope clips on previous projects, including projects on which Cawvey was the foreman (Tr. 282).

Section 1926.451(d)(12)(i) is simple and unambiguous, and is easily complied with. It does not allow an employer to modify its requirements based on the perceived load. TIC concedes it violated § 1926.451(d)(12)(i). In its brief, TIC states, "[T]wo rope clamps were used because Cawvey and Denzer believed that two would provide sufficient strength to the platform since the loading would be fairly light compared to other Safespan projects. While it appears that this belief may have been correct, the regulation was violated" (TIC's brief, p. 35). TIC argues, however, that the Secretary improperly classified the violation as willful.

**Item 2b: Alleged Willful Violations of § 1926.451(d)(12)(iv)**

The citation alleges TIC failed “to inspect and to tighten wire clips before the start of each work shift, exposing employees to the hazard of scaffold collapse. . . . [T]he employer did not inspect and re-tighten the wire rope clips.” Applicability of the standard, employee exposure, and employer knowledge are not in dispute. The sole element at issue is whether TIC violated the terms of the standard.

Section 1926.451(d)(12)(iv) provides:

When wire rope clips are used on suspension scaffolds:

(iv) Clips shall be inspected and re-tightened to the manufacturer’s recommendations at the start of each workshift thereafter.

Cawvey did not perform a daily inspections on the scaffold. He testified he relied on Denzer to perform the inspections (Tr. 1585-1586). Cawvey testified that, on the two days he did go up on the platform and conduct inspections, he visually inspected the wire clips (Tr. 1591-1592). He did not test them for tightness (Tr. 1594). Cawvey’s grudging testimony regarding the wire clips suggests his visual inspection was cursory at best.

Moser testified he accompanied Denzer when he made inspections of the scaffold. Moser stated, “We walked up to the part [of the scaffold] that we were working on, and we would make sure everything was there, and I would usually walk up one side and Dan would walk up the other side, and then we would go to work” (Tr. 1781). They did not inspect the entire scaffold (Tr. 1784-1785).

The Secretary has established TIC did not inspect all of the wire rope clips at the start of each workshift.

### **Willful Classification**

The Secretary classified Items 2a and 2b as willful. Viewed in context with the other items in both citations, this classification is troubling. The Secretary classified as serious violations Cawvey’s decisions to omit thimbles from the scaffold altogether (Item 1 of Citation No. 1) and to substitute plastic tarps for toeplates (Item 4 of Citation No. 1). Here, Cawvey partially complied with the cited standard (by installing two of the required three clips, and by inspecting some of the wire clips). No explanation is given for the different treatment in classification of the four items.

As with his decision not to use thimbles, Cawvey rationalized his violative conduct by claiming the scaffold's load was lighter than usual. Cawvey also claimed that he and Denzer consulted the instructions on the packaging for the clips, in accordance with TIC's safety manual (Tr. 1426). Section D1.5.3.8 of TIC's "Corporate Worker Safety and Health Program" provides in pertinent part:

When wire rope clips are used on suspension scaffolds:

- There will be a minimum of 3 wire rope clips installed with the clips a minimum of 6 rope diameters apart.
- Clips are installed according to the manufacturer's recommendations.
- Clips are retightened to the manufacturer's recommendations after the initial loading;
- Clips are inspected and retightened to the manufacturer's recommendations at the start of each workshift thereafter.

Cawvey stated, "[W]e determined that two cable clamps would be sufficient because on the [manufacturer's] package, it showed a picture of it and said two was sufficient with a half-inch cable<sup>8</sup>, and we knew that it wasn't going to bear the load that it normally carried" (Tr. 1281).

Cawvey's explanation for why he used only two clips further demonstrates his unfamiliarity with OSHA's standards and his penchant for cutting corners. (His explanation also provides additional evidence he fails to meet the requirements of a qualified person in scaffold design.) It suggests, however, a tenuous basis for his mistaken belief that two clips were acceptable. The manufacturer's specifications indicated two clips were acceptable in some unknown situation. Cawvey relied on this mistaken belief in using only two clips, and was not operating with a heightened awareness of the illegality of his conduct.

Denzer's inspection of the wire rope clips fell short of the requirements of the standard, but did not rise to the level of intentional disregard of them. He achieved partial compliance with the cited standard.

The Secretary classified Cawvey's decisions to omit the thimbles on the scaffold and to

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<sup>8</sup>The cables used by TIC were d" cables.

substitute the containment tarps for toeboards as serious violations of the Act. Considered in context with these items, the Secretary's classification of TIC's violations of §§ 1926.451(d)(12)(i) and (iv) as willful is disproportionate. Vicory failed to provide a cogent justification for the discrepancy in the classifications (Tr. 459-460). The court classifies items 2a and 2b as serious.

**Item 3: Alleged Willful Violation of § 1926.451(f)(3)**

The citation alleges TIC failed “to ensure that a competent person inspect[ed] scaffolds and scaffold components for visible defects before each work shift and after any occurrence which could affect the scaffold structural integrity, exposing employees to the hazard of scaffold collapse. . . . [E]mployees were required to work from a scaffold without its first being inspected by a competent person.”

Section 1926.451(f)(3) provides:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity.

Section 1926.450(b) 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.”

As noted under the previous item, Cawvey went up on the platform twice and inspected the scaffold. He testified Denzer inspected the platform on the other days. The Secretary argues that Cawvey was designated by TIC as its competent person, and thus only he could make the required inspections. The standard does not require the employer to designate one person as competent, and then allow only that person to make inspections.

Regardless of who inspected the scaffold on any given day, neither Cawvey nor Denzer demonstrated he was a competent person within the meaning of the standard. The scaffold's many defects were built in to it from the start. The gaping holes, missing thimbles and clips, and the makeshift toeboards were in plain view on a daily basis. Yet each day, either Cawvey or Denzer gave the okay to commence work on the scaffold.

Humberto Soto testified he was worried about working around the holes in the platform and spoke to Denzer about his concern. Denzer told Soto they needed to keep the area around the cross-bracing clear so they could wash the steel. Soto replied that, for washing the cross-bracing, they “just needed some inches,” not the several feet built into the platform (Tr. 2455). Denzer, designated as one of TIC’s competent persons, responded to Soto, “Watch out where you step on them” (Tr. 2455). Shortly after Denzer’s death, Soto quit working for TIC because he believed TIC “wanted to do everything too fast and not safe” (Tr. 2457). Soto told Vasquez he believed there would be another death on the site (Tr. 2458).

James Tyner is a field engineer for Taliaferro and Brown. The City of Kansas City hired him to verify the work being done on the L. A. Bridge (Tr. 3088). Tyner went to the bridge site on a daily basis starting in early April of 2006 (Tr. 3097). Tyner testified he sometimes accessed the platform by climbing up through one of the holes around the cross-bracing. He stated it was obvious that the holes were large enough for a man to fall through, and he told Cawvey he was concerned about them. Tyner stated Cawvey “just kind of told me that was the industry standard and, you know, ‘We’re careful, and we know what we’re doing’” (Tr. 3125).

Not only were Cawvey and Denzer incapable of identifying existing and predictable hazards on the scaffold, they were dismissive of the hazards when others brought them to their attention. Neither Cawvey nor Denzer was competent to adequately inspect a scaffold. No daily inspections were made by a competent person. TIC violated the terms of § 1926.451(f)(3).

### **Willful Classification**

Even though he was the site foreman and a designated competent person, Cawvey admitted he was not aware he was required to conduct daily inspections of the scaffold (Tr. 1498). Cawvey was unfamiliar with the requirements of OSHA’s scaffold standards. He went up on the platform twice prior to Denzer’s death.

Denzer, TIC’s other designated competent person, supposedly conducted inspections on the days Cawvey did not. Moser stated, however, that Denzer did not inspect the entire scaffold. On the part he did inspect, Denzer overlooked the numerous flaws in the scaffold, including the large hole that eventually claimed his life.

It cannot be emphasized enough that Denzer's death was not the result of an unusual circumstance or a freak accident. His death occurred in precisely the manner any reasonable person would have foreseen. Painters working on the platform at times had to look up as they painted, stepping along as they completed an area of the structure. Even if the large holes initially did not raise a red flag for either Cawvey or Denzer, both men were put on notice of the obvious hazard presented by the holes when Tyner and Soto expressed their concerns.

TIC designated these two men as competent persons, despite their inability to fulfill the obligations of the position. Long did not require documentation of the daily inspections. He did not visit the site to ensure proper inspections were being conducted. TIC never disciplined Cawvey for his numerous violations of OSHA's safety standards. TIC management exercised no oversight on the project once its crew began working on it.

TIC has demonstrated an intentional disregard for the requirements of the Act. The Secretary has established TIC committed a willful violation of § 1926.451(f)(3).

**Items 4 Through 23: Alleged Willful Violations of § 1926.451(g)(1)(vii)**

The Secretary cited TIC for 20 willful per-instance violations of § 1926.451(g)(1)(vii). For each of the per-instance items, the citation alleges, "At the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, Mo., the employer failed to protect each employee by the use of a personal fall arrest system or guardrail system when exposed to a fall through the opening," and then identifies a specific hole. Items 4 through 13 each cite two instances of employee exposure to fall hazards, the first on May 10 and the second, as amended, on May 22, 2006. May 10, 2006, is the date Denzer fell as he was painting. May 22, 2006, is the date TIC's second crew repaired the scaffold, including covering up the openings.<sup>9</sup> Items 14 through 23 each cite a single instance of employee exposure, on May 22, 2006.

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<sup>9</sup>The Secretary drafted the instances citing the later exposure to read "May 26, while placing decking over the platform opening." Vicory testified he arrived at that date by reading the paint inspector's report. He stated he was never "told officially when the repairs were ever done" (Tr. 216). The record establishes May 22, 2006, as the actual date the second TIC crew covered the holes. The citation is amended accordingly.

Section 1926.451(g)(1)(vii) provides:

For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

TIC does not dispute the floor openings were not guarded and its employees were not using personal fall arrest systems on May 10, 2006. TIC contends its employees were using personal fall arrest systems on May 22, 2006, when they were repairing the scaffold.

TIC contends the twenty items are duplicative and all but one of the items should be vacated on that basis. The Secretary argues she appropriately cited the twenty separate holes.

#### **Violations of § 1926.451(g)(1)(vii) on May 10, 2006**

TIC does not dispute the applicability of § 1926.451(g)(1)(vii) to the cited conditions. None of the four employees (Brian Moser, Indelfonso Vasquez, Humberto Soto, and Dan Denzer) working on the Safespan platform on May 10, 2006, was using a personal fall arrest system. TIC does not dispute that each of these employees was exposed to the hazard of falling through the holes left open around the cross-bracing. Indeed, Dan Denzer fell to his death through one of the holes. It is also undisputed that TIC's supervisor, Scott Cawvey, knew of the openings. He designed the scaffold along with Dan Denzer, and it was his decision to leave the space around the cross-bracing open.

TIC argues that the violative conduct for these ten items resulted from unpreventable employee misconduct on the part of Cawvey. The court set out reasons for rejecting the employee misconduct defense in discussing Item 1 of Citation No. 1, *supra*. Briefly, TIC's safety program was inadequately communicated to its employees, it took ineffective steps to discover violations, and it failed to discipline its employees for blatant safety violations. Significantly, foreman Cawvey resolutely refused to admit the scaffold erected under his supervision was in any way inadequate (Tr. 1514-1515). "[A] supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *CECO Corp.*, 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995). Given TIC's poor implementation of its safety program, the company cannot avail itself of the employee misconduct defense.

The Secretary has established TIC violated § 1926.451(g)(1)(vii) on May 10, 2006.

### **Violations of § 1926.451(g)(1)(vii) on May 22, 2006**

TIC argues it did not violate the terms of § 1926.451(g)(1)(vii) on May 22, 2006, when its second crew and safety director Long were on the platform to repair the holes. TIC contends all of its employees were tied off while on the platform. The employees were Roger Davis<sup>10</sup>, Loren Friedly, Mike Holloway, John Doe, and Andy Wilson. Davis, Friedly, Holloway, Doe, and Long testified at the hearing. Friedly, Holloway, and Long asserted everyone was tied off while on the Safespan platform. Doe and Davis testified no one was tied off. In order to resolve this discrepancy, witness credibility must be determined.

#### Wayne Long

Long testified he arrived at the L. A. Bridge at approximately 6:15 a. m. on May 22, 2006. He went up to the Safespan platform and attached a cable the crew could tie off to while covering the holes in the platform. Long then held a meeting with the crew members (Tr. 1996). Long told the crew what repairs they would be making to the Safespan platform. He emphasized all employees were to tie off when riding the personnel lift to the platform, and while covering the holes in the platform (Tr. 1997-1998). Long testified that after the crew went up on the platform, he went up at least twice to deliver tools and materials to them. Both times, everyone was tied off (Tr. 2007-2008).

#### Loren Friedly

Loren Friedly began working for TIC in 1999, and was still employed by the company at the time of the hearing. Friedly testified the morning of May 22, 2006, Wayne Long held a meeting attended by the crew members. The crew's assignment that day was to bring the Safespan platform into compliance with OSHA standards. This included adding thimbles and wire rope clips to the vertical tie-ups, and closing the holes around the cross-bracing. Friedly stated Long reminded them to tie off while working on the platform. The employees were wearing body harnesses with attached lanyards. Friedly stated the crew (not Long) attached a cable to an I-beam on the bridge deck, and they tied off their lanyards to the cable while on the platform (Tr. 3219-3220). Runyon did not go

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<sup>10</sup>Davis worked on the ground that day. He went up on the scaffold one time when Long was going over the repairs that needed to be made.

up on the platform. The crew worked in pairs. Friedly was partnered with Holloway, while Doe worked with Wilson. Friedly stated everyone on the crew was tied off while on the platform (Tr. 3223-3224).

On cross-examination, a different story emerged. Friedly was confronted with his deposition testimony, taken on April 21, 2009. During the deposition, Friedly was asked if he used fall protection while covering the holes on the platform. Friedly responded, “No,” and added, “We had a handrail and kickplate” (Tr. 3291-3292). Friedly’s explanation at the hearing was that his deposition statement was a mistake, and that he was nervous that day (Tr. 3292-3293). Friedly also admitted misleading OSHA about his actions and Holloway’s location on July 5, 2006, after Wilson fell. Friedly testified he was worried about losing his job or getting in trouble (Tr. 3003-3004).

#### Mike Holloway

Mike Holloway began working for TIC in 2003, and was still employed by the company at the time of the hearing. Holloway testified the crew met with Long the morning of May 22, 2006. He stated that all employees were tied off while working on the Safespan platform (Tr. 3533).

Holloway’s previous statements to OSHA and his conduct on July 7, 2006, (two days after Wilson fell to his death) cast doubt on his credibility. Holloway was on the Safespan platform on July 5, helping dismantle it. Neither he nor Wilson were tied off when Wilson fell (Tr. 3544). Holloway explained he did not tie off because, “I look at it as when you fight with that retractable lanyard, it kind of wears on you. But, the problem is, like, me and Andy, when we started working, we didn’t have safety belts, there was no lanyards, and I think old-timers sometimes make mistakes and do things they shouldn’t do” (Tr. 3544-3545). Holloway decided to deceive the compliance officer and tell him he had been working on the ground that day. Not only did Holloway deceive OSHA, he asked his fellow crew members to corroborate his deceit, which they initially did (Tr. 3551). Holloway’s excuse for the deception was “because of the way OSHA acted when they showed up at the job site” (Tr. 3551). Holloway also admitted he misled Long when Long asked him if he had been tied off when Wilson fell (Tr. 3610-3611). When asked why he had misled Long, Holloway responded, “Probably because I wanted him to think that we were following safety procedures” (Tr. 3611).

Roger Davis

Roger Davis retired in October 2008. He had worked for TIC for the 10 years previous to his retirement (Tr. 1850). Davis ran the forklift and worked as the groundman for the crew (Tr. 1862). Davis testified he is afraid of heights and only went up on the scaffold his first day on the L. A. Bridge site, May 22, 2006, when Long was on site to instruct the crew in repairing the scaffold. Davis testified he rode up in the aerial manlift with Long.

Q. What did you do then after you got out of the manlift?

Davis: Well, we walked around and looked and seen how many holes there was and how much stuff we had to have and then we went down.

Q. So, when you were walking around on the platform looking at all the holes, were you tied off to anything?

Davis: No.

(Tr. 1893).

Q. And, as the three of you [Davis, Long, and Runyon] walked around, were any of you tied off?

Davis: I don't know; probably not. We was taking notes on what had to be done.

Q. There wasn't anything there for Wayne or Jason to tie off to, was there?

Davis: I don't know.

Q. But, you know you weren't tied off?

Davis: Yes.

Q. And, Jason and Wayne were right there. Did either of them tell you you needed to be tied off?

Davis: No.

(Tr. 1894).

John Doe

John Doe began working for TIC in 1999 (Tr. 2497). During his testimony, Doe became highly emotional at several points. He was confused or forgetful regarding some events of May 22; he did not recall Long's meeting that morning, and he thought (incorrectly) that "the Bushnell brothers" (two TIC employees who worked later on the project) were present that day. He was adamant, however, that neither he nor Wilson, Holloway, or Friedly were tied off while covering the holes on the platform (Tr. 2520). He stated they all wore safety harnesses and tied off while riding

up in the manlift, but did not tie off once they accessed the platform. Doe also testified the crew did not tie off later, when they were dismantling the platform (Tr. 2555).

Doe met with OSHA representatives on July 26, and informed them that the crew routinely did not tie off while dismantling the Safespan platform. The next day, TIC fired him (Tr. 2239). At the time of the hearing, Doe was in the process of suing TIC.

TIC's attack on Doe's credibility at the hearing amounted to character assassination. According to TIC, Does's failings as an employee included the following: drinking every night, showing up to work hungover, showing up to work drunk, manipulating a drug test, filling a fraudulent prescription for Vicodin, showing a pornographic cell phone photo of his girlfriend's 16-year old daughter to his fellow workers, stealing gas during Hurricane Katrina, and looting stores during Hurricane Katrina. TIC also accused Doe of attempting to extort money from Don Thomas in exchange for telling OSHA that TIC's employees tied off (Exh. C-79; Tr. 2231-2236, 3548).

Unquestionably, Doe struggled with personal issues. He testified that during his time with TIC, he had gone through a painful divorce and had been arrested twice for drunk driving (Tr. 2542). The second time, foreman Runyon bailed him out (Tr. 2545). When Doe failed a drug test in March of 2006, (along with two other painters who still worked for TIC at the time of the hearing), he had to complete a two week program and pass another drug test before going back to work (Tr. 2550). Despite these problems, no one at TIC ever warned him he was in danger of losing his job or spoke to him regarding his conduct. His alleged repeated substance abuse, criminal activity, and general boorish behavior were overlooked by TIC's management and co-workers. No one at TIC ever took issue with his conduct until he gave his statement to OSHA on July 26, 2006 (Tr. 2552).

### **Credibility Determination**

On the issue of whether Doe, Friedly, Holloway, and Wilson were tied off while covering the platform openings on May 22, 2006, the court finds the testimony of Doe and Davis to be the most credible. Friedly admitted during his deposition testimony that the crew was not tied off while covering the holes. He initially deceived OSHA about the events of July 5, 2006, and deceived his own safety director because he did not want to get in trouble. Holloway admitted concocting a fraudulent story and conspired with his co-workers to mislead OSHA. Holloway was not wearing

fall protection while dismantling the platform on July 5, and gave as his reason that he did not like using the retractable lanyard. Holloway, Wilson, and Friedly failed to use fall protection when dismantling the platform.<sup>11</sup> If they did not use fall protection for such an inherently risky activity, it is doubtful they would feel compelled to use it for the comparatively less risky job of covering the holes.

Also weighing against the credibility of Friedly, Holloway, and Long is the court's observation of the demeanor of each of the witnesses. All three were evasive and defensive on the stand. They initially recited testimony consistent with each other, but when pressed for details they became vague or confused in their testimony. Each disavowed portions of his previous deposition testimony. Friedly and Holloway both admitted they had previously lied to OSHA about the use of fall protection on the L. A. Bridge site.

The testimony of Doe and Davis is given more weight than that of Friedly, Holloway, or Long. The latter three were still employed by TIC at the time of the hearing, and had an interest in protecting the company. As safety director, Long was particularly under pressure to claim compliance with § 1926.451(g)(1)(vii). Neither Doe nor Davis worked for TIC had the time of the hearing. Davis was a disinterested witness, whose credibility was not challenged by TIC. While he was mistaken in some details, Doe was consistent and credible in his testimony that the crew did not tie off while on the platform.

### **Exposure**

Doe's testimony establishes that he, Friedly, Holloway, and Wilson were not tied off, and were thus exposed to falling through the openings in the platform. Doe testified he observed Long on the platform, and Long was not tied off. He could not recall, however, whether Long was on the platform before or after some or all of the openings had been covered (Tr. 2534). There is no evidence Long was within 10 feet of any opening while on the platform. Long's exposure to a fall

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<sup>11</sup>The citation alleging TIC's workers failed to use fall protection on July 5, 2006, while dismantling the Safespan platform at the L. A. Bridge is addressed later in this decision.

hazard is not established. Davis testified he went up with Long and the others when Long was instructing the crew on how to repair the scaffold. Davis did not help cover the openings. While Davis's testimony corroborates Doe's regarding the crew's failure to tie off while on the platform, there is no evidence regarding how close Davis was to any of the openings.

Exposure is established for Doe, Friedly, Holloway, and Wilson, the four employees who actually covered the openings.

### **Knowledge**

Safety director Long and foreman Runyon were on the site while TIC's crew members were covering the openings in the platform. Long went up on the platform at least twice, while Runyon stayed on the ground. Assuming Long failed to observe the employees were not tied off during his visits to the platform, he and Runyon are still charged with constructive knowledge of the violations. Constructive knowledge means the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc.*, 19 BNA OSHC 2179, 2181 (No. 00-1268, 2003).

TIC failed to have adequate supervision of its employees on May 22, 2006. TIC has a history of employees failing to use fall protection in situations where it was required. Holloway testified that he and other "old-timers" sometimes "do things they shouldn't do." James Belfield had fallen from a Safespan platform under the Jefferson Barracks Bridge less than three months before Denzer fell to his death. Belfield was not tied off. As this court noted in the decision for the proceeding resulting from Belfield's death, "TIC has had long-standing problems getting its employees to observe safety rules." *Thomas Industrial Coatings, Inc.*, (No. 06-1542, 2009), *petition for review granted*. Given TIC's history and the two deaths that has so recently occurred, reasonable diligence required TIC to have a supervisor monitor the crew as they worked to ensure they were tied off.

The Secretary has established Long and Runyon had constructive knowledge Doe, Friedly, Holloway, and Wilson were not tied off. She has, therefore, established TIC violated §

1926.451(g)(1)(vii) on May 22, 2006.

### **Wilful Classification**

By this point in the decision, TIC's intentional disregard of the requirements of the Act is well-established. Despite TIC's history of employees failing to tie off (directly resulting in the deaths of Belfield and Denzer), the company continued its lax monitoring and nonexistent discipline. Neither Cawvey nor Runyon ever visited the scaffold to watch their employees work. The fact the second crew on May 22, 2006, worked without fall protection while TIC's safety director was actually present at the site speaks volumes about the crew's experience with TIC's enforcement policy. The crew's expectations were well-founded: no one from either crew was disciplined in any manner for violating OSHA standards or TIC's own safety rules.

TIC did not discipline foremen for failing to fill out assigned paperwork (Tr. 2207). Long failed to document safety audits and to keep records. He failed to review the documents that were turned in by TIC's foremen. He failed to discipline foremen and other employees who violated work rules. As the lone safety officer for a company with multiple projects, Long was overstretched. TIC knew this, but ignored advice to hire more safety personnel. After Belfield died, TIC considered hiring more safety personnel, but ultimately decided against it (Tr. 2219-2220).

In 2005, one of TIC's insurers recommended using third parties to perform safety inspections for TIC (Exhs. C-38 through C-41; Tr. 745). Geri Kountzman, an environmental engineer with AIG Environmental, inspected the work TIC was doing in July 2005, repainting the Blanchette Bridge. Kountzman is a disinterested third-party witness. Based on her consistent, straightforward statements and her confident demeanor, the court finds her testimony reliable and trustworthy. She testified she was concerned that if TIC did not address its ongoing safety violations, it would lead to environmental hazards (Tr. 746). Kountzman stated she remembered this inspection well because Wayne Long "was adamant that [TIC] did not need third parties to in any way verify any of their monitoring or any of their inspections. . . . [N]ormally, within the course of our work, you always have third parties verifying at least your air monitoring and your various work phases to alleviate any type of liability that might arise from your work, and that was a recommendation we had made before on this account" (Tr. 745).

During her 2005 inspection of TIC's site, Kountzman observed missing handrails and toeboards on a 40 foot high scaffold. She saw painters working on the unguarded scaffolds without personal fall arrest systems. No one was making safety inspections at the beginning of the work shift (Tr. 756-759). Kountzman wrote in report for AIG, "Significant review and management of TIC's Environmental Health and Safety program is needed to begin to effectively and pro-actively manage the risks associated with TIC's operations. TIC's current attitude of 'entrust in our abilities to avoid potential liable exposures' is neither responsible nor effective" (Exh. C-38, p. 31). She gave TIC a below average rating in her report. At the time of the hearing, Kountzman had worked for AIG for eight years, and had inspected approximately 50 worksites. She testified TIC's site "would fall in one of the poorer categories of sites" (Tr. 766).

Dale Cira was Kountzman's supervisor at AIG. He testified that, based on Kountzman's report, he sent an email to TIC's insurance broker stating AIG would not be renewing its insurance policy for TIC (Tr. 619). Cira stated, "Thomas Industrial Coatings's business had increased to a level that it was not feasible for a single health and safety manager to be responsible for all of the various projects in order to conduct his responsibilities" (Tr. 635). Cira directed Kountzman to forward a copy of her report to TIC's insurance broker. Cira stated it was unusual to forward a report created for internal underwriting purposes to an insurance broker. He did so in this case, "because of the findings of the report and our decision internally that those findings have us nonrenew the policy, and we wanted to make sure that the broker was aware of that decision and the rationale for that decision" (Tr. 619).

TIC's pattern when it runs afoul of the law is to blame its employees, both living and dead, for their misconduct. If an employee breaks ranks and asserts the company itself was responsible for safety violations, as John Doe did, he is fired and his name is smeared. TIC did not agree with Kountzman's recommendations, so Long proceeded to denigrate her in his deposition testimony. Long referred to her as a "Nazi" because of her insistence on compliance with safety standards (Tr. 2138-2139). TIC did not heed the advice of Kountzman and AIG. Six months after Kountzman's report, James Belfield fell to his death.

TIC has manifested an ongoing intentional, knowing, and voluntary disregard for the

requirements of the Act. The company ignored recommendations to add safety personnel, either in-house or third party. Despite abundant evidence that Long was overwhelmed by his responsibilities as TIC's only safety officer, TIC failed to address the problem. None of the employees who failed to tie off was disciplined. TIC never disciplined Cawvey or Runyon for their blatant violation of the terms of the cited standard (Tr. 284). There exists a company-wide culture of noncompliance with OSHA's fall protection standards, which TIC has neglected to confront. The Secretary properly classified the violations of § 1926.451(g)(1)(vii) on May 10 and May 22, 2006, as willful.

#### **Authority to Issue Per-instance Citations**

\_\_\_\_\_The Secretary cited the violations of § 1926.451(g)(1)(vii) as egregious. TIC contends the Secretary inappropriately applied its egregious policy to the violations at the L. A. Bridge site.

TIC relies on *The Hartford Roofing Company, Inc.*, 17 BNA OSHC 1361, 1362 (No. 92-3855, 1995). In *Hartford*, the Secretary cited the employer for six separate violations of § 1926.500(g)(1) after the compliance officer had observed six employees working near an unguarded roof edge. The Administrative Law Judge vacated five of the six cited items as duplicative because the violations were caused by a single course of conduct—failing to guard the perimeter. The Commission affirmed the ALJ's decision, agreeing that “it was inappropriate for the Secretary to cite a separate violation for each exposed employee.”

The Commission has, however, more recently rejected an employer's argument that per-instance citations are inappropriate when the violative conditions can be resolved by a single method of abatement. In *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553 (No. 94-1979, 2009), the Commission permitted per-instance citations for violations of the lead training standard. Before addressing the training standard, the Commission reviewed its approach to per-instance citations, specifically reiterating that such citations are appropriate when, as here, a fall protection standard is cited:

The Commission has consistently adhered to the general legal principle that “per-instance violations and penalties are appropriate when the cited regulation or standard clearly prohibits individual acts rather than a single course of action.” [*General Motors Corp.*, 22 BNA OSHC 1019, 1046 (No. 91-2834, 2007)]. “The key . . . [is] the language of the statute or the specific standard or regulation cited.” *Id.* Applying this principle in numerous cases, the Commission has addressed the appropriateness of per-instance citations to various regulations and standards, including those

pertaining to . . . fall protection. . . E.g., . . . *J. A. Jones Constr. Co*, 15 BNA OSHC 2201, 2213 . . . (No. 87-2059, 1993) (upholding per-instance fall protection violations)[.]

*Smalis*, 22 BNA OSHC at 1578.

In *J. A. Jones*, the Commission upheld the ALJ's decision allowing the Secretary to charge the employer with per-instance violations of then § 1926.500, a fall protection standard. The Commission stated,

[S]eparate penalties may be proposed and assessed for separate violations of a single standard. . . . Notwithstanding Jones's contention that all of the section 1926.500 violations are predicated on failure to take measures to protect its employees from fall hazards, the provisions of that standard can reasonably be read to refer to individual instances of improper guarding.

*Id.*

The phrase "each employee" appears to be the key in a given standard in permitting the Secretary to issue per-instance citations. In *Hartford*, where per-instance citations were not allowed, the cited standard, § 1926.500(g)(1), provided in pertinent part, "[E]mployees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof[.]" "Employees" are designated in the plural, and the standard requires that they, as a whole, be protected. In *Smalis*, the Commission noted that in the *GM* case, the lockout/tagout training standard at issue "imposes a duty to train that runs to each employee, regardless whether the employer chooses to provide the required training individually or collectively." *Id.*

The Commission in *Smalis* goes on to overturn that portion of its decision in *Eric K. Ho*, 20 BNA OSHC 1361 (No. 98-1645), that held the Secretary could not issue per-instance citations under the asbestos training standard. The Commission states:

[W]e find that when read in its entirety and in context, the asbestos training standard imposes a duty that runs to each employee. A unit of violation must reflect the substantive duty that a standard imposes, and therefore "any failure to train would be a separate abrogation of the employer's duty to each untrained employee." *GM*, 22 BNA OSHC at 1047.

*Smalis*, 22 BNA OSHC at 1581.

In *National Association of Home Builders v. OSHA*, 602 F.3d 464, 466 (D. C. Cir. 2010),

the court rejected the petitioners' argument that the Secretary could not specify units of prosecution in a standard in order to permit per-employee violations. The court held, "The unit of prosecution is derived from the duty set forth in the Secretary's standard. . . . Petitioners fail to recognize that to define the violation is to define the unit of prosecution."

The standard for which the Secretary issued twenty per-instance items in the present case, § 1926.451(g)(1)(vii), requires the employer to protect "each employee" from fall hazards by the use of personal fall protection systems or guardrails. The duty imposed by § 1926.451(g)(1)(vii) runs to each employee. It is determined the Secretary appropriately cited TIC for separate violations of § 1926.451(g)(1)(vii)<sup>12</sup>.

### **The Court Amends *Sua Sponte* Items 4 Through 11, and Vacates Items 12 Through 23**

In the *Smalis* decision, the Commission uses the phrases "per-instance" and "per-employee" interchangeably. In the present case, the Secretary cited each of the twenty holes in the Safespan platform as a violative condition. The Secretary's reasoning is that § 1926.451(g)(1)(vii):

explicitly requires that "each employee" be protected from falls 10 feet above a lower level. At 20 separate locations on the scaffold decking Respondent exposed its employees to falls of 10 feet or more. Thus, Respondent committed multiple violations of this standard justifying the Secretary's per instance violation assessment. . . . OSHA's per instance penalty assessment for Respondent's failure to provide a personal fall arrest system to employees working near one of the 20 holes in the platform floor is a legally supportable exercise of the Secretary's discretion.

(Secretary's brief, pp. 68-69).

After careful consideration, the court determines that in citing each hole as a violation of § 1926.451(g)(1)(vii), the Secretary has incorrectly analyzed the exposure of the employees. A crew of four men worked on the Safespan platform on May 10: Brian Moser, Indelfonso Vasquez, Humberto Soto, and Dan Denzer. A crew of four men worked on the Safespan platform on May 22: Andy Wilson, John Doe, Loren Friedly, and Mike Holloway. The Secretary contends that each of these employees was exposed to twenty possible fall hazards. The distance from the platform to the ground below was approximately 40 feet. If a man fell from the platform, he would almost certainly

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<sup>12</sup>The Commission recently reiterated its position that per-instance violations are appropriate in *Dayton Tire, Bridgestone/Firestone*, (No. 94-1374, 2010).

die, as evidenced by the tragic deaths of the two men that did fall, Dan Denzer and (on July 5) Andy Wilson. Thus, the total exposure for the two dates was eight employees, each falling once.

The court finds support for this interpretation in the language of the cited standard. Although § 1926.451(g)(1)(vii) includes guardrails as a form of abatement, no one in this proceeding realistically expected TIC to install guardrails around each of the twenty holes. The standard states “each employee shall be protected by the use of personal fall arrest systems,” and that is the form of abatement that was thoroughly litigated in the hearing. Adopting the language used in *Smalis*, the standard imposes a duty on employers to ensure the use of a personal fall arrest system that runs to each employee. The determination of whether the standard has been violated must be made on an employee by employee basis. If an employee on the platform was wearing his personal fall arrest system on the cited date, then there was no violation for that particular cited item, regardless of whether other employees were using their fall arrest systems.

The court finds it appropriate to amend Items 4 through 11 to conform to the evidence. Amendments to a complaint, including *sua sponte* amendments, are routinely permissible where the amendment merely adds an alternative legal theory but does not alter the essential factual allegations contained in the citation. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1517 (No. 91-373, 1993) (amendment proper because it does not alter citation's factual allegations); *A. L. Baumgarten Construction, Inc.*, 16 BNA OSHC 1995, 1997 (No. 92-1022, 1994) (*sua sponte* amendment after hearing permitted).

The inquiry under Rule 15(b) of the Federal Rules of Civil Procedure is whether the employer is prejudiced by the amendment. “To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried.” *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992).

In the present case, neither party left a stone unturned with regard to evidence adduced. The testimony and exhibits regarding the configuration of the Safespan platform and the actions of the employees were exhaustive. Each party had a fair opportunity to present its case. The amendments to the items in which § 1926.451(g)(1)(vii) is cited conform those items to the evidence presented. TIC would have objected on the same grounds to implementation of the egregious policy on a per-

employee basis as it did to its implementation on a per-instance basis. Accordingly, the court amends Items 4 through 11 so that the alleged violations of § 1926.451(g)(1)(vii) are cited on a per-employee basis (rather than a per-instance basis for each of the twenty holes). Items 4, 5, 6, and 7 address the violations on May 10, 2006, by Denzer, Moser, Soto, and Vasquez, respectively. Items 8, 9, 10, and 11 address the violations on May 22, 2006, by Doe, Friedly, Holloway, and Wilson, respectively.

Citing violations per-instance resulted in twenty items; amending the citation to reflect a per-employee basis results in eight items. Therefore, the court vacates Items 12 through 23.

**Items 24, 25, and 26: Alleged Willful Violations of § 1926.454(a)**

The Secretary cited TIC for violating § 1926.454(a) in three separate ways.

Section 1926.454(a) provides:

The employer shall have each employee who performs work while on a scaffold trained by a person qualified in the subject matter to recognize the hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. The training shall include the following areas, as applicable:

- (1) The nature of any electrical hazards, fall hazards and falling object hazards in the work area;
- (2) The correct procedures for dealing with electrical hazards and for erecting, maintaining, and disassembling the fall protection systems and falling object protection systems being used;
- (3) The proper use of the scaffold, and the proper handling of materials on the scaffold;
- (4) The maximum intended load and the load-carrying capacities of the scaffolds used; and
- (5) Any other pertinent requirements of this subpart.

**Item 24:** The citation alleges TIC “failed to provide employees working in the capacity of competent person with adequate instruction in the recognition of hazards associated with the scaffold in use, and means to control or minimize each hazard at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, on May 10, 2006.”

The court previously determined in Item 3 of Citation No. 2 that neither Cawvey nor Denzer were competent persons within the meaning of § 1926.451(f)(3). The same evidence used to establish that violation establishes that TIC failed to train Cawvey and Denzer “to recognize the

hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards.”

Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). Here, the abatement is the same for both standards: provide adequate training to employees designated as competent persons.

The court finds this item duplicative of Item 3 of Citation No. 2. Accordingly, item 24 is vacated.

**Item 25:** The citation alleges TIC “failed to provide two employees, performing high pressure water cleaning, material handling, and painting at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, on May 10, 2006, with instruction in the recognition of hazards associated with their work including the hazards specific to the scaffold in use and the means to control or minimize the hazards in a format and in a language that the employees were able to understand.”

Humberto Soto and Indelfonso Vasquez are the employees at issue in Item 25. Their first language is Spanish, and the training provided by TIC was in English. Soto, who could speak some English, translated information for Vasquez, who spoke little or no English. Bruce Neal could speak some Spanish and aided with translations.

Soto testified at the hearing with the aid of a translator. He stated TIC’s safety training (provided by Long) was in English. Soto testified (and demonstrated at the hearing) that he understood and spoke English “pretty well,” and that he translated for Vasquez (Tr. 2410-2411).

The Secretary’s argument that Soto and Vasquez did not understand TIC’s safety training is undercut by her counsel’s examination of Soto:

Q. Mr. Soto, you understand how to properly erect and use a platform when you were out at the Lexington Bridge project in and around the time Mr. Denzer died, didn’t you?

Soto: Yes.

Q. In fact, you were a leadman at Pat Painting and Construction, weren't you?

Soto: Yes.

Q. You've got 13 or 14 years experience doing this kind of work, right?

Soto: Yes.

Q. And, you interacted in English with any number of individuals that were management individuals of Pat Painting and Construction in connection with your work, right?

Soto: Yes.

Q. And you understand English pretty well, don't you?

Soto: Yes.

Q. And you wanted to make sure that your testimony was correct, and that's why you requested an interpreter, right?

Soto: Right.

Q. You're a smart guy, right?

Soto: Yes.

Q. You know why you're here?

Soto: Yes.

Q. You know what the process is?

Soto: Of course.

(Tr. 2435-2436).

Soto's testimony establishes he understood the safety training provided in English. There is no evidence Vasquez did not understand the safety training as translated for him by Soto. The Secretary has failed to establish Soto and Vasquez did not understand the safety training provided to them. Item 25 is vacated.

**Item 26:** The citation alleges TIC "failed to provide employees with instruction in the recognition of hazards associated with using material and personnel hoists to deliver and remove material and personnel to and from the scaffold in a safe manner at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, on May 10, 2006."

Although this item relates specifically to the use of personnel hoists, in her brief the Secretary contends TIC never trained either Bruce Neal or Harry Moser in the installation, use, and dismantling of suspension scaffolds. They only received on-the-job training.

Moser was not operating the personnel hoist on May 10, 2006. He was on the scaffold, painting with Denzer (Tr. 1752-1757). He rode up in the basket of the personnel hoist with his bucket and paint brushes (Tr. 1762-1763).

Neal operated the personnel hoist on May 10, 2006 (Tr. 3657). He testified that, prior to working on the L. A. Bridge project, he and ten to twelve other TIC employees underwent training in the operation of personnel hoists. Fabick, the machinery rental company from whom TIC leased the personnel hoist, presented a one-day training course at its store in St. Louis (Tr. 3674-3675). Neal testified, "We had a classroom setting to start with and we had films and lectures and then a written test. And from there, we went to their office or their shop area and one by one put a harness on and operated their equipment inside their facility" (Tr. 3676).

The Secretary has not established TIC failed to provide employees with instruction in the safe operation of personnel hoists. Item 26 is vacated.

#### **Docket No. 06-1974**

The citations issued under Docket No. 06-1974 involve the events that occurred on July 5, 2006, when Wilson fell to his death, and July 14, 2006, when Runyon and Doe removed the remaining pans.

#### **Citation No. 1**

##### **Item 1: Alleged Serious Violation of § 1926.100(a)**

The citation alleges TIC failed "to require the use of protective helmets when employees [were] working in areas having exposure to overhead hazards. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where an employee was observed walking beneath steel I-beams in a crouched position, without use of [a] protective helmet, while negotiating the suspended platform to remove metal decking sheets."

Section 1926.100(a) provides:

Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

The cited standard is part of OSHA's construction standards. It is undisputed the standard applies to the L. A. Bridge site.

It is also undisputed TIC foreman Jason Runyon was not wearing a protective helmet while walking on the scaffold platform. On July 14, 2006, Runyon and John Doe returned to the L. A. Bridge and removed the remaining Safespan pans (Tr. 2562). While they were working, compliance officers Scott Maloney and Jay Vicory arrived at the site. Maloney photographed Runyon dismantling the scaffold while not wearing a protective helmet. Runyon is visible in the photographs wearing a baseball cap, walking and standing underneath the I-beams located on the undercarriage of the bridge (Exh. C-48, C-49). Maloney testified Runyon was required to wear a protective helmet because "he was observed walking, taking those panels underneath of these I-beams where he could hit his head, impact, knock himself out, knock himself off the bridge" (Tr. 888).

TIC argues Runyon's lack of a protective helmet does not violate the terms of the standard because he was not exposed to a hazard. TIC contends he was not working in an area where there was "a possible danger of head injury from impact." TIC's argument is contradicted by Wayne Long, its safety director, who had actually gone up on the scaffold. Long stated employees working on the scaffold platform were exposed to parts of the bridge's structure that caused them duck their heads to avoid hitting them. Wayne stated, "There were—you could hit your head, yes. . . . They should be wearing hard hats" (Tr. 2302). The Secretary has established Runyon was exposed to the possible danger of a head injury caused by impact with the parts of the bridge's undercarriage.

As foreman, Runyon's knowledge he was not wearing a hard hat is imputed to TIC. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

The Secretary has proven TIC violated § 1926.100(a). The Secretary classified this item as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Runyon was working at a height of approximately 40 feet, removing pans (the job Wilson was doing when he fell to his death). Had

he hit his head on one of the steel I-beams, Runyon could have fallen, sustaining injuries beyond those caused by the initial impact. The violation is properly classified as serious.

**Item 2: Alleged Serious Violation of § 1926.453(b)(2)(iv)**

The citation alleges TIC allowed “employees to sit and/or climb the edge of the aerial basket, exposing employees to the hazard of falling to a lower level. This violation was most recently observed at the Lexington Avenue Bridge Project over Chestnut Trafficway, Kansas City, Missouri—On or about July 5, 2006, employees were exposed to a fall hazard in that employees would use the aerial lift to elevate themselves, climb the guardrails and step on the scaffold while unprotected from falling to the lower level.”

Section 1926.453(b)(2)(iv) provides;

Employees shall always stand firmly on the floor of the basket, and shall not sit or climb on the edge of the basket or use planks, ladders, or other devices for a work position.

The parties litigated this issue at the hearing. In her post-hearing brief, the Secretary states, without further comment, “The Secretary withdraws this item of Citation 1” (Secretary’s brief, p. 110). Accordingly, Item 2 is vacated.

**Item 3: Alleged Serious Violation of § 1926.453(b)(2)(vi)**

The citation alleges TIC allowed “employees to operate aerial lifts having an exceeded boom and basket limit. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were required to use an aerial platform in the movement of scaffold components to ground level, which exceeded the manufacturer’s platform load limits.”

Section 1926.453(b)(2)(vi) provides:

Boom and basket load limits specified by the manufacturer shall not be exceeded.

Section 1926.453 applies to aerial lifts. As such, it is applicable to the aerial lift TIC was using on the L. A. Bridge project.

The load limit on the aerial lift used by TIC on July 5, 2006, at the L. A. Bridge site was 500

pounds, and the maximum number of occupants allowed in the basket was two (Exh. C-56; Tr. 908). Each full-sized Safespan pan weighed 57 pounds (Tr. 911-912). Bruce Neal testified he would ride with as many as six pans in the basket. He weighed approximately 200 pounds at the time of the hearing. The total weight he placed in the basket was approximately 542 pounds (Tr. 3698-3699).

Doe testified he would routinely load ten to twenty pans at a time in the basket, and then ride with them. Doe weighed approximately 180 pounds at the time of the hearing. The total weight he placed in the basket ranged from approximately 750 to 1,320 pounds (Tr. 909, 912, 2587-2588). Sam Harris testified the painters would routinely ride up to the scaffold three at a time. Harris weighed approximately 280 pounds at the time of the hearing (Tr. 3464). Any combination of three TIC's employees working at the L. A. Bridge site on any given day weighed more than 500 pounds.

TIC's defense rests on Long's vague testimony that he thought ("I'm not positive") that at some unspecified point, TIC had used a different aerial lift on the site with a higher load limit (Tr. 2364). TIC adduced no records or rental agreements in support of this claim. It is undisputed that the aerial lift operated by Doe on July 5, 2006, had a load limit of 500 pounds. TIC was removing pans that day. Doe testified he stacked ten to twenty pans in the basket at a time. The Secretary has established the TIC violated the terms of the standard.

The hazard created by TIC's overloading of the basket was that the aerial lift could tip over, striking or crushing any employees within range. All of the employees on site were exposed to the hazard.

The employees testified they routinely rode in the basket three at a time, and Doe and Neal routinely overloaded the pans. As foreman, Runyon is charged with constructive knowledge of a violative condition that occurred on a daily basis in plain view.

Item 3 is affirmed. The employees were exposed to the hazard of being struck or crushed by the falling lift or the pans being transported. The violation is serious.

**Item 4: Alleged Serious Violation of § 1926.453(b)(2)(ix)**

The citation alleges TIC did "not provide aerial lifts having plainly marked controls for operator identification of control function. This violation was most recently observed at the

Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were required to operate an aerial lift, as material handling equipment, having the identification of control function covered by paint.”

Section 1926.453(b)(2)(ix) provides in pertinent part:

Articulating boom and extensible boom platforms, primarily designed as personnel carriers, shall have both platform (upper) and lower controls. Upper controls shall be in or beside the platform within easy reach of the operator. Lower controls shall provide for overriding the upper controls. Controls shall be plainly marked as to their function.

The cited standard applies to the aerial lift used by TIC. Doe and Harris each testified they operated the aerial lift using the controls located in the basket. Exhibit C-55 is a copy of a photograph of the controls taken on July 5, 2006. The markings indicating the functions of the controls are completely painted over. Doe testified he operated the aerial lift in the condition shown in Exhibit C-55. Employees used the aerial lift on a daily basis to access the scaffold platform. They were all exposed to the hazard of the operator mistakenly operating the wrong control for the desired function, causing injuries due to the unexpected movement of the lift. The painted-over controls were in plain view of anyone in the basket, which the employees entered on a daily basis.

In its post-hearing brief, TIC concedes it violated § 1926.453(b)(2)(ix): “There was evidence that the manlift on site on July 5, 2006, had red paint over some of the controls in the basket. While the evidence did not show how long the rented manlift had been used at the Lexington Avenue project, the controls in the basket should have had legible labels” (TIC’s brief, p. 51).

The Secretary has established TIC violated § 1926.453(b)(2)(ix). Employees could have been injured if the operator mistakenly chose the wrong control for the desired function. Item 4 is affirmed as serious.

## **Citation No. 2**

### **Item 1: Alleged Willful Violation of § 1926.451(e)(1)**

The citation alleges TIC failed “to provide employees with safe access to scaffold platforms more than two feet above the point of access. This violation was most recently observed at the

Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were required to access the scaffold platform by scaling a steep, rocky, bridge abutment, due to the aerial lift provided for scaffold access and egress was being used for other tasks.”

Section 1926.451(e)(1) provides:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways integral pre-fabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

The Secretary concedes TIC had a personnel hoist on site, but argues it was also used to transport pans and equipment, so that it was not always available to transport employees to and from the scaffold. The record indicates that employees sometimes walked up or down the rocky bridge abutment. The Secretary argues this area “spilled the employee on to an incline littered with concrete slabs and other hazardous obstructions (C-57; C-58, C-59; C-88). The employee would then have to choose whether he would expose himself to the hazards of climbing up or down the hill” (Secretary’s brief, pp. 113-114).

Employees usually accessed the scaffold platform by using the personnel hoist on site. The personnel hoist was available at the beginning and end of each work shift, and at the beginning and end of breaks. If an employee walked up or down the abutment, it was due to his personal choice and not force of necessity.

Harry Moser testified he used the aerial lift to gain access to the scaffold platform, and to descend from it at the end of his shift. He stated other subcontractors had placed a portable toilet on the bridge deck for the use of their employees. (TIC’s portable toilet was located on the ground underneath the bridge). TIC’s painters sometimes walked up the abutment to use the portable toilet on the bridge deck because it was closer. Moser testified he walked up the abutment once to use the portable toilet on the bridge deck, and walked down the abutment once to exit the scaffold (Tr. 1672-1673).

It is undisputed that TIC had an aerial lift on site, and that its employees used the lift for

access to and from the scaffold platform. The Secretary cannot establish a violation based on the choice some employees may have made to walk up or down the abutment. The Secretary has failed to establish TIC violated § 1926.451(e). Item 1 is vacated.

**Item 2: Alleged Willful Violation of § 1926.451(f)(3)**

The citation alleges TIC failed “to conduct an inspection of suspension scaffold systems by a competent person, for visible defects which may affect scaffold structural integrity and expose employees to the hazard of scaffold collapse. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were required to work from a scaffold structure without first being inspected by a competent person before each day’s use.”

Section 1926.451(f)(3) provides:

Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold’s structural integrity.

Section 1926.450(b) 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 argues only one employee can be designated as a competent person on a site, and that TIC’s competent person, Jason Runyon, never conducted an inspection of the scaffold. Runyon no longer worked for TIC at the time of the hearing, and he did not testify. It is undisputed, however, that Runyon did not perform daily inspections of the scaffold, and, in fact, never went up on the scaffold between May 22, 2006, and Wilson’s death on July 5, 2006 (Tr. 3539).

TIC contends that each member of the second crew working on the scaffold after Denzer’s May 10, 2006, death was a competent person within the meaning of § 1926.451(f)(3). TIC states that it was Mike Holloway who conducted daily inspections of the scaffold. Holloway’s testimony, however, does not support TIC’s contention:

Q. Did you ever inspect any parts of the Safespan platform?

Holloway: Just when you walked out, you could look at it.

Q. What do you mean when you walk out?

Holloway: Just as you're walking the length of the Safespan, you just check it out as you're walking along.

(Tr. 3552).

Q. During your deposition, you told me that you weren't even aware that there was a daily inspection required by OSHA. Do you remember that?

Holloway: No, you asked me if I did a daily inspection by OSHA, and I said, "No," I believe. I was just saying as you walk up and down the Safespan, you can inspect the Safespan. I never filled out any—they have a form or something like that daily, but that's just like almost—

Q. Who told you that?

Holloway: I've been through a lot of schooling.

. . .

Q. So, who told you between March 10, 2009, [the date of Holloway's deposition] and now that Safespan had to be inspected daily?

Holloway: Nobody. Like I said, I didn't realize it had to be inspected daily. I'm just saying even a manlift or any scaffolding you work on, you're supposed to check it out.

Q. Well, why didn't you say that when I asked you? . . .

Holloway: I don't understand why I didn't. . . . Did I say it was supposed to be inspected daily? Is that what I said? I said as I walked up and down the Safespan, I just looked at it.

Q. No, sir, you said in your cross-examination just a few seconds ago that anything has to be inspected daily if maybe a manlift or something else. So are you saying now that you know that everything should be—anything on a worksite, any equipment should be inspected daily. So, do you know that now?

Holloway: I knew that then. I just answered the question wrong.

Q. A lot of wrong answers, Mr. Holloway.

Holloway: Nobody's perfect.

(Tr. 3613-3616).

Holloway's evasions and double-talk quoted here are typical of his entire testimony. Holloway never claims he conducted daily inspections of the scaffold, he states he "just walked up and down the Safespan" and "just looked at it." In the end, Holloway gave straightforward testimony regarding daily inspections of the scaffold:

Q. You never heard Jason Runyon assign a daily platform inspection to any employee, did you?

Holloway: No.

Q. And, you didn't do that inspection yourself, did you?

Holloway: No.

(Tr. 3631).

Holloway did not know daily inspections were required, and he did not know that he was apparently the employee responsible for conducting any inspections due to Runyon's failure to go up on the scaffold. Holloway's "just looking" at the scaffold is not a substitute for a competent person conducting an inspection before a work shift. Holloway never states he "just looked" at the start of the work shift, or that he looked at the entire scaffold. The Secretary has established TIC violated

the terms of § 1926.451(f)(3).

The four crew members working daily on the scaffold were exposed to the hazard of a scaffold collapse created by TIC's failure to have a competent person inspect the scaffold before each work shift. Runyon knew he was not conducting a daily inspection of the scaffold. His knowledge is imputed to TIC. The Secretary has established TIC was in violation of § 1926.451(f)(3). Item 2 is affirmed.

### **Willful Classification**

The Secretary classifies this violation as willful.

It is incumbent upon TIC to make certain its foremen and competent persons are conversant with OSHA's standards and capable of recognizing and abating hazardous conditions. Runyon did not venture onto the scaffold he was entrusted with overseeing between May 22 and July 14, 2006. Holloway, the employee TIC claims it designated as a competent person on the site, did not know he was the designated competent person and did not know a competent person was required to make a daily inspection of the scaffold. Long did not require Runyon or Holloway to inspect the scaffold or to complete the site safety checklists (Tr. 2250-2251). TIC subsequently failed to impose any form of discipline on Runyon or Holloway.

Long did not visit the site to ensure proper inspections were being conducted. TIC management exercised no oversight on the project after Long's visit on May 22, 2006, despite the recent deaths of James Belfield and Daniel Denzer. Both Don Thomas and Wayne Long had expressed surprise that foreman Cawvey allowed his crew to erect the unsafe scaffold that contributed to Denzer's death. Thomas stated he was "stunned" when Long informed him of the scaffold's condition (Tr. 3924). Despite this recent tragic history, TIC took no steps to ensure daily scaffold inspections were being conducted.

TIC has manifested an ongoing intentional, knowing, and voluntary disregard for the requirements of the Act. TIC never disciplined Runyon for his violation of the terms of the cited standard (Tr. 284). The Secretary properly classified the violation of § 1926.451(f)(3) as willful.

### **Item 3: Alleged Willful Violation of § 1926.451(f)(7)**

The citation alleges TIC allowed “employees to dismantle and/or alter scaffold structures without the direction of a person(s) competent in scaffold dismantling or alteration. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were dismantling and/or altering a suspended scaffold structure without supervision by a person(s) competent in dismantling and/or alterations.”

Section 1926.452(f)(7) provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed by experienced and trained employees selected for such work by the competent person.

Section 1926.452(f)(7) applies specifically to the dismantling of scaffolds, the activity being performed by Runyon’s crew at the L. A. Bridge in July, 2006. The cited standard applies to the cited conditions.

The Secretary predicates her allegation that TIC violated the cited standard on two grounds: (1) that foreman Jason Runyon did not spend enough time on the site to adequately supervise and direct the TIC crew; and (2) that Runyon was not a competent person qualified in scaffold construction.

Runyon often left the site after meeting with the crew in the morning and giving them their instructions for the day. Nicholas Withington is a paint inspector who was working for Taliaferro and Brown on the L. A. Bridge project. His job was to ensure the layer of paint TIC was applying was the correct thickness (Tr. 2810). Withington testified Runyon would leave every day to attend to another job site he was supervising. Runyon would leave the site two or three times daily (Tr. 2903).

The Secretary’s evidence is insufficient to establish Runyon did not supervise the dismantling of the scaffold. There is no requirement that a supervisor be on site 100 percent of the work shift. The record indicates Runyon showed up at the site at the beginning of every work day and met with the crew, and was on site sporadically throughout the day. His temporary absences during the day do not establish he was not directing and supervising his crew.

Compliance officer Maloney testified he determined Runyon was not a competent person within the meaning of the standard. His testimony demonstrates, however, that Maloney based this determination on a criterion not found in the cited standard. Maloney believes Runyon required certification from Safespan itself in order to supervise the dismantling of the scaffold:

Q. Your position with respect to the competent person citation is that Mr. Runyon had to have a certification from Safespan that he is competent to erect and disassemble a platform using Safespan components?

Maloney: I would think you would want to have some degree of competency from Safespan itself if you're going to call this a Safespan scaffold.

Q. So, the answer to my question is, yes, it should have been certified by Safespan?

Maloney: I would think as an employer, you would want to have your employees trained by Safespan.

...

Q. Did you make any inquiry as to who he learned from with respect to the erection and dismantling of the platform, using Safespan components?

Maloney: No, I don't recall that.

Q. So, you don't know how he was trained, do you?

Maloney: No.

Q. Same thing with Mr. Davis?

Maloney: Thomas Industrial did provide us with that he may have attended a scaffold course put on by the Union.

Q. Is that sufficient?

Maloney: No.

. . .

Q. Did you ask Mr. Davis who he learned from when he learned how to erect and disassemble a platform using Safespan components?

Maloney: I don't recall asking him that question.

Q. So, you don't know how he learned about Safespan, do you?

Maloney: Not specifically.

(Tr. 1084-1086).

Because he was convinced only someone certified by Safespan could be a competent person when working on a Safespan scaffold, Maloney did not consider any other qualifications Runyon may have had. Runyon told Maloney he had worked on approximately 100 Safespan scaffolds during his career with TIC (Tr. 1081). TIC adduced evidence Runyon had taken several different safety training courses, including a "Scaffolding User Erectors & Dismantling Course" (Exh. R-48).

Under Docket No. 06-1975, the Secretary cited TIC for various defects found in the Safespan scaffold as it was installed on May 10, 2006, including missing thimbles and wire clips, inadequate toeboards, and large openings in the platform. Foreman Scott Cawvey's testimony revealed he was not capable of identifying existing and predictable hazards in the scaffold. The Secretary established Cawvey was not a competent person within the meaning of the cited standard by showing the unsafe condition of the scaffold and eliciting testimony from Cawvey demonstrating his unfamiliarity with OSHA's standards and his failure to recognize obvious hazards.

Here, the Secretary has failed to meet her burden of proof. Although Maloney stated the scaffold was unsafe due to the amount of deflection (Tr. 1079), the Secretary did not cite TIC for this. Unlike the citations issued under Docket No. 06-1975, the Secretary did not cite Runyon's crew for defects in the installation of the scaffold. The voluminous consolidated record under these two docket numbers makes clear that Cawvey specifically was not a qualified person in scaffold design, nor was he a competent person. The record also provides abundant evidence that TIC in general was lax in safety oversight and discipline. Finding a violation for the instant item, however,

requires specific evidence that Runyon was not qualified to supervise his crew. The violation cannot be extrapolated from TIC's other violations. Perhaps if Runyon had testified, he would have shown himself, like Cawvey, to lack the requisite knowledge and ability to recognize existing and predictable hazards. As the record stands, the preponderance of the evidence does not establish that Runyon was not a competent person.

Item 3 is vacated.

**Item 4: Alleged Willful Violation of § 1926.451(g)(1)(vii)**

The citation alleges TIC allowed "employees to work from scaffold platforms during the dismantling process, without use of personal fall arrest systems or standard guardrail systems. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees were working from a suspended scaffold platform greater than ten feet above the next lowest level, performing dismantling and/or alterations, without use of personal fall arrest systems or standard guardrail systems."

Section 1926.451(g)(1)(vii) provides:

For all scaffolds not otherwise specified in paragraphs (g)(1)(i) through (g)(1)(vi) of this section, each employee shall be protected by the use of personal fall arrest systems or guardrail systems meeting the requirements of paragraph (g)(4) of this section.

Applicability

Section 1926.451(g)(1)(vii) applies to the suspended scaffold which TIC's employees were dismantling on July 5, 2006.

Noncompliance with the Terms of the Standard

It is undisputed Andy Wilson and Mike Holloway were not tied off on July 5, 2006, when Wilson fell to his death. TIC acknowledges some of its crew failed to tie off momentarily after a break on July 5, 2006, but argues it was the result of unpreventable employee misconduct.

The crew dismantling the scaffold on July 5, 2006, consisted of Loren Friedly, Chris Warren, Sam Harris, Mike Holloway, and Andy Wilson. Foreman Jason Runyon stayed on the ground when

he was at the site. Roger Davis also worked on the ground. John Doe ran the aerial lift.

Sam Harris began working for TIC on June 1, 2006 (T. 3379). On July 5, 2006, he was helping dismantle the Safespan platform. After Wilson removed the pans from the cables, Harris would drag them over to a beam, where another employee would take them down. Harris testified he was tied off while dragging the pans (Tr. 3391). After lunch that day, Harris continued dragging pans Wilson had removed. A beam was between Wilson and Harris, blocking Harris's view. As he was working, Harris heard Wilson yell. Harris dropped to his knees and looked over the edge of the beam he was on. He then grabbed his work bucket and walked down the abutment to where Wilson had fallen. Harris intended to provide first aid for Wilson, but realized Wilson was dead as soon as he got to him. Harris continued down the abutment and waited for the emergency personnel (Tr. 3395-3396). Harris was not aware of whether anyone else was tied off while dismantling the Safespan (Tr. 3490).

John Doe worked at the L. A. Bridge site only during the morning of July 5, 2006. He went home at lunch time. Later that day, he heard that a TIC painter had fallen to his death from the L. A. Bridge scaffold. Doe went to the site and spoke with Runyon, who had returned by that point (Tr. 2556-2557). Doe testified that, on the days he observed the dismantling of the scaffold, no member of TIC's crew was tied off (Tr. 2561, 2564-2565).

Loren Friedly began working for TIC in 1999, and was still employed by the company at the time of the hearing. When asked if he was wearing fall protection when Wilson fell on July 5, 2006, Friedly responded, "Yes, I was wearing my harness" (Tr. 3230). When pressed as to whether he was actually tied off at the time, Friedly admitted, "Probably not" (Tr. 3231). Friedly attempted to minimize his violative conduct by claiming he was in the northwest corner of the scaffold "right next to the dirt" of the abutment underneath the bridge (Tr. 3231-3232). On cross-examination, Friedly refused to estimate the distance between the scaffold platform where he claims he was located and the abutment (Tr. 3251-3259). Exhibit C-93 is a copy of a photograph showing the area where Friedly stated he was located. The abutment is sloped. It is clear from the photograph the distance between the platform and the abutment exceeds 6 feet.

Mike Holloway began working for TIC in 2003, and was still employed by the company at

the time of the hearing. Neither he nor Wilson were tied off when Wilson fell (Tr. 3544). As quoted earlier, Holloway explained he did not tie off because, “I look at it as when you fight with that retractable lanyard, it kind of wears on you. But, the problem is, like, me and Andy, when we started working, we didn’t have safety belts, there was no lanyards, and I think old-timers sometimes make mistakes and do things they shouldn’t do” (Tr. 3544-3545).

Holloway initially decided to deceive the compliance officer and tell him he had been working on the ground that day. Not only did Holloway deceive OSHA, he asked his fellow crew members to corroborate his deceit, which they did (Tr. 3551). Holloway’s excuse for the deception was “because of the way OSHA acted when they showed up at the job site” (Tr. 3551). Holloway concocted a story to tell OSHA in which he was on the ground picking up cables, when he glanced up and saw Wilson working at the receding edge of the platform (Tr. 3557). The rationalization Holloway gave for fabricating this story was that he did it in a fit of pique:

Holloway: Yes, mentally [the compliance officer] abused me. He was loud and he was boisterous, and I thought he was rude as hell. My friend was laying there dead on the ground, and I thought he was a completely unprofessional person.

Q. So, your friend was dead on the ground and the best thing that you thought you could do for him was lie about where you were and what you were doing? Is that what you’re telling the Court?

Holloway: I made a mistake.  
(Tr. 3561).

Holloway did not correct his “mistake” until an OSHA representative subsequently informed him that lying during an OSHA investigation is a criminal offense. Holloway also admitted he misled Long when Long asked him if he had been tied off when Wilson fell. Holloway falsely told Long that he had been tied off (Tr. 3610-3611). When asked why he had misled Long, Holloway responded, “Probably because I wanted him to think that we were following safety procedures” (Tr. 3611).

The record establishes that Wilson, Holloway, and Friedly were not tied off the afternoon of July 5, 2006, while working at heights greater than 6 feet. The testimony of Doe establishes the failure of TIC’s crew to tie off was not an isolated occurrence. The Secretary has established TIC

was not in compliance with the terms of § 1926.451(g)(1)(vii).

#### Employee Exposure

At least three employees, Wilson, Holloway, and Friedly were exposed to the hazard of falling when they failed to tie off on July 5, 2006. As evidenced by Wilson's death, the hazard was deadly.

#### Employer Knowledge

The only supervisory employee who had been at the site on July 5, 2006, was Runyon. He was not present at the time Wilson fell. Actual knowledge of the violative behavior cannot be imputed to TIC. The Secretary can, however, establish TIC had constructive knowledge of the violative behavior. Constructive knowledge means the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions "An inquiry into whether an employer was reasonably diligent involves several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Stahl Roofing Inc.*, 19 BNA at 2181.

Despite TIC's history of employees failing to tie off (directly resulting in the deaths of Belfield and Denzer), as of July 5, 2006, the company continued its lax monitoring and nonexistent discipline. Runyon did not go up on the scaffold to watch the employees work. He assigned no one to supervise the crew during his frequent absences. Doe observed TIC's crew members failing to tie off earlier while dismantling the scaffold. Had Runyon or anyone else in TIC's management been willing to look, he could have made the same observations as Doe.

The Commission has held that "the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co.*, 17BNA OSHC1869, 1871, 1993-95CCH OSHD ¶ 31,207, p.43,723 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16BNA OSHC1073, 1089, 1993-95CCH OSHD ¶ 30,034, p.41,184 (No. 88-1720, 1993), *aff'd*, 28F.3d 1213 (6th Cir. 1994) (unpublished).

*KS Energy Services, Inc.*, 22 BNA OSHC 1261 (No. 06-1416, 2008).

The Secretary has established TIC violated § 1926.451(g)(1)(vii).

## Employee Misconduct Defense

TIC argues its employees engaged in employee misconduct when they failed to tie off while dismantling the scaffold. “To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.” *Schuler-Haas Electric Corp.*, 21 BNA at 1494.

TIC has a work rule requiring its employees to tie off when working 6 feet or more above the lower level. The work rule is well-communicated: every TIC employee who testified was aware of the rule, and referred to it as a “100 percent” requirement. The fault lies in TIC’s failure to take reasonable steps to discover violations of the rule and its failure to enforce the rule.

Runyon took over supervising the L. A. Bridge project on May 22, 2006. Except for that day, he failed to go up on the scaffold until after Wilson’s death on July 5, 2006. Runyon did not delegate supervisory authority to any of the other crew members. Wayne Long did not visit the site again. Despite TIC’s continued experience with its employees failing to wear fall protection when exposed to falls greater than 6 feet, TIC did nothing to discover such violations. Don Thomas testified regarding his reaction to Wilson’s death:

I still can’t believe it. That’s why we’re here today. I’m totally unbelievable of that one. . . . We just had two major catastrophes. Jimmy Belfield . . . it comes down to Jimmy made a decision, he’s in the river. We preached that over and over. He untied at some point. . . . And, then, we go to Danny and he leaves—Scott and Danny leave holes in the platform, which Danny to this day, had his harness up there, had worn it in the JLG, took it off, it’s laying up there under the plastic, or that’s what they said, and he walks off into a hole backwards, ducks under a cable and walks backwards into a hole that supposedly he can’t fit in, but he did.

And, then Andy Wilson blatantly would be up there untied with nothing on. *You can’t predict that. That’s just as far inconceivable as possible.* I still can’t believe it.

(Tr. 3924-3925; emphasis added).

Contrary to Thomas’s statement, Wilson’s death was predictable. TIC knew employees had previously died as a result of failing to tie off while working at heights above 6 feet. A reasonable person could foresee that employees would likely continue to ignore the safety rule requiring them

to tie off. A reasonable response to this foreseeable hazard would be to increase supervisory oversight to ensure compliance. Thomas expresses disappointment and frustration at the behavior of the deceased employees, and states that TIC “preached [tying off] over and over.” TIC did not, however, increase its safety monitoring.

There is a disconnect in TIC’s approach to safety. This is the third case involving TIC this court has presided over in the past two years. In all three cases, TIC has consistently failed to take reasonable steps to discover violations of its safety rules. TIC failed altogether to discipline any employees working on the crews with which Belfield, Denzer, and Wilson were working when they fell to their deaths. In the instant case, TIC failed to discipline Runyon, its supervisor on the site. TIC also failed to discipline Friedly and Holloway. Holloway not only failed to tie off, he then compounded his offense by lying about it to OSHA, as well as TIC’s own safety director.

TIC’s employee misconduct defense is rejected.

### **Willful Classification**

The Secretary rightfully classified this violation as willful.

TIC has manifested an ongoing intentional, knowing, and voluntary disregard for the requirements of the Act. Some of TIC’s painters, many of them “old-timers,” as Holloway characterized himself and Wilson, prefer to work without the encumbrance of a safety harness and attached lanyard. This preference was well-known to TIC. Despite this knowledge, TIC took no steps to increase its monitoring of employees working in situations where fall protection was required.

TIC was on notice that its employees often flouted its fall protection rules. James Belfield was not tied off when he fell from the Jefferson Barracks Bridge in February 2006. Doe, Friedly, Wilson, and Holloway were not tied off when they closed the gaps on the L. A. Bridge scaffold on May 22, 2006. Yet TIC made no attempt to curtail this violative conduct with increased monitoring. TIC continued to allow its employees to work unobserved by supervisory personnel, despite the employees’ known propensity to not tie off.

No one was disciplined for the numerous violations of the so-called “100 percent” rule.

Under TIC's safety program, as implemented, there is simply no accountability for violations. TIC has a responsibility to take steps to overcome its employees known resistance to using fall protection. When an employer continually turns a blind eye to its employees' violative conduct, it emboldens the employees to disregard their safety training.

TIC's refusal to address the continued failure of its employees to tie off when required constitutes an intentional disregard for the requirements of the Act. The Secretary properly classified the violation of § 1926.451(g)(1)(vii) on July 5, 2006, as willful.

#### **Items 5, 6, and 7: Alleged Willful Violations of § 1926.454(b)**

The Secretary cited TIC for three separate violations of § 1926.454), its scaffold training standard:

**Item 5:** The citation alleges TIC failed "to provide each employee with adequate instruction in the recognition of hazards associated with the scaffold in use, and the means to control or minimize each hazard. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employee #1 and #4 were required to supervise and work from a suspended scaffold system having fall and structural collapse hazards, and had not been provided adequate instruction in matters such as those required of a competent person."

The employees referred to in Item 5 are Jason Runyon and Roger Davis.

**Item 6:** The citation alleges TIC failed "to provide each employee with adequate instruction in the recognition of hazards associated with scaffold use, and the means to control or minimize each hazard. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees #2, 3, 4, 6, 7, 8, 9, and 10 were required to work on and dismantle a suspended scaffold system having fall and structural collapse hazards, and had not been provided adequate instruction in detection of hazard exposure, and appropriate steps for hazard control."

The employees referred to in Item 6 are John Doe, Mike Holloway, Sam Harris, Chris Warren, Andy Wilson, Loren Friedly, Bill Bushnell, and Mike Bushnell.

**Item 7:** The citation alleges TIC failed "to provide each employee with adequate instruction

in the recognition of hazards associated with the scaffold in use, and means to control or minimize each hazard. This violation was most recently observed at the Lexington Avenue Bridge over Chestnut Trafficway, Kansas City, MO, where employees #3 and #7 were required to vertical tie-up removal work from a suspended scaffold system, having fall and structural collapse hazards, and had not been provided adequate instruction from the employer in the hazards associated with this work and appropriate steps for hazard control.”

The employees referred to in Item 7 are Mike Holloway and Andy Wilson.

Section 1926.454(b) provides:

The employer shall have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. The training shall include the following topics, as applicable:

- (1) The nature of scaffold hazards:
- (2) The correct procedures for erecting, disassembling, moving, operating, repairing, inspecting, and maintaining the type of scaffold in question;
- (3) The design criteria, maximum intended load-carrying capacity and intended use of the scaffold;
- (4) Any other pertinent requirements of this subpart.

The analysis of TIC’s alleged violation of § 1926.451(f)(7) under Item 1 of Citation No. 2 is apposite for the three items cited here.

Item 5 addresses Runyon and Davis’s supposed lack of competent person training. If the Secretary had proven the violation for Item 1 (which she did not), Item 5 would be duplicative of Item 1 and the court would vacate it.<sup>13</sup> As discussed under Item 1, the Secretary failed to prove Runyon and Davis were not qualified as competent persons. Compliance officer Maloney focused

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<sup>13</sup>Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA at 2056-2057. The abatement is the same for both standards cited in Item 1 and Item 5: provide adequate training to employees designated as competent persons.

on whether the employees received a certification document from Safespan to the exclusion of all other training evidence. The lack of certification from Safespan is insufficient to establish Runyon and Davis were not competent persons

Items 6 and 7, which would be duplicative if one of them were affirmed, are also unsupported by the evidence. TIC's employees at the L. A. Bridge site were not personally trained by a Safespan representative. Such training is not required.

TIC adduced evidence that it trained its employees in scaffold safety. This proceeding has established TIC did a poor job of enforcing its safety program. Its employees were aware they could violate safety standards with impunity. TIC's poor enforcement of its program is not, however, equivalent to proof no safety training took place. The Secretary has failed to establish the cited employees were not adequately trained in scaffold safety.

Items 5, 6, and 7 are vacated.

### **Penalty Determination**

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

TIC employs fourteen office employees and generally between 100 and 110 painters (Tr. 3784, 3794). TIC has a history of OSHA violations. The court finds TIC failed to exhibit good faith. Gravity will be determined on a violation by violation basis.

### **Docket No. 06-1975**

#### Citation No. 1

*Item 1—§ 1926.451(d)(9)*: The gravity of this violation is high. Cawvey substituted his own judgment instead of complying with the standard. His decision possibly compromised the strength

of the wire cables. At least four employees worked daily on the scaffold for several weeks. TIC's employees routinely failed to tie off, so if the scaffold had collapsed due to its lack of thimbles, the employees would likely have died in the fall. A penalty of \$ 7,000.00 is assessed.

*Item 4—§ 1926.451(h)(2)(ii):* The gravity of this violation is intermediate. The tarps TIC substituted for the required toeboards afforded some protection to employees below from falling objects. A penalty of \$ 3,500.00 is assessed.

#### Citation No. 2

\_\_\_\_\_ *Item 1—§ 1926.451(a)(6):* The gravity of this violation is very high. Neither Cawvey nor Denzer was qualified to safely design a scaffold. Their lack of qualifications resulted in an inherently unsafe scaffold, which included the 4 x 11 foot opening through which Denzer fell. A penalty of \$ 70,000.00 is assessed.

*Items 2a and 2b—§§ 1926.451(d)(12)(i) and (iv):* The gravity of these violations is intermediate. TIC made some attempt to comply with the requirements of the standards. A total penalty of \$ 3,500.00 is assessed.

*Item 3—§ 1926.451(f)(3):* The gravity of this violation is very high. Neither Cawvey nor Denzer were competent persons within the meaning of the standard. They were unable to recognize obvious and continuing hazards. Their inability to recognize hazards resulted in an unsafe scaffold, on which a crew of four men worked daily for several weeks. A penalty of \$ 70,000.00 is assessed.

*Items 4 through 11—§ 1926.451(g)(1)(vii):* The gravity of the eight violations of § 1926.451(g)(vii) is of the highest order. Employees worked without fall protection among 20 large openings in the scaffold platform. For several weeks, a crew of at least four men worked every day for several hours on the platform. Falling through one of the holes would result in death, as it did for Daniel Denzer. A penalty of \$ 70,000.00 for each item is assessed.

#### **Docket No. 06-1974**

#### Citation No. 1

*Item 1—§ 1926.100(a):* The gravity of this violation is moderate. Only Runyon was exposed to the risk of bumping his head. The risk of impact is less when an employee is moving around fixed

structural members than when subject to falling objects. A penalty of \$3,500.00 is assessed.

*Item 3—§ 1926.451(b)(2)(vi):* The gravity of this violation is high. Employees daily exceeded the load limit of the boom and basket, both with materials and with employees. The hazard of overbalancing the aerial lift endangered not only the employees in the basket, but everyone in range of the falling lift. A penalty of \$ 7,000.00 is assessed.

*Item 4—§ 1926.453(b)(2)(ix):* The gravity of this violation is intermediate. The identifications for the control functions were completely obscured by paint. There is no evidence, however, that the operators of the aerial lift experienced any difficulty in operating the lift. Doe testified that when “you work on these machines daily all day long, you learn to memorize all the controls” (Tr. 2607). A penalty of \$ 7,000.00 is assessed.

#### Citation No. 2

\_\_\_\_\_ *Item 2—§ 1926.451(f)(3):* The gravity of this violation is high. No competent person conducted a daily inspection of the scaffold. The scaffold had only recently been brought into compliance with OSHA’s standards. Daniel Denzer had fallen to his death on May 10, 2006, as a direct result of his and Cawvey’s inability to recognize existing hazards. Given the inherently dangerous nature of working on a 40 foot high scaffold, daily safety inspections should have been a priority for TIC. A penalty of \$ 70,000.00 is assessed.

*Item 4—§ 1926.451(g)(1)(vii):* The gravity of the violation of § 1926.451(g)(vii) is of the highest order. Employees worked without fall protection as they dismantled the scaffold. They were exposed to a fall of 40 feet. Two employees died from falling from the scaffold in an 8 week period. A penalty of \$ 70,000.00 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) of the Federal Rules of Civil Procedure.

#### **ORDER**

Based upon the foregoing decision, it is ORDERED that:

**Docket No. 06-1975**

1. Item 1 of Citation No. 1, alleging a violation of § 1926.451(d)(9), is affirmed, and a penalty of \$ 7,000.00 is assessed;
2. Item 2a of Citation No. 1, alleging a violation of § 1926.451(d)(19), is vacated, and no penalty is assessed;
3. Item 2b of Citation No. 1, alleging a violation of § 1926.451(e)(1), is vacated, and no penalty is assessed;
4. Item 3 of Citation No. 1, alleging a violation of § 1926.451(f)(13), is vacated, and no penalty is assessed;
5. Item 4 of Citation No. 1, alleging a violation of § 1926.451(h)(2)(ii), is affirmed, and a penalty of \$ 3,500.00 is assessed;
6. Item 1 of Citation No. 2, alleging a violation of § 1926.451(a)(6), is affirmed, and a penalty of \$ 70,000.00 is assessed;
7. Item 2a of Citation No. 2, alleging a violation of § 1926.451(d)(12)(i), is affirmed as serious;
8. Item 2b of Citation No. 2, alleging a violation of § 1926.451(d)(12)(iv), is affirmed as serious, and a grouped penalty of \$ 3,500.00 is assessed for items 2a and 2b;
9. Item 3 of Citation No. 2, alleging a violation of § 1926.451(f)(3), is affirmed, and a penalty of \$ 70,000.00 is assessed;
10. Item 4 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;
11. Item 5 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;
12. Item 6 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;
13. Item 7 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

14. Item 8 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

15. Item 9 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

16. Item 10 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

17. Item 11 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

18. Items 12 through 23 of Citation No. 2, alleging violations of § 1926.451(g)(1)(vii), are vacated, and no penalties are assessed; and

19. Items 24 through 26 of Citation No. 2, alleging violations of § 1926.451(454(a), are vacated, and no penalties are assessed.

#### **Docket No. 06-1974**

1. Item 1 of Citation No. 1, alleging a violation of § 1926.100(a), is affirmed, and a penalty of \$ 3,500.00 is assessed;

2. Item 2 of Citation No. 1, alleging a violation of § 1926.453(b)(2)(iv), is vacated, and no penalty is assessed;

3. Item 3 of Citation No. 1, alleging a violation of § 1926.453(b)(2)(vi), is affirmed, and a penalty of \$ 7,000.00 is assessed;

4. Item 4 of Citation No. 1, alleging a violation of § 1926.453(b)(2)(ix), is affirmed, and a penalty of \$ 7,000.00 is assessed;

5. Item 1 of Citation No. 2, alleging a violation of § 1926.451(e)(1), is vacated, and no penalty is assessed;

6. Item 2 of Citation No. 2, alleging a violation of § 1926.451(f)(3), is affirmed, and a penalty of \$ 70,000.00 is assessed;

7. Item 3 of Citation No. 2, alleging a violation of § 1926.451(f)(7), is vacated and no

penalty is assessed;

8. Item 4 of Citation No. 2, alleging a violation of § 1926.451(g)(1)(vii), is affirmed, and a penalty of \$ 70,000.00 is assessed;

9. Item 5 of Citation No. 2, alleging a violation of § 1926.454(b), is vacated and no penalty is assessed;

10. Item 6 of Citation No. 2, alleging a violation of § 1926.454(b), is vacated and no penalty is assessed; and

11. Item 7 of Citation No. 2, alleging a violation of § 1926.454(b), is vacated and no penalty is assessed.

    \s\ Ken S. Welsch  
**KEN S. WELSCH**  
**Judge**

**Date: October 18, 2010**